



NALSAR Law Review

Volume 7

Number 1

2013

In Search of True 'Alternative' to Existing Justice
Dispensing System in India

Shivaraj S. Huchhanavar

Comparative Advertising – Boon or Bane to Consumer Interest?

Dr. G V Narasimha Rao

Rape and Compensation: An Economic Analysis of the
Criminal Law on Rape in India

Manika Kamthan

Institutional Arrangements to Combating Corruption:
A Comparative Study India's (C.B.I) and Hong Kong's
Independent Commission Against Corruption (I.C.A.C)

*Srinivasa Rao Gochipata &
Y. R. Haragopal Reddy*

Legal Status of BCCI as Instrumentality of State Under
Article 12 of The Indian Constitution

Dr. M. Suresh Benjamin & Samu Rani Paul

Plea Bargaining in Us and Indian Criminal Law
Confessions for Concessions

K.V.K. Santhy

Jurisdictional Waters Delimitation: India's Exclusive Economic
Zone (Eez) in Mv Enrica Lexie Case

Dr. Jayan P.A

Tyranny Over The Mind: Paid News as Electoral Crime

Dr. Madabhushi Sridhar

The Right of People to Self-Determination and the Principle of
Non-Interference in the Domestic Affairs of States

Eze, Kenneth Uzor & G. N. Okeke

Cartels Vis-À-Vis Competition Law: Judicial Analysis

Dr. R. Y. Naidu

Universities, Intellectual Property Rights and Spinoffs:
A Critical Evaluation

Finaki Nandan Pattnaik

Legal Aid in India and the Judicial Contribution

Dr. G. Mallikarjun

Parental Substance Misuse and the Child

Dr. Aruna B Venkat

Chief Justice of Andhra Pradesh
Chief Patron
Chancellor, NALSAR

Prof. Faizan Mustafa
Patron
Vice-Chancellor, NALSAR

Editorial Advisory Board

Justice V. R. Krishana Iyer
Prof. S. D. Sharma
Prof. S. K. Verma
Prof. M. P. Singh
Prof. Balraj Singh Chouhan
Prof. A. Lakshminath

Editorial Committee

Editor
Prof. Vijender Kumar

Co-editors
Dr. K. Vidyullatha Reddy
Dr. Aruna B. Venkat
Dr. N. Vasanthi

Note to Contributors: Manuscripts, Editorial Correspondence and Style-sheet requisitions should be addressed to the Editor, NALSAR Law Review, NALSAR University of Law, Post Box No. 1, NISA Hakimpet, Justice City, Shameerpet, R.R. Dist., Hyderabad - 500078, A.P., India, for soft material use E-mail : registrar@nalsar.ac.in

Price Rs. 300 (Rs. Three Hundred) or US\$50 (Fifty)

Mode of Citation : 7NLR2013

Copyright © 2011 NALSAR University of Law. Any reproduction and publication of the material from the text without the prior permission of the publisher is punishable under the Copyright Law.

Disclaimer : The views expressed by the contributors are personal and do not in any way represent opinions of the University.

NALSAR Law Review

Volume 7

Number 1

2013

Editorial

In Search of True 'Alternative' to Existing Justice Dispensing System in India	<i>Shivaraj S. Huchhanavar</i>	1
Comparative Advertising – Boon or Bane to Consumer Interest?	<i>Dr. G V Narasimha Rao</i>	26
Rape and Compensation: An Economic Analysis of the Criminal Law on Rape in India	<i>Manika Kamthan</i>	38
Institutional Arrangements to Combating Corruption: A Comparative Study India's (C.B.I) and Hong Kong's Independent Commission Against Corruption (I.C.A.C)	<i>Srinivasa Rao Gochipata & Y. R. Haragopal Reddy</i>	46
Legal Status of BCCI as Instrumentality of State Under Article 12 of The Indian Constitution	<i>Dr. M. Suresh Benjamin & Sanu Rani Paul</i>	70
Plea Bargaining in Us and Indian Criminal Law Confessions for Concessions	<i>K.V.K. Santhy</i>	84
Jurisdictional Waters Delimitation: India's Exclusive Economic Zone (Eez) in MV <i>Enrica Lexie</i> Case	<i>Dr. Jayan P.A</i>	103
Tyranny Over The Mind: Paid News as Electoral Crime	<i>Dr. Madabhushi Sridhar</i>	120
The Right of People to Self-Dertermination and the Principle of Non-Interference in the Domestic Affairs of States	<i>Eze, Kenneth Uzor & G. N. Okeke</i>	145
Cartels Vis-À-Vis Competition Law: Judicial Analysis	<i>Dr. R. Y. Naidu</i>	165
Universities, Intellectual Property Rights and Spinoffs: A Critical Evaluation	<i>Pinaki Nandan Pattnaik</i>	188
Legal Aid in India and the Judicial Contribution	<i>Dr. G. Mallikarjun</i>	234
Parental Substance Misuse and Child Abuse	<i>Dr. Aruna B Venkat</i>	242

Editorial

At the outset we extend our gratitude to our contributors for their consistent support and contribution to our Journal. Our aim is to promote social justice, legal and judicial reforms through scholarship of our contributors. The Seventh volume of the University's flagship Journal titled "Nalsar Law Review" is being published on the eve of Eleventh Annual Convocation, 2013. This gives us great pleasure to present our scholarship in this issue of NLR. The research articles in this issue are well researched and have definite recommendations; these articles have a socio-legal context.

Quality legal research and standard publications constitute one of the important mandates of a leading law school like NALSAR. We hope readers would find the present issue interesting and thought provoking. Our reader's response is always a source of inspiration to improve the quality of our research publications.

This issue has articles written on very significant topics like: *In Search of True 'Alternative' to Existing Justice Dispensing System in India* by Shivaraj S. Huchhanavar, *Rape and Compensation: An Economic Analysis of the Criminal Law*, *Tyranny Over The Mind: Paid News as Electoral Crime* by Dr. Madabhushi Sridhar, *Jurisdictional Waters Delimitation: India's Exclusive Economic Zone (Eez) in Mv Enrica Lexie Case* by Dr. Jayanp.A and many more.

We hope our readers will enjoy reading the Review as much as we did putting it together for you.

Editorial Committee

IN SEARCH OF TRUE 'ALTERNATIVE' TO EXISTING JUSTICE DISPENSING SYSTEM IN INDIA

Shivaraj S. Huchhanavar^{*}

"I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter men's hearts. I realized that the true function of a lawyer was to unite parties given as under. The lesson was so indelibly burnt unto me that the large part of my time, during the twenty years of my practice as a lawyer, was occupied in bringing about private compromises of hundreds of cases. I lost nothing, thereby not even money, certainly not my soul¹".

-Mahatma Gandhi

1. Introduction

For the efficient functioning of any legal system fundamental requisite is that such system shall be built on the aspirations of the people, law or legal system for that matter will not work in vacuum, for this reason surrounding social condition are the deciding factors for adoption or for bringing any change in the legal system. Unfortunately in a developing country like India it is considered to be normative practice to find the solution for our problems (legal) in western jurisprudential thought and practices (it is true at least in regard to Legal restructuring is concerned). In India with a view to overcome the problems of 'formal legal system' serious attempt were made and continued to be made, as result of which there is adoption of Alternative Dispute Resolution System of Anglo-Saxon style in this country. Thus, post-emergency, the dominant theme of legal reform was translated into sponsoring relatively informal, conciliatory, and alternative institutions alongside the formal judicial mechanism. The early 1980s saw a concerted effort to promote a more indigenous character within the justice dispensing system, and to provide alternatives to the Anglo-Saxon models of adjudication.

In India until now no solemn attempt has been made to identify and to recognize our own system of justice administrations which stood as efficient mechanism of dispute resolution from vedic age. This

^{*} Guest Faculty of Law, Karanataka State Law University's Law School Rayapur, Dharwad, E-mail:
1 Mahatma Gandhi, *The Story of My Experiments With Truth* (Part II, Chapter XIV).

development brought us to such tragedy that, more than 70% cases in rural India even today were solved by traditional Panchayats, in fact these Panchayats were the true aspiration of institutions whereas, foreign made modern ADRs had got statutory recognition even though they were failed to achieve desired results, except Lok Adalats anything decipherable had happened by ADRs in this country.

Today justice dispensing system in India is on twisted road at the one end failure of formal law Courts resulting in backlog of cases, and on the other end ADRs fails to get much need public support, under this circumstance it is essential to rethink on the new ways out for coming generation. Accordingly it is essential in this context to study various forms of ADRs, their development, and mode of working of ADRs so as to assess it pros, cons and applicability to the pluralistic Society of Indian.

2.1. Alternative Dispute Resolution System

The basic yet pre-eminent question surrounding ADR is this: what is it an alternative to? The answer, particularly in India, is that it is the alternative to the often tedious, strictly formal legal proceedings in court that is presided over by a state-appointed judge, with counsel representing the parties, and, in some cases or jurisdictions, the presence of juries was recognized to be an alternative to the judicial system that has been existence in India. In fact 'Alternative' is not Conciliation, Mediation and Arbitration but the British System Justice of Administration, for this reason 'A' is used as 'appropriate' and not as 'alternative'. The problem with this alternative approach is that there are numerous cultures and communities in many parts of India, where litigation is not the norm and is actually the alternative. The norms for these people are their own community dispute resolution procedures. Hence, the word "alternative" in ADR seems to be a misnomer as applied.

In India all forms of LokAdalat, Conciliation, Mediation and Arbitration were prevalent being part of the Legal system from time immemorial. 'Lok' means 'people' and 'Adalat' refers to Court, it is nothing but a 'people's Court', i.e Nayaya Panchayats of those glorious fast of this country. It is approximate 250 year of colonization made our

own system as 'alternative' and it was brought back in more perverted form as ADRs after Independence.

2.2. Concept of Alternate Dispute Resolution in Olden days in India

Before formation of law Courts in India, people were settling the matters of dispute by themselves by mediation. The mediation was normally headed by a person of higher status and respect among the village people and such mediation was called in olden days "Panchayat". The Pancha is the person of integrity, quality and character who will be deemed to be unbiased by people of the locality, called Village headman (sarpanch) and he was assisted by some people of same character or cadre from several castes in the locality. The dispute between individuals and families will be heard by the Panchayat and decision given by the Panchayat will be accepted by the disputants. The main thing that will be considered in such Panchayat will be the welfare of the disputants as also to retain their relationship smooth. Similarly in the case of dispute between two villages, it will be settled by Mediation consists of person acceptable to both villages and people from both the villages and the decision of such mediation will be accepted by both village people. The disputes in olden days seldom reached law Courts. They were even settling the complicated civil disputes, criminal matters, family disputes etc. Such type of dispute resolution maintained the friendly relationship between the disputants even after resolution of their disputes. ADR techniques have also been largely based on co-existential justice. "This form of justice has . . . always been part of African and Asian traditions where conciliatory solutions were seen to be to the advantage of all and often as a *sine qua non* for survival"².

Let us take ADRs in its ordinary contextual form and discuss about its origin and development. Alternative Dispute Resolution (ADR, sometimes also called "Appropriate Dispute Resolution") is a general term, used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational way. It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party

2 SAFLII, South African Law Commission – Issue Paper 8 (Project 94): Alternative Dispute Resolution – Chapter 2: The Problem (undated), available at <http://www.saflii.org/za/other/zalc/ip/8/8-CHAPTER-2.html>.

imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies “mediation,” a process by which a third party aids the disputants to reach a mutually agreed solution. The term “alternative dispute resolution” or “ADR” is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini-trials that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the rubric of ADR. ADR systems may be generally categorized as negotiation, conciliation, mediation, or arbitration systems.

Modern ADRs originated in the USA in a drive to find alternatives to the traditional legal system, felt to be adversarial, costly, unpredictable, rigid, over-professionalized, damaging to relationships, and limited to narrow rights-based remedies as opposed to creative problem solving. The American origins of the concept are not surprising, given certain features of litigation in that system, such as: trials of civil actions by a jury, lawyers' contingency fees, lack of application in full of the rule “*the loser pays the costs*”. Beginning in the late nineteenth century, creative efforts to develop the use of arbitration and mediation emerged in response to the disruptive conflicts between labor and management. In 1898, Congress followed initiatives that began a few years earlier in Massachusetts and New York and authorized mediation for collective bargaining disputes. In the ensuing years, special mediation agencies, such as the Board of Mediation and Conciliation for Railway Labor, (1913)(renamed the National Mediation Board in 1943), and the Federal Mediation and Conciliation Service (1947) were formed and funded to carry out the mediation of collective bargaining disputes. Additional State Labor Mediation services followed³.

The 1913 New lands Act and later legislation reflected the belief that stable industrial peace could be achieved through the settlement of collective bargaining disputes; settlement in turn could be advanced through conciliation, mediation, and voluntary arbitration⁸⁵. The well organized ADRs movement in the United States was launched in the

3 http://www.courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_history.htm

1970s, beginning as a social movement to resolve community-wide civil rights disputes through mediation, and as a legal movement to address increased delay and expense in litigation arising from an overcrowded court system. Ever since, the legal ADR movement in the United States has grown rapidly, and has evolved from experimentation to institutionalization with the support of the American Bar Association, academics, courts, the U.S. Congress and state governments. For example, in response to the 1990 Civil Justice Reform Act requiring all U.S. federal district courts to develop a plan to reduce cost and delay in civil litigation, most district courts have authorized or established some form of ADR. Innovations in ADR models, expansion of government-mandated, court-based ADR in state and federal systems, and increased interest in ADR by disputants has made the United States the richest source of experience in court connected ADR.

Around 1970's the situation in US was not totally different from other developed and developing countries of the world it had suffered all short of defects for the reason of adopting English system of justice administration. Edward Bennet Williams, as appeared in U.S. News and World Report of September 21, 1970,

“The Legal System isn't working. It is like scarecrow in the field that doesn't scare the Crows anymore because it is too beaten and tattered-and the crows are sitting on the arms and cawing their contemptuous defiance”.

In the same manner Earn Warren in his Speech at Johns Hopkins University as Reported in San

Francisco Examiner and Chronicle of Nov. 15, 1970,

“The greatest weakness of our judicial system is that it has become clogged and does not function in a fluent fashion resulting in prompt determination of guilt or innocence of those charged with crime”.

Considering the delay in resolving the dispute Abraham Lincoln has once said: *“Discourage litigation. Persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time”.*

In the same vein Judge Learned Hand commented, *“I must say that as a litigant, I should dread a law suit beyond almost anything else short of sickness and of death”*. These all the cautions were rightly perused by Judicial and political thinker of US and gave way to their Home made practices of ADRs. As most countries of the world were constantly in lack of efficient justice dispensing system, quickly turn their face towards ADRs, as a result of which within short period ADRs recognized not only at the domestic level but also at the international level. Further more developments in economic field i.e. trade commerce throughout the world is greatly in need of mechanism of speedy disposal of their cases, as matter of inevitability commercial world accepted this new development. ADRs proved efficient and timely in corporate sector as result of developing countries like India get attracted to ADRs.

ADRs today fall into two broad categories: court-annexed options and community-based dispute resolution mechanisms. Court-annexed ADR includes mediation/conciliation—the classic method where a neutral third party assists disputants in reaching a mutually acceptable solution—as well as variations of early neutral evaluation, a summary jury trial, a mini-trial, and other techniques. Supporters argue that such methods decrease the cost and time of litigation, improving access to justice and reducing court backlog, while at the same time preserving important social relationships for disputants⁴.

Community-based ADR is often designed to be independent of a formal court system that may be biased, expensive, distant, or otherwise inaccessible to a population. New initiatives sometimes build on traditional models of popular justice that relied on elders, religious leaders, or other community figures to help resolve conflict. India embraced LokAdalat village-level people’s courts in the 1980s, where trained mediators sought to resolve common problems that in an earlier period may have gone to the Panchayat, a council of village or caste elders.

Mandatory process of ADRs requires the parties to negotiate, conciliate, mediate or arbitrate, prior to court action. ADR processes may also be required as part of prior contractual agreement between parties.

4 <http://www1.worldbank.org/publicsector/legal/ADR%20Workshop.pdf>

Whereas, in voluntary processes, submission of dispute to the ADR process depends entirely on the will of the parties.

2.3. Important mechanisms of Alternative Dispute Resolution System

Most commonly used forms of ADRs are Mediation, Conciliation, Arbitration and Lok Adalats. Let us have eye bird view on these aspects of ADRs.

2.3.1. Mediation:

Of all mankind's adventures in search of peace and justice, mediation is among the earliest. Long before law was established or Courts were organized, or judges had formulated principles of law, man had resorted to mediation for resolving disputes⁵. Mediation is a process of dispute resolution in which one or more impartial third parties intervenes in a conflict or dispute with the consent of the participants and assists them in negotiating a consensual and informed agreement. It can also be said as a confidential process of negotiations and discussions in which a 'neutral' third party or mediator assists in resolving a dispute between two or more parties. Mediation' is defined as a facilitative process in which "disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication"⁶. The most essential feature of mediation has been highlighted in the following words "Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge has no power to impose an outcome on disputing parties"⁷. In resolving the dispute or settlement the general role of the mediator is to facilitate communication between the parties, assist them on focusing on the real issues of dispute and to generate options that meet the respective parties' interests or needs in an effort to resolve the dispute. The most important feature of Mediation is that it

5 <http://www.arbitrationindia.com/pdf/mediationtostay.pdf>

6 Henry J. Brown and Arthur L. Mariot, *ADR Principles and Practice*, 127 (Sweet & Maxwell: Lodon, 2nd Ed. (1997) Chapter 7)

7 Stephen B. Goldberg, Frank E.A. Sander and Nancy H. Rogers, *Dispute Resolution, Negotiation, Mediation and other processes*, p. 123 (Gaithersburg and New York Aspine Law & Business, 3rd ed)

provides a solution that both parties can live with, instead of a verdict imposed by a court. Both parties are involved in suggesting possible solutions to the conflict. Mediation is based on the voluntary cooperation and good faith participation of all parties. The mediator cannot force the parties to resolve their differences. But the mediator can help the parties reach a solution agreeable to both of them. If the parties work out all or some of their differences, the resolution – or agreement – is put in writing and signed by both the parties.

Mediation may be able to plow beneath the surface of frequently vexatious litigations by addressing the underlying conflicts. The mediator acts as a bridge to iron the wrinkles of differences affecting the parties⁸. Mediation differs from conciliation on this point that Mediation is not compulsive or legally binding, whereas, conciliation used as tool of more liberalized or litigant friendly adjudication system where conciliator not only acts as facilitator but draws the binding decision on the basis of submitted fact, and deliberation between the parties. Mediation differs from arbitration, in which the third party (arbitrator) acts much like a judge in an out-of court, less formal setting but does not actively participate in the discussion. Unlike a judge or an arbitrator, a mediator does not decide what is right or wrong or make suggestions about ways to resolve a problem. A mediator seeks to help parties to develop a shared understanding of the conflict and to work toward building a practical and lasting resolution. Mediation serve to identify the disputed issues and to generate options that help disputants reach a mutually satisfactory resolution. It offers relatively flexible processes; and any settlement reached should have the agreement of all parties. This contrasts with litigation, which normally settles the dispute in favour of the party with the strongest argument. Despite the lack of ‘teeth’ (adjudicating) in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impeding (an)agreement, the mediator may attempt to encourage exchange of information, provide new information, help the parties to understand each others’ views, let them know that their concerns are understood; promote a productive level of emotional expression; deal with differences in perceptions and interest between negotiations and constituents (including lawyer and client); help negotiators realistically, assess alternatives to settlement, learn (often in separate sessions with

8 Ibid at p.123

each party) about those interest the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interests of all parties.

Panchayat system of ancient India can be an example, where we can find the efficacy of mediation as tool of dispute resolution but fundamental distinction lies between both is that Panchayat system is backed by popular support of the whole community and is relatively conclusive and widely respected by the people, that sense of popularity not lies with mediation. Ancient Panchayat system were so efficient because they were not worried about convenience of parties to the dispute, it is the 'Dharma' that binds both disputant party and Pancha (mediators). Pancha(s) not only represents the parties to the dispute but they represent whole community in which they live. That they no more oblige to settle individual interest but community interest is of greater importance to them, henceforth their decision gains popular support to which every member of that community feel obliged. For this reason Mediations seems to be toothless and less effective and it is already falling into disused (that has already happened in USA)

2.3.2. Conciliation

Conciliation is "the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator"⁹. Conciliation is an alternative dispute resolution process whereby the parties to a dispute (including future interest disputes) agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award. Conciliation differs from mediation in that the main goal is to conciliate, most of the time by seeking concessions. In mediation, them editor tries to guide the discussion in a way that optimizes parties' needs, takes feelings in to account and reframes representations.

9 definition of 'conciliation' formulated by the ILO (1983) concepts

In common parlance not much distinction lies between conciliation and mediation. However, statute in India had attached different meanings to these two concepts.

(a) In the year 1996, the Arbitration and Conciliation Act, was passed and Sec. 30 of that Act, which is in Part I, provides that an arbitral tribunal may try to have the dispute settled by use of ‘mediation’ or ‘conciliation’. Sub-section (1) of sec. 30 permits the arbitral tribunal to “use mediation, conciliation or other procedures”, for the purpose of reaching settlement.

(b) The Civil Procedure Code (Amendment) Act, 1999 which introduced sec. 89, too speaks of ‘conciliation’ and ‘mediation’ as different concepts. Order 10 Rules 1A, 1B, 1C of the Code also go along with Sec. 89. Thus our Parliament has made a clear distinction between conciliation and mediation. In Part III of the 1996 Act (sections 61 to 81) which deals with ‘Conciliation’ there is no definition of ‘conciliation’. Nor is there any definition of ‘conciliation’ or ‘mediation’ in Sec. 89 of the Code of Civil Procedure, 1908 (as amended in 1999). Sec 89 of Arbitration and Conciliation Act, 1996 provides for reference dispute for conciliation even where parties do not consent, provided the Court thinks that the case is one fit for conciliation. This lays down the stark distinction between mediation and conciliation.

Further Sec 67 describes the role of a conciliator. Sub Sec (1) states that he shall assist parties in an independent and impartial manner. Sub Sec (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned, and the circumstances surrounding the dispute, including any previous business practices between the parties. Sub Sec(3) states that he shall take into account “the circumstances of the case, the wishes the parties may express, including a request for oral statements”. Subsection (4) is important and permits the ‘conciliator’ to make proposals for a settlement. It states as follows: “Section 67(4). The conciliator may, at any stage of the conciliation proceeding, make *proposals for a settlement of the dispute*. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore.” Section 69 states that the conciliator may invite parties to meet him. Sec. 70 deals with disclosure by the conciliator of information given to him by one party, to

the other party. Sec. 71 deals with cooperation of parties with the conciliator, sec. 72 deals with suggestions being submitted to the conciliator by each party for the purpose of settlement. Finally, Sec. 73, which is important, states that the conciliator can *formulate terms of a possible settlement* if he feels there exist elements of a settlement. He is also entitled to *'reformulate the terms'* after receiving the observations of the parties. Subsection (1) of sec. 73 reads thus: "Sec. 73(1) settlement agreement. (1) When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, *he shall formulate the terms of a possible settlement* and submit them to the parties for their observations. After receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations."

These all provision signifies that conciliator not only a facilitator for the settlement but he is having statutory authority to,

- (a) to take surrounding facts and existing local usage and customs into consideration,
- (b) make proposals for the settlement,
- (c) formulate terms of a possible settlement,
- (d) reformulates the terms, these all power distinguishes conciliator from mediator but generally unlike arbitrator, conciliator does not have decision making power. The difference lies in the fact that the 'conciliator' can make proposals for settlement, 'formulate' or 'reformulate' the terms of a possible settlement while a 'mediator' would not do so but would merely facilitate a settlement between the parties. However, in India Family Courts Act-1984 confers decision making on the presiding officer of the Court who is called as conciliator.

The process of conciliation is widely used as an alternative mechanism of alternative dispute resolution. For example Sec 4 and 5 of Industrial Dispute Act provides for Conciliation officer and Board of Conciliation. Though conciliation acquired statutory recognition in India, their efficacy in resolving disputes or arriving at the settlement is negligible. Nothing significant has been achieved by giving statutory recognition to this mechanism, rather a waste of State resources and hurdle to the disputant parties in the way of choosing appropriate forum of redressal.

During 1959-66 the percentage of dispute settled by Conciliation Machinery varied from 57% to 83% in the central sphere. During 1988, 10,106 disputes were referred to conciliation out of which the number failure report received was 3,183 in the Central sphere. From period 1990-2000, in 39, 521 labour disputes conciliation proceedings were held out of which only 10,985 were successfully settled. The statistics of the working of the conciliation machinery reveals that it made no remarkable success in India. Number of reference themselves speak efficacy of Conciliation we have Corers of Cases pending but references are in thousands. For the failure of this mechanism there are several reasons,

- (a) Lack of proper personnel, inadequate training and low status enjoyed by conciliation officer and too frequent transfer.
- (b) Undue emphasis on legal and formal requirements.
- (c) Considerable delay in conclusion of conciliation proceedings.
- (d) Lack of adjudicating authority with conciliator.
- (e) Failure of conciliation had much impact as failure leads to reference of dispute to Labour Courts and Tribunals.
- (f) Failure to magnetize people as there are little differences in environ of Courts and Conciliation Board(s).

2.3.3. Arbitration

Arbitration is a quasi-judicial process in which a neutral person sits as a private judge and resolves the dispute of the parties in confidential manner. "Arbitration is a legal technique for there solution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons such as the 'arbitrators', 'arbiters', or 'arbitral tribunal', by whose decision the award they agreed to be bound"¹⁰. Arbitration is a binding method of dispute resolution governed by statute. It is a traditional 'alternative' to court-based litigation. The appointed arbitrator considers the evidence presented by both parties and then issues an award, which is enforceable by the courts – in some countries it is even enforceable without court decision. Procedures used in arbitration can range from informal to rules which essentially mirror court procedures.

10 Report of Secretary-general, UNCITRAL working Group on Arbitration, 33rd Session at, <http://www.uncitral.org> United Nations Commission on International Trade Law (UNCITRAL)

In India arbitration was originally governed by the provisions of the Indian Arbitration Act, 1940. The Courts were very much concerned over the supervision of Arbitral Tribunals and they were very keen to see whether the arbitrator has exceeded his jurisdiction while deciding the issue, which has been referred to him for arbitration. The scope of interference of the award passed by arbitration was dealt with by the Apex Court in the decision reported in *Food Corporation of India V. Jogindarlal Mohindarpal*¹¹ as follows,

“Arbitration as a model for settlement of disputes between the parties has a tradition in India. It has a social purpose to fulfill today. It has a great urgency today when there has been an explosion of litigation in the Courts of law established by the sovereign power. However in proceedings of arbitration, there must be adherence to justice, equality of law and fair play inaction. The proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure, which will lead to a proper resolution of the dispute and create confidence of the people, for whose benefit these procedures are resorted to. It is therefore, the function of the Court of law to oversee that the arbitrator acts within the norms of Justice. Once they do so and the award is clear, just and fair, the Court should as far as possible give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of corrections by the Court of an award made by the arbitrator. The law of arbitration must be made simple, less technical and more responsible to the actual realities of the situation but must be responsible to the canon of justice and fair play. The arbitrator should be made to adhere to such process and norms which will create confidence not only doing justice between parties but by creating a sense that justice appears to have been done”.

11 1989(2) SCC 347

2.3.3. (a) Species of arbitration

(i) Commercial arbitration: Agreements to arbitrate were not enforceable at common law, though an arbitrator's judgment was usually enforceable (once the parties had already submitted the case to him or her). During the Industrial Revolution, this situation became intolerable for large corporations. They argued that too many valuable business relationships were being destroyed through years of expensive adversarial litigation, in courts whose strange rules differed significantly from the informal norms and conventions of business people (the private law of commerce, or *jus merchant*).

Arbitration appeared to be faster, less adversarial, and cheaper. Since commercial arbitration is based upon either contract law or the law of treaties, the agreement between the parties to submit their dispute to arbitration is a legally binding contract. All arbitral decisions are considered to be "final and binding." This does not, however, void the requirements of law.

Any dispute not excluded from arbitration by virtue of law (e.g. criminal proceedings) may be submitted to arbitration.

(ii) Other forms of Contract Arbitration: Arbitration can be carried out between private individuals, between states, or between states and private individuals. In the case of arbitration between states, or between states and individuals, the Permanent Court of Arbitration and the International Center for the Settlement of Investment Disputes (ICSID) are the predominant organizations. Arbitration is also used as part of the dispute settlement process under the WTO Dispute Settlement Understanding. International arbitral bodies for cases between private persons also exist, the International Chamber of Commerce Court of Arbitration being the most important. The American Arbitration Association is a popular arbitral body in the United States. Arbitration also exists in international sport through the Court of Arbitration for Sport.

(iii) Labor Arbitration: A growing trend among employers whose employees are not represented by a labor union is to establish an organizational problem-solving process, the final step of which consists of arbitration of the issue at point by an independent arbitrator, to resolve

employee complaints concerning application of employer policies or claims of employee misconduct. Employers in the United States have also embraced arbitration as an alternative to litigation of employees' statutory claims, e.g., claims of discrimination, and common law claims, e.g., claims of defamation.

(iv) Judicial Arbitration: Some state court systems have promulgate court-ordered arbitration; family law (particularly child custody) is the most prominent example. Judicial arbitration is often merely advisory, serving as the first step toward resolution, but not binding either side and allowing for trial de novo.

2.3.4 Arbitrators: Arbitrators are not bound by precedent and have great leeway in such matters as active participation in the proceedings, accepting evidence, questioning witnesses, and deciding appropriate remedies. Arbitrators may visit sites outside the hearing room, call expert witnesses, seek out additional evidence, decide whether or not the parties may be represented by legal counsel, and perform many other actions not normally within the purview of a court. It is this great flexibility of action, combined with costs usually far below those of traditional litigation, which makes arbitration so attractive. Arbitrators have wide latitude in crafting remedies in the arbitral decision, with the only real limitation being that they may not exceed the limits of their authority in their award. An example of exceeding arbitral authority might be awarding one party to a dispute the personal automobile of the other party when the dispute concerns the specific performance of a business-related contract. It is open to the parties to restrict the possible awards that the arbitrator can make.

2.3.5. Statutory recognition to Arbitration in India: The Arbitration and Conciliation Act 1996 before this The Arbitration Act 1940 was in existence. Some of the important provisions of 1996 Act are as follows,

- (1) When there is an arbitration agreement, the Court is required to direct the parties to resort to arbitration as per the agreement (Sec.8).
- (2) The ground on which the award can be challenged now minimized on the basis of invalidity of agreement, want of jurisdiction on the part of arbitrator or want of proper notice to a party of the appointment of arbitrator or of arbitral proceedings or a party being unable to present his case. At the

same time an award can be set aside if it is in conflict with “the public policy in India, a ground which covers inter alia fraud and corruption”.

- (3) The power of the arbitrator himself have been amplified by inserting specific provision on several matters such as law to be applied by him, power to determine the venue of arbitration, failing agreement, power to appoint experts, power to act on the report of a party, power to apply to the Court for assistance in taking evidence, power to award interest and so on.
- (4) Provision to adopt obstructive method by parties to agreement are thwarted by providing express provision to that regard.
- (5) Role of arbitral institution in promoting arbitration has been recognized for the first time in law.
- (6) Provision has been made for appointment of arbitrator by Chief Justice Scheme which takes the act of selecting arbitrator by Court outside the litigation process and makes it an administrative act. Parties are given the liberty to select the arbitrator and only in cases when the parties failed to nominate their arbitrator, the Court’s intervention need be sought.
- (7) Time limit for conducting the arbitration proceedings has been deleted which is a drastic change in the new Act compared to old Act where the time will have to be extended only by Court when there is time limit is provided.
- (8) Formal written agreement to arbitration as provided under the old Act has been now relaxed.
- (9) Though the parties to the agreement held the arbitration in India, the parties to the contract are free to designate the law applicable to the substance of the disputes.
- (10) The Arbitrator has been clothed with power to grant interim relief.
- (11) Arbitrator has been given the power to decide his own jurisdiction to decide the dispute.
- (12) The Act provides for various other saving measures such as requiring an arbitrator to disclose any possible bias at the threshold itself (Sec.12)
- (13) Even if an arbitrator is replaced, the proceedings conducted by him are saved. This reduces the delay.
- (14) The arbitrators are directed to give reason for their conclusion unless it has otherwise provided in the agreement. Further there is no necessity for the party to arbitration to get the award made

a rule of Court as required under the old Act and the award passed by the arbitrator will have the force of a decree.

Further provision has been made to deal with international arbitration, which was not provided, in the old Act. A further matter disclosed to arbitrator has been protected from disclosure unless otherwise required by law to do so. This gives the parties to the arbitration to disclose their views freely. Even though all procedural innovation is made adversarial character of this mechanism cannot be undermine arbitrator is adjudicator unlike Mediator and Conciliator. For several reasons arbitration fail to gain much efficacy in Indian Legal system, this system is widely in use at international level¹².

2.3.6. Important International Arbitral Institutions

2.3.6. (a) Permanent Court of Arbitration (PCA): The Permanent Court of Arbitration (PCA), also known as The Hague Tribunal is an international organization based in The Hague in the Netherlands. It was established in 1899 as one of the acts of the first Hague Peace Conference, which makes it the oldest institution for international dispute resolution. In 2002, 96 countries were party to the treaty. The court deal in cases submitted to it by the consent of the parties involved and handles cases between countries and between countries and private parties.

2.3.6.(b) World Trade Organization (WTO): The World Trade Organization is an international organization which oversees a large number of agreements defining the “rules of trade” between its member states. The WTO is the successor to the General Agreement on Tariffs and Trade, and operates with the broad goal of reducing or abolishing international trade barriers. The WTO has two basic functions: as a negotiating forum for discussions of new and existing trade rules, and as a trade dispute settlement body. The function of WTO as a trade dispute settlement body is important in this context. The WTO has significant power to enforce its decisions, through the Dispute Settlement Body, an international trade court with the power to authorize sanctions against states which do not comply with its rulings. The WTO mainly resolves disputes through the process of “consensus” and “arbitration” which are essentially mechanisms of ADR.

12 <http://www.spea.indiana.edu/icri/terms.htm#ENE>

2.3.6.(c). International Chamber of Commerce (ICC): The International Chamber of Commerce is an international organization that works to promote and support global trade and globalization. It serves as an advocate of world business in the global economy, in the interests of economic growth, job creation, and prosperity. As a global business organization, made up of member states, it helps the development of global outlooks on business matters. ICC has direct access to national governments worldwide through its national committees. ICC activities include Arbitration and Dispute resolution which are the most prominent activities that it performs.

2.3.6.(d) Court of Arbitration for Sport (CAS): The Court of Arbitration for Sport (CAS) (Tribunal Arbitral du Sport or TAS in French) is an arbitration body set up to settle disputes related to sports. Its headquarters are in Lausanne; there are additional courts located in New York City and Sydney, with ad-hoc courts created in Olympics host cities as required. The CAS underwent reforms to make itself more independent of the International Olympic Committee (IOC), organizationally and financially. Generally speaking, a dispute may be submitted to the CAS only if there is an arbitration agreement between the parties which specifies recourse to the CAS. Currently, all Olympic International Federations but one, and many National Olympic Committees have recognized the jurisdiction of the CAS and included in their statutes an arbitration clause referring disputes to it. Its arbitrators are all high level jurists and it is generally held in high regard in the international sports community.

2.3.6.(e). United Nations Commission on International Trade Law (UNCITRAL): The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body within the United Nations system in the field of international trade law. UNCITRAL was tasked by the General Assembly to further the progressive harmonization and unification of the law of international trade. As at the international up to now it was not made possible to establish and constitute a Adjudicator body having compulsory jurisdiction and abidingness independent of consent state parties it is inevitable to the international community to adopt these Arbitral and other ADRs Mechanisms.

2.3.4. Lok Adalat

Lok Adalat is the concept having its roots in Indian glorious past which mean 'people's Court', it is the system of "nyayapanch" is conceptualized and institutionalized as LokAdalat. It involves people who are directly or indirectly affected by dispute resolution. The main reason for bring this system is also to lessen the burdens of Court and provide speedy justice with people's participation in decision making. This concept is, now, again very popular and is gaining historical momentum. Experience has shown that it is one of the very efficient and important ADRs and most suited to the Indian environment, culture and societal interests. The finest hour of justice is the hour of compromise when parties after burying their hatchet reunite by a reasonable and just compromise. This Indian-institutionalized, indigenized and now, legalized concept for settlement of dispute promotes the goals of our Constitution. Equal justice and free legal aid are hand in glove. It is, rightly said, since the Second World War, the greatest revolution in the law has been the mechanism of evolution of system of legal aid which includes an ADRM. The statutory mechanism of legal services includes concept of Lok Adalat in the Legal Services Authorities Act. The legal aid, in fact, is a fundamental human right. The concept of Lok-Adalat was pushed back into oblivion in last few centuries before independence and particularly during the British regime. Now, this concept has, once again, been rejuvenated. It has, once again, become very popular and familiar amongst litigants. The Legal Services Authorities Act, 1987, pursuant to the constitutional mandate in Article 39-A of the Constitution of India, contains various provisions for settlement of disputes through LokAdalat. Thus, the ancient concept of Lok Adalat has, now, statutory basis. This is the system which has deep roots in Indian legal history and its close allegiance to the culture and perception of justice in Indian ethos.

LokAdalat is the dispute resolution system presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the LokAdalat. The procedural laws and the Evidence Act are not strictly followed while assessing the merits of the claim by the LokAdalat.

The Legal Service Authority Act, 1987 provided for constitution of Lok-Adalat, jurisdiction and other special provisions. Under this Act a Lokadalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of:

(i) any case pending before; or

(ii) any matter which is falling within the jurisdiction of, and is not brought before, any court for which the LokAdalat is organised. The LokAdalat can compromise and settle even criminal cases, which are compoundable under the relevant laws. So this Act provides that a case which has not brought before Court can be dealt in LokAdalat and it can be settled there.

This Act provides for the constitution of The State Authority and District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee and Taluk Legal Services Committee (mentioned in Section 19 of the Act) can organize Lok Adalats at such intervals and places as may be deemed fit.- Every Lok Adalat so organized shall consist of:

(a) Serving or retired judicial officers, (b) other persons, as may be specified¹³. National Service Authority is also constituted to exercise its powers and functions at the national level under this Act.

2.3.4.(a) Cognizance of cases by Lok Adalat: there were two mode of taking cognizance were recognized under the Act, (i) On Application: When all the parties to the case agree for referring the case to Lok Adalat, or When one of the party to the case makes an application to court, praying to refer the case to Lok Adalat and the court is prima facie satisfied that there are chances for settlement. (ii) *Suo Moto*: Where the court is satisfied that the matter is an appropriate one to be taken cognizance of, by the Lok Adalat. Then, the court shall refer the case to the Lok Adalat, after giving a reasonable opportunity for hearing to all the parties¹⁴.

4.6.2.(b) Mode of Determination of cases: the Authority or Committee organizing Lok Adalat may, on application from any party to a dispute,

¹³ Sec 9 of Legal Service Authority Act, 1987

¹⁴ Sec 20

refer the said dispute to Lok Adalat, after giving a reasonable opportunity for hearing to all the parties. Lok Adalat shall proceed to dispose of a case referred to it expeditiously.

- Shall be guided by principles of law, justice, equity and fair play.
- Shall yearn to reach a settlement or compromise between parties.
- When no compromise or settlement is accomplished, the case is to be returned to the court which referred it. Then the case will proceed in the court from the stage immediately before the reference.

2.3.4.(c) Finality of Settlement arrived before Lok Adalat: Sec 21 of the Act declares that every award of (a) Lok Adalat shall be deemed to be decree of Civil Court, (b) Every Order made by the Lok Adalat shall be final and binding on the all the parties, (b) no appeal shall lie form the order of Lok Adalat.

2.3.4.(d) Establishment of Permanent Lok-Adalat under the Act: Chapter VI A was newly added by Amendment Act, 2002, introducing the concept of Permanent Lok Adalat¹⁵. The Central or State Authorities may establish by notification, Permanent Lok Adalats at any place, for determining issues in connection to Public Utility Services.

Public Utility Services include:

- (1) Transport service,
- (2) Postal, telegraph or telephone services,
- (3) Supply of power, light and water to public,
- (4) System of public conservancy or sanitation,
- (5) Insurance services and such other services.

Lok Adalat proved to be one of the efficient machinery of dispute resolution, we can substantiate this by analyzing its performance, in every respect the scheme of Lok Adalat is a boon to the litigant public, where they can get their disputes settled fast and free of cost. They get faster and inexpensive remedy with legal status. Success of Lok Adalats in India can be judged from the number of cases settled by the Lok dalats in all the States. The difference between the work done by Lok Adalats and the regular courts becomes much more marked if one takes into account the number of cases settled at various Lok Adalats and compares them to the corresponding figures for those decided by regular courts. The table below shows the number of Lok Adalats held in all the States

15 Section 22A to 22E of Legal Service Authority Act- 1987

till 30th November 2011 from its inception, number of MACT (Motor Accidents Claims Tribunal) cases settled, number of total cases settled and compensation awarded in MACT cases:

State/Union Territory	No. of Lok Adalats held	No. of MACT Cases Settled	No. of Cases Settled (including MACT Cases)	Compensation awarded in MACT Cases (in Rs.)
Andhra Pradesh	159110	112169	1431481	993710136
Arunachal Pradesh	481	549	4925	30137176
Assam	3976	22869	247406	126758885
Bihar	20550	120135	825871	938946619
Chhattisgarh	9365	8329	81072	759240532
Goa	658	5206	8004	306091648
Gujarat	113239	182344	6864186	10739579473
Haryana	13954	34868	1165674	3289016583
Himachal Pradesh	5614	5414	93014	422908879
Jammu & Kashmir	3365	8527	119594	1609457800
Jharkhand	18166	3487	147598	489116740
Karnataka	76463	132589	1298306	6250538966
Kerala	23722	121157	285533	5064256058
Madhya Pradesh	33645	121096	3022786	9227305797
Maharashtra	32375	82614	1173676	9615545572
Manipur	43	1170	1185	57221500
Meghalaya	109	926	6157	161072918
Mizoram	1268	240	1272	6094080
Nagaland	99	1049	1648	109098322
Orissa	12099	44128	4067482	3002792997
Punjab	18964	16889	999956	1472283274
Rajasthan	112633	598919	2365331	5373836690
Sikkim	1068	160	4008	9101000
Tamil Nadu	244675	154380	547320	14513720409
Tripura	568	3103	23756	67753578
Uttar Pradesh	37934	72431	8223824	5742022194
Uttarakhand	1209	4121	241993	442574460
West Bengal	17873	34271	193645	2454330542
And. & Nico. Islands	158	24	1789	3736468
U.T. Chandigarh	6145	17842	192396	1221173175
D & Nagar Haveli	12	119	1781	12007699
Daman & Diu	8	61	135	3099000
Delhi	10937	19287	589464	3048379536
Lakshadweep	73	11	131	435000
Puducherry	854	7967	28958	284499244
SCLSC	6	44	179	--
Total	981418	1938495	34261536	97881720428*

* http://www.ijmra.us/project%20doc/IJPSS_MAY2012/IJMRA-PSS1101.pdf

This is the expeditious method to settle large number of MACT claims. It has become a Dispute Management Institution. It is an informal system of dispute resolution. This has resulted in settlement of a large number of cases long pending before the Motor Accident Claims Tribunals, which would have otherwise taken years for adjudication. Undue delay in settlement of Motor Accident Compensation claims in most of the cases defeats the very core of the purpose. It is in this area that Lok Adalat is rendering very useful service to the needy. It is not merely the question of payment, the time and expense factor and saving the victim families from harassment involved in execution and appeal proceedings are of considerable importance.

However fact is that people in India are now not interested in Lok Adalat though large number of cases have been solved through Lok Adalat. In the beginning there was great flow of cases towards Lok Adalat, this is not wholly because of its efficiency, because there is no alternative left with the people to redress their dispute other than Lok Adalats. Presently it is evident that Lok adalat is not safety value against the drawbacks of Ordinary Courts, as people were also felt dissatisfied with the working of Lok Adalats, to common man Lok Adalat is no different than Court except some procedural relaxation, in fact when the case is long pending Lok Adalat will be last resort at least to weak party(economically) to get relief (form being litigant).

Litigant is mere spectator here though there is absence of Procedural Law, it is still not open to him, opinion of Lawyer and the Judges consider being monolith he feels it uneasy to say actually what he want. The study points out that in Lok Adalats, justice has fallen victim to the desire for the speedy resolution. Instead of trying genuine compromise, in some cases Lok Adalats try to force an adjudicatory decision upon unwilling litigants. The right to fair hearing, which is one of the basic principles of natural justice, is denied to the people. Many sitting and retired judges while participating in Lok Adalats as members, tend to conduct the Lok Adalats like courts, by hearing parties and by imposing their views as to what is just and equitable on the parties. Sometimes they get carried away and proceed to pass order on merits even though there is no consensus or settlement¹⁶. The presiding officers should resist from the practice of making adjudicatory decisions in the

16 <http://pib.nic.in/welcome.html>

Lok adalats. Such acts instead of fostering alternative dispute resolution through Lok Adalats will drive the litigants away from the Lok Adalats. The study stresses that the people in India should take resort to the Lok Adalats to get their disputes settled in an indigenous way.

3. Conclusion

Justice delayed is justice denied to overcome this problem, presently in India it is appropriate to give greater encouragement and legislative sanctions in more appropriate way to strengthen our Sanathanic Panchayat system, instead of giving undue importance to ADRs. In this research paper author tried to establish and author firmly believe that ADRs will not be true alternative to the problems posed by administration of Justice by British modeled Courts. Every Legal System must be built upon its own '*theory*' i.e. *Legal theory* we can loosely call it as Jurisprudence, construction or adoption of Indian Legal System completely based on Anglo-Saxon Jurisprudence is in itself blunder. Just because British ruled us for more than three hundred years Indian Society was not completely westernized. Especially the notion of Justice and injustice, truth and false etc were still in India based on our pre-colonial experiences/perceptions. A matter or dispute in India cannot be satisfactorily decided by a judge sitting impartially, because in fact justice in India is not just settlement of individual interest, whole community had its vested interest in outcome of such dispute or settlement, this is the reason why in India (pre-colonial period) there were five adjudicators (Pancha) who were representative of community and being upholders of Dharma uses to decide the matters.

Accordingly we should not forget that justice delivery system should be in consonance with aspiration of people: today we are but quite busily involved in finding out alternative mechanism of dispute resolution system to ordinary courts of law, but fundamental question is to what extent this foreign made ADR system acceptable and adoptable to the Indian circumstance? In India more than 70% of disputes were resolved by village Panchayats, comprising selected (by disputants) members of village. It means the role of Ordinary Law Courts in India is that of a small tip of ice berg. The reason behind raising this issue here is that ADRS were brought to force for the reasons inter alia to improvise the administration of justice (of ordinary Courts) by speedy redressal of dispute. Well the reason is quite genuine but the problem with ordinary

courts of justice is that they covering only 30% disputes that were existed in society, ADRS on the other hand intended to overcome the difficulties or short comings of ordinary courts of Justice but what about other 70% disputes, we are not thinking about it, instead we are glorifying this foreign made ADRS, suppressing or by neglecting our own indigenous system of dispute resolution. In India court system including ADRS was not able to be a main stream of dispute resolution because they are not backed by aspirations of people. Well we already given statutory status to ADRs but we are far from achieving satisfactory outcome from this ADRs. Accordingly it is not the Arbitration, Conciliation and Mediation of American type is 'Alternative' to existing legal system but our own Indigenous Panchayat system is the 'Appropriate' if adequate step to strengthen it is undertaken at the earliest.

COMPARATIVE ADVERTISING – BOON OR BANE TO CONSUMER INTEREST?

*Dr. G V Narasimha Rao**

Salt and pepper to a dish, so an advertisement to a modern life. Advertisements have become so integrated in every one's life that life cannot be imagined without them. Advertisements touch every walk of life and influence every one of us. Every day, we come across varieties of advertisements. Some of them are social advertisements promoting social causes; some others are political advertisements promoting political causes; others are cultural advertisements furthering cultural causes; and yet others are economic advertisements promoting some business and trade causes of an organization or a corporation.

Advertising has a long history and has been part of the culture of USA throughout its history. The public in America, in the colonial days, relied on “commercial speech”(advertising as otherwise known) for vital information about the market. It was the practice, as it is today, that early newspapers displayed advertisements for goods or services on their front pages and town criers called out prices in public squares.¹ Even in twenty first century, advertising is the most powerful medium to dispense information to the public. The court of Justice of European Community in its judgment in **GB-INNO-BM V Confederation du Commerce Luxembourgois**² Asbl (case no C-362/88) also recognized the

* B.COM.,M.L.,Ph.d P.G.Diploma In International Trade, P.G.Diploma In Intellectual Property Rights, Certificate In Financial Markets.

The author is presently serving as Chief Manager (Legal) in Bank of Baroda, Ahmedabad and the views expressed in this article are purely personal and do not reflect in any way the views of Bank of Baroda.

1 *44 Liquormart, Inc v Rhode Island*,517 U.S.484(1996); The text of the judgment also can be accessed at <http://www.rasmusin.org/zg604/lectures/26-Thomas--44Liquormartv.RhodeIsland.ht>

2 (1991) 2 CMLR 801; the case came before the Court of Justice of the European Communities as a reference from the Supreme Court of Luxembourg. A somewhat peculiar problem arose under Article 30 of the charter of EEC. GB-INNO-BM a Belgian Company operates supermarkets in Belgium including in Anon, an area close to the Belgium-Luxembourg border. In September 1986 GB-INNO-BM, distributed in Grand Duchy, leaflets advertising the promotion of sale of its products by price reduction. The leaflets stated that the price reduction would be valid for a limited period and reduced period were advertised by referring the previous prices. The advertising complied with Belgian legislation relating to unfair competition but not with the Grand Duchy's legislation in force at the time. Grand Duchy's legislation prohibited the offering of goods for retail sale at a temporarily reduced price, other than in special sale or clearance sales when those offers state their duration or refer to previous prices. Confederation du Commerce, Luxembourg (Chamber of Commerce) applied for an injunction against GB-INNO-BM restraining it from the above practice. GB-INNO-BM, after losing in lowest and court of appeals, has approached the Supreme Court of Luxembourg seeking the quashing of the order or judgment of the appellate court. The Supreme Court of Luxembourg at this stage made the reference to the Court of Justice of European Communities.

significance of free flow of information through advertising for the protection of the interests of the consumers in the Community. Court of Justice of European Communities, in the context of Community, has observed that “free movement of goods concerns not only to traders but also to individuals. It requires, particularly in frontier areas, that consumers resident in one member-State may travel freely to the territory of another member-State to shop under the same conditions as the local population. That freedom of consumers is compromised if they are deprived of access to advertising available in the country where purchases are made. Consequently a prohibition against distributing such advertising must be examined in the light of Articles 30,31 and 36.”

Why do people or organizations advertise about the products or services? is a question the answer to which is not unknown to us. Advertising, as its primary objective, endeavours to influence the opinion or behavior of the people to whom it is addressed and aims at attracting attention of potential consumers and public about the brands, products or services.

Advertising so long as it espouses the qualities of a product or services, does not result in infringement of rights and as such will not give rise to any legal action. But advertiser soften, in their attempt to highlight the qualities of their product or services, compare their products or services with those of competitors. Such comparison of products or services through advertisement with that of the other is known as comparative advertising. Comparison of products or services may take place in any form; it may be explicit or implicit or may be verbal or visual or may be superior on some attributes or of parity. Lawful advertising of products or services by comparison is permissible in many judicial systems and is considered as a form of commercial advertising, which hitherto was not the case.³ While comparing so, they often knowingly or unknowingly disparage the products or services of their competitors. At other times the comparison may even result in the

3 A lawful comparative advertising is permissible throughout European Union including United Kingdom of Great Britain and the law of comparative advertising has been harmonized throughout European Union under Misleading and Comparative Advertising Directive.

In Canada, comparative advertising, depending on the content, shall be governed by the common law tort of injurious falsehood, competition Act and copyright Act.

In United States of America, prior to 1970 comparative advertising was considered illegal. The Supreme Court in *Central Hudson Gas & Electricity Corp V Public Service Commission of New York* ruled that the “commercial speech”, if truthful and non-misleading deserves the protection of First Amendment and State has to justify the restrictions on commercial speech.

vilification of the competitor in person. The comparison, however, brings to fore a potential conflict between the rights of the manufacturers or traders who advertise, rights of the competitors with whose products or services comparison is made and rights of the consumer. The conflicting situation gives rise to several fundamentally interesting questions like whether or not the comparison of products or services is permissible under law? If so, to what extent is it permissible? Do the advertisers have any right or liberty to compare their products or services with the products or services of their competitor? If the advertisers exceed the limits set by law, what is legal recourse available to the competitor? Under which law, is the recourse available? Does comparison of products or services have any effect on the interest of the consumers? If so, what its effect is? What legal recourse is available to the consumers? Under which law?

The rights of the advertisers and their competitors are well settled in the major judicial systems under trademark law and other relevant laws. The courts consistently have been holding that “commercial speech”(otherwise known as advertising) is part of the free speech and free flow of information is essential for the proper functioning of the economic democracy. The U S Supreme Court is in the forefront in widening the ambit of the First Amendment⁴ so as to bring “commercial speech” into its fold.

But the issue of effect of comparative advertising on consumers’ interest is not thoroughly examined, nonetheless of the general consensus that comparative advertising should be beneficial to consumers and should increase consumer’s chances of better decision making. As a consequence the rights of the consumers till date remain unsettled. Apart from this, apathy, lack of education and weak consumer movements all over are some of the factors contributed to a confusing situation which is already confounded. It is from this perspective of the rights of the consumer this article aims at examining the limits of comparative advertising and conduct of the courts in protecting the interest of the consumer.

4 First Amendment of U S Constitution states that Congress shall make no law respecting an establishment of religion, or prohibiting the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Advertising vis- a- vis rights of the Consumers

USA

First Amendment of the American Constitution, Federal and State statutes governing trademarks, marketing and advertising regulations etc., are some of the codes and laws in force in United States of America governing the advertising commonly known as “commercial speech”.

In United States, legal actions for false advertising are permissible under Lanham Act which is major federal legislation. Section 43 (a) of Lanham Act⁵ permits the legal actions for false advertising. But Lanham Act debars individuals from bringing action under the Act as the power to bring action has been vested in the Federal Trade Commission(FTC) with the authority to act as a watchdog of consumers’ interest to prevent consumers from filing frivolous actions.

Many states in USA, in addition to Lanham Act, have legislated consumer protection laws⁶ which encompass corporate tort liability for making untrue statements or representation about a product or a service. The state consumer laws enable the individuals to bring legal actions for false advertising which is not possible under Lanham Act.

The Supreme Court of United States, though ruled in *Valentine VC hrestensen*⁷ in 1942 that purely commercial Speech did not deserve

5 Legal action under Section 43 (a) of the Lanham Act is permissible if (1) the defendant makes false statements about its own product by the use of affirmatively misleading statements, partially correct statements, or by a failure to disclose material facts; (2) the advertisement actually deceives or has the tendency to deceive a substantial segment of their audiences (3) the deception is material that it influences the purchasing decision (4) defendant causes falsely advertised goods to enter interstate commerce and (5) the plaintiff has been or is likely to be injured as result of the foregoing, either by direct diversions of sales from plaintiff to defendant or by lessening of the goodwill which its products enjoy with the buying public.

6 For example, California Consumer Law provides for actions for false advertising by consumer. The actions include (1) passing off goods or services as those of another(2) misrepresenting the source, sponsorship, approval or certification of goods or services(3) Using deceptive representations, or designations geographic origin in connection with goods or services (4) representing that goods or services have sponsorship, approval ,characteristics, ingredients, uses, benefits or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation or connection which he or she does not have (5) advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

7 316 US 52(1942); the summary judgment of the case can also be accessed at <http://supreme.justia.com/us/316/52/case.html>This suit was brought by the Respondent challenging the New York city municipal ordinance which prohibited the distribution in streets handbills bearing commercial advertising matter. The Respondent requested the District Court of New York to enjoin the

protection under First Amendment, but extended the protection of First Amendment in all subsequent cases⁸ up to *Lorillard Tobacco V Reilly*⁹ in 2001. The Supreme Court of US in those cases upheld the validity of the commercial speech, the rights of the advertisers and their competitors and struck down the statutes which attempted to interfere or attempted with the freedom of “commercial speech”.

The US Supreme Court in 1976 in *Virginia Board of Pharmacy v Virginia Citizens Consumer Council*¹⁰ for the first time found an opportunity to examine the effect of the “commercial speech” on the rights and interest of the consumer. The Court observed that “as to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate. Appellees’ case in this

petitioner (New York Police) from interfering with the distribution of handbills containing his offer to sell his submarine. District Court of New York granted interim injunction and later passed the decree of permanent injunction and later the circuit court of Appeals affirmed the decree of District Court. The Respondent preferred Appeal to the Supreme Court of America contending that the New York municipal ordinance abridged his freedom of speech and violated First Amendment. The Supreme Court, on hearing the contentions of the both the parties, held that there cannot be a constitutional right to distribute in the streets handbills containing commercial advertising matter in contravention of the New York municipal ordinance. Supreme Court further held that a constitutional right cannot be acquired by adding to the handbills a matter of possible public interest which is added with an intention of evading the prohibition of the ordinance with respect to advertising matter.

8 *New York Times v Sullivan* (1964), *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* (1976), *Central Hudson Gas and Electric v Public Service Commission of New York* (1980), and *44 Liquormart v Rhode Island* (1996) .

9 533 US 525 (2001)

10 425 US 748 (1976). The appellees were individual consumers and consumer groups of prescription drugs. They brought a suit in the District Court, Virginia against Virginia State Board of Pharmacy and its individual members challenging the validity of the Virginia statute under First and Fourteenth Amendment. Virginia statute has prohibited pharmacists from advertising prescription drug prices and those who advertised drug prices would be guilty of “unprofessional conduct” A three-judge District court declared the statute void and enjoined the appellants from enforcing it. The District Court held that (1) any Amendment protection enjoyed by Advertisers seeking to disseminate prescription drug price is also enjoyed, and thus may be asserted, by appellees as recipients of such information (2) “Commercial Speech” is not wholly outside the protection of the first and Fourteenth Amendments and Virginia Statute, therefore, is invalid (2)(a) that the Advertisers interest in a commercial advertisement is purely economic does not disqualify him from protection under the First and Fourteenth Amendments. Both the individual consumer and society in general may have strong interests in the free flow of commercial information (2)(b) the ban on advertising prescription drug prices cannot be justified on the basis of the State’s interest in maintaining the professionalism of its licensed Pharmacists, but State is free to require whatever professional standards it wishes of its pharmacists..... but it may not do so by keeping the public in ignorance of the lawful terms that competing pharmacists are offering. The Federal Court, while dismissing the appeal of the Virginia Board of Pharmacy, recognized the right of the individual consumers and consumer groups to bring action. The court also recognized the right of the audiences or spectators to receive information, would deserve protection. Court also recognized that First Amendment protection would be available to “purely commercial speech”, consumer and Society’s interest in free flow of commercial information. It also simultaneously recognized the government’s power to ban false, misleading, deceptive advertisements and illegal products or services and government’s power to regulate time, place and manner.

respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs. Yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drugs prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.” The Court further observed that “generalizing, society also may have a strong interest in the free flow of commercial information. Even as an individual advertisement, though entirely, “commercial” may be of general public interest.”

Virginia Board of Pharmacy V Virginia Citizens Consumer Council is the first case which recognized how an advertisement as a commercial speech is significant to the welfare of the consumers and the right of the consumer to bring legal action against Government ban or prohibition of the prices of prescription drugs. It also recognized consumers’ right to receive information and Pharmacists’ rights to provide it thereby gave new dimension to right to free speech laying down it was not only the speaker, but also the receiver has got the right to receive the information.

European Community And United Kingdom Of Great Britain

The court of Justice of European Community in its judgment in *GB-INNO-BM v Confederation du Commerce Luxembourgeois Asbl* (case no C-362/88), as stated above, also recognized how significant free flow of information through advertising is for the protection of the interests of the consumers in the Community. The Court in the above context pointed the close link that existed between the protecting the consumer and providing the consumer with information. The Court further pointed out that “the introduction to Second Programme of the European Economic Community for a consumer protection and information Policy” goes on stating that the purpose of the Second Programme is to continue and intensify the measures in this field and to help establish conditions for improved consultation between consumers on the one hand and manufacturers and retailers on the other. To that the Programme set out five basic rights to be enjoyed by the consumer, amongst which appears the right to information and education. One of

the measures proposed in the programme is the improvement of the consumer education and information. The part of the programme which lays down the principles which must govern the protection of the economic interests of consumers includes passages which aim to ensure the accuracy of information provided to the consumer, but without refusing him access to certain information. Thus, according to one of the principles, no form of advertising should mislead the buyer; an advertiser must be able to justify by appropriate means, the validity of any claims he makes.”¹¹

In United Kingdom of Great Britain, Misleading and Comparative Advertisement Directive (MCAD) which replaced Misleading Advertising Directive (MAD) and later Comparative Advertising Directive contains the regulations which govern the Advertising. Apart from these regulations European Convention on Human Rights concerning freedom of speech also governs the comparative advertising. Further industry codes such as Broadcast Television Advertising Standard Code also govern the advertising. The Courts in United Kingdom in a latest case *King span V Rockwool*¹² though upheld comparative advertising, set limits of it, but the effect of comparative advertising on consumer interest has not been raised in it. Effect of comparative advertising on consumer interest as a matter of fact has never been an issue in any case before the courts of

11 Supra note no 2.

12 <http://www.herbertsmith.com/NR/rdonlyres/0D1BF312-F5AB-4161-...> This has been filed by Kingspan seeking declaratory and other reliefs against the Rockwool. Kingspan has been engaged in the manufacture of insulation materials made of plastic foam whereas the Rockwool in the manufacture of non-combustible stone wool which is used as insulation material. The case relates to the advertisements which demonstrated the relative performance of insulation material of both King Span and Rockwool in fire-growth tests. These advertisements have been arranged in 2007 and 2008 in the form of road shows which also include small scale fire demonstrations, marketing DVDs containing a footage of large scale fire tests carried out independently under the ISO 9705 fire test standard by SP Technical Research Institute of Sweden. As Rockwool believed that there existed some misconception in the market, it attempted through these advertisements, to demonstrate the difference between combustible and non-combustible insulation products. Kingspan initiated proceedings for malicious falsehood and trademark infringement, alleging that the road shows and DVDs falsely represented that its products were dangerous. Kingspan also sought a number of declarations alleging at the road shows and DVDs did not comply with the Misleading and Comparative Advertising Directive as implemented in the UK by the Business Protection Regulations 2008. Rockwool denied the allegations and contended that the fire tests were objective, compared like for like and formed the basis of legitimate comparative advertisements. Rockwool also contended that the use of Kingspan's trademark was permitted under the MCA Directive and was not unlawful. The High Court of Great Britain held that King spans trademarks were infringed under the Trademark Directives as the road shows presented by the Rockwool that the tests conducted showed that the performance of King Span products was misleading and false. The High Court also held that Rockwool's presentation that King Span products were unsafe under fire conditions was held to be unjustifiable.

United Kingdom of Great Britain. The issue of comparative advertising on consumer interest still remains to be determined.

India

In India ‘advertising’ is regulated by various statutes and code like the Constitution of India,¹³ Trademarks Act 1999¹⁴ and Consumer Protection Act¹⁵ and codes of Advertising Standard Council of India (ASCI)¹⁶ etc.

The Supreme Court of India in *TATA Press Ltd. v Mahanagar Telephone Nigam Ltd. and others*, before answering the question whether TATA-pages is a telephone directory within the meaning of the Rule 458 of the Indian Telegraph Rules or a buyers’ guide or trade directory outside the scope of the said rule, has found an opportunity to determine the constitutional aspect of the ‘commercial advertisement’ and held, after examining the legal position in USA, that ‘commercial advertisement’ was part of freedom of speech and expression guaranteed under Article 19(1)(a) of Constitution of India.¹⁷

13 Article 19 of Constitution of India deals with the protection of certain rights regarding freedom of speech. Article 19(1)(a) guarantees to all citizens the right to freedom of speech and expression. This right under Article 19 (1)(a), however, may be affected by the operation of any existing law or shall not prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

14 According to Section 29 (8) of Trademarks Act 1999, a trademark is said to be infringed by any advertising of that trademark if such advertising (a) takes unfair advertisement of and is contrary to honest practices in industrial or commercial matters; or (b) is detrimental to its distinctive character; (c) is against the reputation of the trade mark.

15 As per Section 2(r) (x), ‘unfair trade practice’ means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, gives false or misleading facts disparaging the goods, services or trade of another person. The District forum or State Commission or National Commission as the case may be after conducting the proceeding is satisfied that the allegations contained in the complaint are true, it shall issue an order to the opposite party directing him to discontinue the unfair trade practice or to pay such sum of money as may be determined by it or to issue corrective advertisement or to provide for adequate costs.

16 ASCI has been established in 1985 with an objective to protect the interest of the consumers through responsible advertising and is a self regulatory voluntary organization of the advertising industry. The code has been drawn up by people in professions and industries connected with advertising in consultation with representatives of people affected by advertising and has been accepted by individuals, corporate bodies and associations engaged in or otherwise concerned with the practice of advertising in the best interest of the consumers. The code applies to advertisers, advertising agencies and media. For more information the ASCI code may be accessed at <http://www.ascionline.org/>

17 <http://login.westlawindia.com/maf/wlin/app/documents?src=toced&docg>. Supreme court has observed that “advertising as a “commercial speech” has many facets. Advertising, which is no more than a commercial transaction, is nonetheless dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy, free flow of commercial information is indispensable. There cannot be honest and

Some of the leading cases like *Reckitt & Coleman of India Ltd. v Kiwi TTK Ltd.*,¹⁸ *Hindustan Lever Ltd., v Colgate Palmolive (I) Ltd.*¹⁹ *Godrej Sara Lee*²⁰, *Eureka Forbes Ltd v Pentair Water India P Ltd.*,²¹ and *Unibic Biscuits India P Ltd v Britannia Industries Ltd.*,²² *Pepsi Co. Inc. and others v Hindustan Coca Cola Ltd and others*²³ dealt with claims between the competitors. But the issue of effect of comparative advertising on consumer interest has not been agitated in any of these cases. As such all the leading cases wherein comparative advertisement has been an issue are silent about the effect of the comparative advertising on consumer interest.

Madras High Court for the first time in *Colgate Palmolive v Anchor*²⁴ on its own has raised the issue of effect of comparative advertising on consumer interest and examined the possible effect of comparative advertising on consumer interest. The court has observed that “the law as it developed from the decision of the Calcutta High Court in *Reckitt Colman v M P Ramachandran* up to *Godrej Sara Lee case* (Delhi High Court), on the basis of English precedents, recognizes the rights of producers to puff their own products even with untrue claims, but without denigrating or slandering each other’s product. But the recognition of this right of the producers, the court observed, would be to de-recognize the rights of the consumers guaranteed under the Consumer Protection Act 1986. To permit two rival traders to indulge in puffery, without denigrating each other’s product, would benefit both of them, but would leave the consumer helpless. If, on the other hand, the

economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in democracy would be handicapped without there being freedom of “commercial speech”. The court further observed that “examined from another angle, the public at large has a right to receive the “commercial speech. Article 19(1)(a) not only guarantees the freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech. So far as the economic needs of a citizen are concerned, their fulfillment has to be guided by the information disseminated through advertisements. The protection of Article 19 (1)(a) is available to the speaker as well as to the recipient of the speech. The recipient of “commercial speech” may be having much deeper interest in the advertisement than the business who is behind the publication. An advertisement giving information regarding a life saving drug may be of much more importance to general public than to the advertiser who may having purely a trade consideration.

18 63 (1996) DLT 29.

19 The judgment may be accessed at <http://www.indiankanoon.org/doc226414/>

20 32(2006) PTC 307 (Del).

21 The judgment may be accessed at <http://www.manupatra.info/nxt/gateway.dll/highcourt1/karnataka/2001-2003ka/ka2006/3060720.htm?f=...>

22 The judgment may be accessed at <http://www.manupatra.info/nxt/gateway.dll/highcourt1/karnataka/2001-2003ka/ka2008/3080238.htm?f=...>

23 The judgment may be accessed at <http://www.indiankanoon.org/doc/924003/>

24 The judgment may be accessed at <http://www.indiankanoon.org/doc/1500699>

falsity of the claim of a trader about the quality and utility value of his product is exposed by his rival, the consumer stands to benefit, by the knowledge derived out of such exposure. After all, in a free market economy, the products will find their place, as water would find its level, provided the consumers are well informed. Consumer education, in a country with limited resources and a low literacy level, is possible only by allowing a free play for the trade rivals in the advertising arena, so that each exposes the other and the consumer thereby derives a fringe benefit. Therefore, it is only on the touchstone of public interest that such advertisements are to be tested. This is why the supreme court held in TATA Press case that “public at large is benefited by the information made available through the advertisements.” As a matter of fact the very basis of the law relating to Trade Marks is the protection of public interest only, since the courts think of an unwary purchaser, who may buy a spurious product on the mistaken impression that it was brand “x”. The same logic should form the basis for an action in respect of the disparaging advertisements also.” The court, having discussed the principles laid down in the leading cases mentioned above found the emergence of the following SEVEN principles:

- (a) Publication of advertisements being free commercial speech, is protected by Article 19(1)(a) of the Constitution as per the dictum of the Apex Court in TATA Press Case.
- (b) There are few restrictions on the aforesaid right, which would satisfy the test of the reasonableness under Article 19(2). These restrictions could be traced to the definition of the term “unfair trade practice” in Section 2(1)(r) of the Consumer Protection Act ,1986.
- (c) Therefore, only if a case of disparaging advertising falls within the definition of the term ‘unfair trade practice’, an action may lie.
- (d) An action may lie against such advertisement before a civil court both at the instance of manufacturer or marketer and *at the instance of the consumer provided that the advertisement in question contains a false representation coming within the four corners of sub-clauses (i) to (x) of clause (1) of Section 2(1)(r) of the Consumer Protection Act.*
- (e) A careful scrutiny of all the sub-clauses in section 2(1)(r) of Consumer Protection Act would show that four types representations are categorized as actionable as ‘unfair trade practices’ namely. (1) false representations falling under sub-

- clauses (i),(ii) and (iii), (2) Representations which may not necessarily be false but are nevertheless incorrect under sub-clauses (iv) and (v) (3) a Warranty or guarantee under sub-clauses (vii) and (viii) and (4) false or misleading representations that fall under sub-clauses (vi), (ix) and (x).
- (f) In the light of above statutory prescription, it is doubtful if false claims by traders, about the superiority of their product, either simplicitor or in comparison with the products of their rivals is permissible in law. In other words, the law as it stands today, does not appear to tolerate puffery anymore.
- (g) An advertisement which tends to enlighten the consumer either by exposing the falsity or misleading nature of the claim made by the trade rival or by presenting a comparison of the merits (or demerits) of their respective products, is for the public good and hence cannot be taken to be an actionable wrong, unless two tests are satisfied namely (1) that it is motivated by malice and (ii) that it is also false. This is on account of the fact that competitor is more equipped to make such exposure than anyone else and hence the benefit that would flow to the society at large on account of such exposure would always outweigh the loss of business for the person affected. If two trade rivals indulge in puffery without hitting each other, the consumer is misled by both, if both are restrained from either making false representations, incorrect representations or misleading representations or issuing unintended warranties then the consumer stands to gain. Similarly permitting two rivals to expose each other in a truthful manner, will also result in consumer education.

It is obvious from the above that the High Court of Madras, in the light of the statutory provisions especially the provisions under the Consumer Protection Act, expressed doubt on the maintainability of a false claim as to the superiority of a product and aptly commented that if the trade rivals indulge in puffery without hitting each other, the consumer is misled by both, but consumer stands benefited if the rival traders are restrained from making false, incorrect and misleading representations.

It is evident from the above that the issue of comparative advertising on consumer interest till now has not been agitated before the

Supreme Court of India either by the individual consumers or consumer organizations even if furtherance of consumer interest is the principal objective of the advertising. It may be observed that issue has not been agitated even in *Colgate Palmolive v Anchor* in High Court of Madras, but the suo motto, by obiter, made above observations. As a result, the conflict of interest between the rights of advertisers, advertised and consumer remain unsettled but hopefully the Supreme Court finds an opportunity to resolve the conflict.

RAPE AND COMPENSATION: AN ECONOMIC ANALYSIS OF THE CRIMINAL LAW ON RAPE IN INDIA

*Manika Kamthan**

Introduction:

Criminal law is the backbone of any civilized nation. It aims to maintain law and order in the society. The criminal law specifies various wrongs as 'crimes' and penalises them. By and large the criminal law works on the principle of 'deterrence' and thus it punishes the wrongdoers to set an example for others. However, with the span of time the criminal law has also engulfed the idea of 'reformatory justice' apart from the 'retributive justice'. It aims to reform the wrongdoers by subjecting them to various rehabilitative programmes. Criminal law differs from various other laws because other laws deal with 'private wrongs', but the offences under the criminal law are regarded as the 'public offences' and thus need harsher punishments. Crimes are wrongs against the State and thus, the State is the prosecutor in criminal law.

Economics is the study of the problem of choice, where resources are limited and the aim of society is the 'maximization of benefit welfare'. There is growing trend of the economic analysis of law and legal problems because an economic analysis is being used to choose the most effective punishment. A crime is not only a wrong against the victim, but it carries certain costs too. When a crime is committed the society suffers from the loss of certain resources, or if physical harm is inflicted, certain cost is incurred on the treatment, or when a man is killed his family suffers from the loss of his earnings. So, somewhere down the line all crimes affect the economics of the society. Criminal law aims at the welfare of society by minimising the occurrence of crimes and economics aims at the social welfare maximization. In the following paper we shall try to do an economic analysis of criminal law with special reference to the offence of rape.

* B.A.LL.B, LL.M (A.M.U.); M.Phil (J.N.U.); Research Scholar, Centre for the Study of Law & Governance, J.N.U.

Why an economic analysis?

A question which arises as to why we need to do an economic analysis of any law? A law is one of the most stringent of the social sciences where everything is chalked out in black and white. Economists like Posner, Robert Cooter, Thomas Ulen, Steven Shavell, G.S.Becker etc. are some of the stalwarts in the field of economic analysis of law and legal problems. The economic approach to criminal law is based on the proposition that economic efficiency is useful for examining and designing rules and institutions. Economic efficiency means that there is no way to make a change that benefits someone without harming someone else. A given change is efficient if those winning from that change compensate those losing so that no one is worse off after the change. This is the well known “**Pareto Efficiency.**” Most of our analysis is based on a less restrictive concept of efficiency, social welfare maximization or “Kaldor Hicks Efficiency”. Under this less restrictive concept, a given change is efficient if an individual could in principle compensate those who lose and remain better off but with no requirement placed on the beneficiary to actually hand over compensation. Understanding efficiency is fundamental to the economic analysis of criminal law in two ways:

1. In a positive sense, to evaluate the efficiency of current institutions.
2. In the normative side, to propose more efficient institutional arrangements.¹

Economics and the criminal:

One of the main differences between a civil wrongdoer and the criminal is this that the later do all the wrongs intentionally, whereas the former might have done it by accident. Professional criminals are economically rational. They compare the profit from committing a crime with the expected cost, including the risk of punishment, the possibility of social stigma and eventual psychological costs. A criminal is an individual for whom the gain from committing a crime more than compensates the expected cost. Now, the question which arises is whether the criminal should be allowed to move freely if he adequately compensates the victim as is done in civil wrongs? Cooter and Ulen

1 Nuno Garoupa, “An Economic Analysis of Criminal Law”, www.estig.ipbeja.pt/~ac_direito/Garoupa_criminalaw01.pdf

define the '*perfect compensation*', which is a sum of money that leaves the victim indifferent between the injury with compensation and no injury.² If a criminal proposes to compensate the victim perfectly then can he be acquitted? No is the answer, because he interferes with the liberty of the victim which are to be protected by the State. If this is allowed then the liberties and rights of the citizens shall be exposed to continuous violation. The main aim of the criminal law is 'deterrence' which cannot be undone only by way of compensation. Thus even if we try to analyse the activities of a criminal economically we cannot justify them. However, we cannot deny the fact that his activities are economically effective.

Crime and the cost:

If we try to study the costs related to the crime and criminal law then we need to look into the theory of "transaction cost" by Ronald H.Coase. *Transaction cost means the cost incurred in the maintenance and protection of the rights.* Criminal law aims at protecting and maintaining the liberties and rights of the civilians and thus the cost incurred by the State on the maintenance of Police, Jails, and Compensations etc are all included in the transaction cost. Now Coase also gave a theorem known as the "Coase Theorem" which says that "*the goal of the legal system should be to establish a pattern of rights such that economic efficiency is attained.*"³ As discussed earlier, economic efficiency is useful for designing compensation etc. But in criminal law we cannot allow mere compensation to undo the wrong done. However, the punishments can be so designed that the economic efficiency is attained. The State incurs heavy cost in punishing criminals. Jails are to be maintained and all food and lodging costs of the criminals are incurred by the State. Thus according to the Coase theorem the legal system should be such that the occurrence of crime is minimised so that the economic efficiency is maintained. If the crime rate is high then the state shall not be able to maintain the economic efficiency. Moreover, it also means that the punishments must be sufficient enough to deter future wrongdoers. If the punishments are not harsh enough then the "deterrence aim" of the criminal law shall lose its meaning and the crime not be controlled.

2 Coote, Robert r & Thomas Ulen; "Law and Economics";Addison-Wesley Longman, Inc; 1999;p.432

3 Medem, Steven G. & Richard O.Zerbe, Jr.; " The Coase Theorem", *encyclo.findlaw.com/0730book.pdf*

Punishment and economics:

The theory of criminal law aims to answer two basic questions:

1. What acts should be punished?
2. To what extent?⁴

Those acts should be punished which fulfil the essentials of 'crime' i.e. *actus reus* + *mens rea* + *motive*. Any act coupled with wrongful intention and a motive which causes harm either to an individual or to society as a whole is a crime and thus should be liable to be punished.

The method should be to formulate a measure of the social loss from offenses and find those expenditures of resources and punishments that minimize loss. We have already discussed the 'perfect compensation'. Now there is '*perfect disgorgement*', which is a sum of money that leaves the injurer indifferent between the injury with disgorgement and no injury.⁵ The general theory of punishment is the "*theory of reasonableness*" i.e. the punishment should be in proportion of the harm inflicted or the injury caused. The actual punishment should be such that it exceeds the amount of 'perfect disgorgement'.

Multiplier principle:

When the probability of detection and punishment is one (certain enforcement), any sanction between 80 and 100 deters the criminal act (since the loss from being punished outweighs the illegal gain). Under a rule of strict liability for harm (a criminal pays for the harm a criminal act causes), the fine would be 100. Under a rule of fault based liability for harm (a criminal pays for the harm only if his act is undesirable), the fine would be 100 because the act is undesirable. However, if the harm caused by the act were to be 60, the fine would be 60 under a rule of strict liability and zero under a rule of fault based liability. In this last example, the criminal act is not undesirable because the benefits obtained by the criminal exceed the harm. Due to the fact that it is costly to identify and penalize criminals, the probability of punishment is less than one (enforcement and probability). If the probability of punishment is 50% and the fine is 100, the expected fine is 50. For a risk neutral

4 Supra2, p.427

5 Supra2, p.432

criminal (a criminal with no regard for risk), the relevant cost is the expected sanction. Thus, he will commit a criminal act that benefits him with 80 and has an expected cost of 50. In order to deter this individual, the government should apply a fine of 200. This result is known in the literature as the multiplier principle.⁶ The multiplier principle is not very efficient because the punishment must be decided according to harm caused to the victim and according to the gain of the criminal.

An economic analysis of rape:

Rape is one of the most heinous crimes against mankind. No other crime includes all the costs i.e. transaction cost + social cost + psychological cost in one. A victim of rape suffers social stigma as well as psychological trauma. There has been a growing trend to award compensation to rape victims. A Bangladeshi woman was gang raped by some railway employees. Damages were awarded to her against the *Railway Administration in Chairman, Railway Board* under Art.226.⁷

‘Suppose a rapist derives extra pleasure from the coercive character of his act. Then there would be no market substitute for rape and it could be argued therefore that rape is not a pure coercive transfer and should not be punished criminally. But the argument would be weak: (a) the prevention of rape is essential to protect the marriage market and more generally to secure property rights in women’s persons. (b) Allowing rape would lead to heavy expenditures on overcoming these protections. The expenditure would be largely offsetting and to that extent socially wasted. Given the economist definition of value- the fact that the rapist cannot find a consensual substitute does not mean that he values the rape more than the victim disvalues it.’⁸

Another very important aspect of economic analysis is to try to draft a legal structure under which when rational individuals act the effect is efficient. What do we mean by efficient outcomes? In case of criminal law, efficient outcome would, mean that both the parties are induced to behave in such a way that the social costs are minimized. Now, if we interpret in context of rape then the legal structure should be

6 Supra 1

7 AIR 2000 SC 988: (2000) 2 SCC 465

8 Donohue III, John J & Ian Ayres; “Book Review: Posner’s Symphony No.3 : Thinking About The Unthinkable”; www.jstor.org/stable/1228766

such that the women feel so safe that they don't spend extra on their safety like personalized cabs etc. while travelling. They should feel equally safe in a public transport which is cheaper and efficient. In case of rapist, first of all the law should be very stringent and strict that they don't dare to rape. Another, far reaching change in the legal structure can be to legalise prostitution. This argument assumes that crimes always have a cheaper market substitute, for example purchase instead of theft. So if we legalise prostitution then probably the menace of rape can be efficiently tackled. But, this do not addresses the issue of marital rape and poor people who can't even make two ends meet, to expect that they will pay prostitute, is too much to ask for. It will rather result into the exploitation of prostitutes and a prostitute will always have a right to say no! Thus, the punishment of rape needs to be made very stringent so as to deter the criminals and to induce them to act so as to reach efficient outcomes.

Why rape takes place? There can be innumerable answers to this question. We will try to find an economic answer to it. A person commits a crime when the value of the crime or the gain out of it is more than the cost, which he pays in his punishment, or he wouldn't do it.⁹ Given the lawlessness in India, to rape doesn't costs a penny. If caught then it can cost something, however, due to shockingly low rate of conviction in rape cases, the value of pleasure derived out of rape is much more than the cost incurred by the rapist. Thus, an efficient punishment is the only ray of hope for reducing rapes.

Towards an efficient punishment:

Law in India:

In India, rape is dealt under with Section 375, Indian Penal Code. Section 375 defines rape and Section 376 prescribes punishment. The maximum punishment which can be awarded is life imprisonment. The minimum punishment is fixed at seven years which can be reduced at the discretion of the Court. Thus, the total outcome of the punishment is not efficient. The deterrent effect of punishment is almost zero. There should be no exemption from the minimum punishment. A greater stigma needs to be attached with the crime of rape, not to the victim but to the

9 Friedman, David.D; "Law's Order- What Economics Has To With Law and Why it Matters"; Princeton University Press, Princeton & Oxford (2000); pp.223

accused. In India the case is vice versa. Accused of rape should not be accepted back into the society. He should suffer economic penalties also. His sources of income should shrink after acquittal. Unfortunately, all this happens with the victim in India. Economist John Lott did two empirical studies, one dealing with the white collar criminals and other dealing with the corporations charged with cheating their customers. He reached to the conclusion that “stigma is a very real punishment”.¹⁰ The loss to be suffered by the rapist should be more than the highest fine that would be imposed if the charges turn out to be true.

Optimal punishment:

The expected punishment should at least be equal to the gain to the criminal. Thus, to deter the criminal the punishment should be more than the gain to the criminal. Now, how do we employ this theory in rape cases? It is here the idea of compensation comes into the picture. As far as the other punishment goes that is quite stringent. Compensation should be higher than the gain to the criminal. It should be exemplary and compulsory. The conviction should result in both a sentence and compensation. The idea of compensation should include both the aspects: compensation to the victim and compensation to the State as well. It increases the punishment cost. Punishment cost is defined as the difference between the cost the punishment imposes on the criminal and the benefit it provides to others.¹¹ Punishment cost should be made zero. However, compensation can never equal the damage done to the victim in the rape cases. But, if compensation is also paid to the State then probably State could work efficiently. It is not that the State does not want to prevent rapes, but the State is not ready to pay the cost of doing so. If the State is also compensated by the victim then State would work towards preventing the rape, for example by lighting the stray streets, deploying more police on dark roads etc.

The economic analysis is aimed to document the additional costs to the health sector of improving post rape. The transaction costs of rape are not very high because the State doesn't seem to be taking any care of maintaining and protecting the rights of the citizens. Moreover, the compensation cannot adequately undo the wrong done to the victim, but it should be given along with the punishment to the wrongdoer. Nothing

10 Ibid; pp.231

11 Supra 10, p. 225

like perfect compensation exist in the case of rape. Moreover, the State doesn't seem to be following the Case theorem because no such pattern of rights seems to be emerging in case of rape which is economically efficient. The Pareto Optimal rule also doesn't seem to apply because there is no way a rapist can undo the harm done to the victim.

Conclusion:

The economic analysis of law seems to be a very attractive hypothesis; however, not very practical applications of this approach have been evident. It works best for the ascertainment of the punishment. In rape the costs of the crime are too high to be compensated or to be met by the state. But compensation should be given for making the punishment cost zero. There are no doubts that the economic theory of criminal law constitutes a body of literature which has contributed to the understanding of crime and law. Rape has been made the crime because there is no inexpensive way of protecting women's body. Some societies did this by locking their women in houses. In modern times it would be a very costly solution. Thus, the State has been bestowed upon the duty to protect women's right to their own body. Rape violates this right and thus is a crime.

INSTITUTIONAL ARRANGEMENTS TO COMBATING CORRUPTION: A COMPARATIVE STUDY INDIA'S (C.B.I) AND HONG KONG'S INDEPENDENT COMMISSION AGAINST CORRUPTION (I.C.A.C)

Srinivasa Rao Gochipata & Y. R. Haragoapal Reddy***

1. Introduction

Corruption is a global phenomenon and has serious implications and consequences for the growth of democracy, promotion and protection of fundamental rights. There is a wide spread perception that the level and pervasiveness of corruption gains significance¹.

Corruption in any form treated as an incurable disease is caused by many social and economic evils in the society. It damages the moral and ethical fibers of the civilization. Undisputedly, corruption breeds many evils in the society. Once the seed of corruption starts growing it takes roots slowly and gradually and cancerously. It passes through the whole Nation and becomes a perilous disease². Corruption has been considered one of greatest challenges impeding the growth of contemporary India. Though India's economy stands tall and firm, it has not realized its true potential as corruption has, in the present scenario, inhibits and undermines not only the economic growth, but also the effective functioning of democracy. Corruption, a social menace, has made our country susceptible to and defenseless against the oncoming forces of anti-social elements. Corruption in India is a consequence of the nexus between bureaucracy, politics and criminals. India is now no longer considered a soft State. It has now become consideration State where everything can be had for a consideration. Corruption has a corrosive impact on economy. It worsens our image in the international market and leads to loss of overseas opportunities.

There are several social evils in the society which ruin people, particularly the younger generation. The evils are, terrorism, smoking,

* Dr. Srinivasa Rao Gochipata, Post Doctoral Fellow, P.G.Department of Legal Studies and Research, Acharya Nagarjuna University.,Andhra Pradesh.

** Prof. Y.R. Haragopala Reddy,(Retd)Professor of Law, Acharya Nagarjuna University. Andhra Pradesh.

1 Harriss-White, B. and G. White, Editorial Introduction: Corruption, Liberalization and Democracy, in B. Hasrris-White (eds), Liberalization and the new Corruption, Vol.27,No.2, 1996,p.1.

2 Nye, Joseph S., "Corruption and political development: A cost-benefits analysis" American political Science Review, Vol.61.No.2, June 1967, p.417.

drinking, drug addiction, immoral trafficking, cheating, fraudulent activities, obscene and vulgar scenes in cinemas and TV channels, dowry, corruption, bribery, adulteration of foods and lifesaving medicines, pollution of the atmosphere, air, soil and water by the industrial effluents and poisonous gasses. If it is reflected on this deeply one could come to the conclusion that the fundamental reason for these evils is the pollution of the mind of human beings, which is a consequent result of man's selfishness and egoism.

More importantly, corruption in India flows from the political class. It manifests latently in party activities and election funds. Further, political patronage gives an aura of invincibility and respectability to corruption and deprives it of all moral and legal fears. David Bayley observes that "The presence of corruption is an important hindrance to economic growth and progressive social change"³.

It is now commonly agreed that corruption has vitiated India's public life like a cancer spreading over a human body. All sectors, be they administrative or political or economic, have come under the ever-increasing onslaught of corruption. There are many reasons as to why this has happened. Political actors of all shades including Ministers, Legislators, office-bearers of political parties, and other political office-holders are involved in corruption⁴.

The Nation's progress is seriously hampered by all pervasive corruption. Weeding out corruption today is a major challenge before Indian society. To eradicate the evil of corruption, the Central Government has enacted Anti-Corruption Laws⁵ to deal with the prevention of corruption and constituted commissions such as Central Vigilance Commission (CVC), Central Bureau of Investigation (CBI) and Anti-Corruption Bureau (ACB) to enforce the Anti-Corruption Laws effectively

The Santhanamm Committee on the prevention of corruption in India defines the corruption as "any improper or selfish exercise of

3 Bayley David. H "The Effects of Corruption in a Developing Nations", *Western Political Quarterly*, Vol.XIX.No.4. (1996) p. 719-732

4 Padhay K.S. "Corruption in Politics: A Case Study". New Delhi: B.R. Publishing Corporation.1986.

5 The Prevention of Corruption Act, 1947, Sections 161 to 165A of the Indian Penal Code, The Criminal Law Amendment Act, 1944, The Prevention of Corruption Act, 1988, Prevention of Money Laundering Act, 2002, and Right to Information Act, 2005.

power and influences attached to a public office or to the special position one occupies in a public life⁶ Corruption is the use of public office for private gain:“It is the effective implementation of the rule of law that confers legitimacy on the State. If the rule of law is compromised by corruption, the State loses its legitimacy⁷”.

2. Legal frame work for combating corruption

To combat this devastating corruption Indian penal code (IPC) was the main tool during the pre-independence period. The code had a chapter on “offences by public servants”. Section 161 to 165 provides the legal framework to prosecute corrupt public servants. At that time the need for a special law to deal with corruption was not felt. But the Second World War created menaces (shortages). Taking advantage of that situation the unscrupulous elements exploited the situation which led to large scale corruption in public life. Then the law makers sincerely felt that drastic legislative measures needed to be taken immediately. Hence the Prevention of Corruption Act, 1947 was enacted to fight the evils of bribery and corruption.

This Act did not redefine nor expand the definition of offences resulted to corruption, already existing in the IPC. However, the law defined a new offence ‘criminal misconduct in discharge of official duty’ for which enhanced punishments was stipulated. Later in 1988, the Prevention of Corruption Act was enacted. It consolidates the provisions of the Prevention of Corruption Act 1947, the Criminal Law Amendment Act, 1952 and some provisions of IPC. It has also certain provisions intended to combat corruption effectively among public servants. In this Act the term ‘Public Servants’ is broadly defined and a new concept ‘Public Duty’ is introduced. Besides, trail on cases by Special Judges.

Recently, in the way of combating corruption, the prevention of Money Laundering Act 2002 was enacted empowering the Directorate of Enforcement, India, and Financial Intelligence Unit, India to investigate and prosecute such public servants who hold ill-gotten wealth in foreign countries and transfer to their homeland through money laundering. Further, since secrecy in public administration breeds corruption. The

6 Kashyep, Subhash C., *The Ministers and Legislators*, Metropolitan, New Delhi, 1982, p.16.

7 Vittal. N, Former Central Vigilance Commissioner, paper presented at the Rotary District Conference, New Delhi, 2002

Right Information Act, 2005 has been enacted aiming at ensuring efficiency, transparency and accountability in public life. This is a revolutionary step towards the eradication of corruption from public life.

In pursuance of the recommendations made by the Committee on Prevention of Corruption, popularly known as the Santhanam Committee, the Central Vigilance Commission was set up by the Government of India by a Resolution dated 11.2.1964. At the federal level, key institutions are include the Central Vigilance Commission (CVC), The Central Bureau of Investigation (CBI), The Office of the Comptroller and Auditor General (C&AG) and the State Level Anti-Corruption Bureaus (ACB) of each State are created to combating the corruption in India. This article asses the roles and functions of CBI to eradicate corruption in India and compare the one of the successful anti-corruption agency in Hong Kong's Independent Commission Against Corruption (ICAC).

3. Institutional frame work to combat corruption in India

3.1 Central Bureau of Investigation (CBI)

During the World War II, the Government of India issued an ordinance in 1943 constituting a Special Police Force for the investigating of certain offences committed in connection with the affairs of the Central Government. The said ordinance lapsed with the end of the war. In the year 1946, the Parliament enacted the Delhi Special Police Establishment Act, 1946. The Act was intended to create a Special Police Establishment, a specialized agency, for making enquiries and investigations into certain specified offences. Section 5 of the Act provides that the Central Government can, with the concurrence of the State Governments, extend the jurisdiction of the SPE to all States.

Special Police Act is envisaged as supplementary to the State police forces, enjoying great powers of investigation in cases notified under section 5 in respect of offences notified under section 3 of the DSPED Act, 1946 which can of course be exercised in a State only with the consent of the Government of that State. The Central Bureau of Investigation in its present form came into being in 1963 through the resolution adopted by the Government of India pursuant to the recommendations of the Committee on Prevention of Corruption

(Santhanam Committee). The Resolution also specified the types of cases which would be investigated by the CBI, which of course continues to derive its legal powers for investigation from the aforesaid Act⁸.

The Central Bureau of Investigation (CBI) was the successor police organization to the Delhi Special Police Establishment (DSPE). The DSPE Act granted the DSPE the jurisdiction to work alongside State Governments and to investigate categories of crimes allegedly committed by Central Government employees or offenses connected to the departments of the government. As India's economy continued to grow, there was concern that the number of investigations needed would overwhelm the DSPE. In response, the government passed Resolution No. 4/31/61-T in 1963, creating the CBI and merging it with the DSPE⁹.

The legal powers of investigation of CBI are derived from the DSPE Act 1946. This Act confers concurrent and coextensive powers, duties, privileges and liabilities on the members of Delhi Special Police Establishment (DSPE) with Police Officers of the Union Territories. The Central Government may extend to any area, besides Union Territories, the powers and jurisdiction of members of the CBI for investigation subject to the consent of the Government of the concerned State. While exercising such powers, members of the CBI of or above the rank of Sub Inspector shall be deemed to be officer's in charge of Police Stations of respective jurisdictions. The CBI can investigate only such of the offences as are notified by the Central Government under the Delhi Special Police Establishment Act, 1946.

The CBI became responsible for the "investigation of crimes then handled by the D.S.P.E., for collection of intelligence relating to certain types of crime, participation in the work connected with Interpol, maintenance of crime statistics, study of specialized crimes and coordination of laws relating to crime." The CBI retains the investigative powers of the DSPE¹⁰. Initially, the CBI only had the power to investigate offenses in the Union Territories¹¹.

8 Law Commission of India, One hundred sixty first report on Central Vigilance Commission and Allied Bodies, 1998.

9 CBI manual, 182, Para. 1.6 ("in fact, with the establishment of CBI on 1st April, 1963, the Delhi Special Police Establishment was made one of its divisions, viz. 'investigation and Anti-Corruption division.'").

10 CBI manual, 182, Para. 1.7. the CBI's manual states:

The CBI's jurisdiction extends to other States who agreed to this augmentation of control. In comparison to state and local police, the CBI is arguably superior. As a first step in that direction the Government of India have decided to set up with effect from 1st April, 1963 a Central Bureau of Investigation¹² at Delhi. Over the years the character of the CBI has undergone a significant change. Its role is no longer restricted to anti-corruption activities. It is being increasingly called upon to investigate the conventional crimes and banking and other economic offences. Of course, the main thrust of its functions continues to be on the detection and investigation of offences of bribery and corruption committed by public servants under the control of the Central Government and its undertakings.

Motto of CBI:

- Industry, Impartiality and Integrity

Mission of CBI:

- To uphold the Constitution of India and law of the land through in-depth investigation and successful prosecution of offences; to provide leadership and direction to police forces and to act as the Nodal Agency for enhancing inter-state and international cooperation in law enforcement.

Vision of CBI:

Based on motto, mission and the need to develop professionalism, transparency, adaptability to change and use of science and technology in our working, the CBI will focus on.

1. Combating corruption in public life, curb economic and violent crimes through meticulous investigation and prosecution.
2. Evolve effective systems and procedures for successful investigation and prosecution of cases in various law courts.

[this] act confers concurrent and co-extensive powers, duties, privileges and liabilities on the members of Delhi Special Police Establishment (CBI) with Police Officers of the Union Territories in relation to the investigation of offences notified by the Central Government under Section 3 of the act and arrest of persons concerned in such offences.

11 Delhi Special Police Establishment Act, No. 25 of 1946, § 2 (India).

12 Rama Krishna P.V "A treatise on Anti-Corruption Laws in India" Hyderabad, S.Gogia & Company, 2009.p.1907

3. Help fight cyber and high technology crime.
4. Create a healthy work environment that encourages team-building, free communication and mutual trust.
5. Support state police organizations and law enforcement agencies in national and international cooperation particularly relating to enquiries and investigation of cases.
6. Play a lead role in the war against national and transnational organized crime.
7. Uphold Human Rights, protect the environment, arts, antiques and heritage of our civilization.
8. Develop a scientific temper, humanism and the spirit of inquiry and reform.
9. Strive for excellence and professionalism in all spheres of functioning so that the organization rises to high levels of endeavor and achievement.

3.2 Functions of CBI

The CBI is the premier investigating police agency in India. It is an elite force playing a major role in preservation of values in public life and in ensuring the health of the national economy. It is also the nodal police agency in India which coordinates investigation on behalf of Interpol Member countries. The services of its investigating officers are sought for all major investigations in the country. It was constituted under the following six heads:

- i) Investigation and Anti-Corruption (Delhi Special Police Establishment).
- ii) Technical Division
- iii) Crime Records and Statistics Division
- iv) Research Division
- v) Legal and General Division
- vi) Administrative Division.

3.3 Investigation and Anti-Corruption Division (Delhi Special Police Establishment)

- 1) Cases in which public servants under the control of the Central Government are involved either by themselves or along with State Government servants and or other persons.
- 2) Cases in which the interests of the Central Government or of any public sector project or undertaking, or any statutory

corporation or body set up and financed by the Government of India are involved.

- 3) Cases relating to breaches of Central Laws with the enforcement of which the Government of India is particularly concerned, *e.g.*
 - a) Breaches of Import and Export Control orders.
 - b) Serious breaches of Foreign Exchange Regulation Act.
 - c) Pass port frauds.
 - d) Cases under the Official Secrets Act pertaining to the affairs of the Central Government.
 - e) Cases of certain specified categories under the Defense of India Act or Rules with which the Central Government is particularly concerned.
- 4) Serious cases of cheating or fraud relating to the Railways, or Posts and Telegraphs Department, particularly those involving professional criminals operating in several States.
- 5) Crime on the High Seas
- 6) Crime on the Airlines
- 7) Important and serious cases in Union Territories particularly those by professional criminals.
- 8) Serious cases of fraud, cheating and embezzlement relating to Public Joint Stock Companies.
- 9) Other cases of serious nature, when committed by organized gangs or professional criminals, or cases having ramifications in several States including Union Territories, serious cases of spurious drugs, important cases of kidnapping of children by professional inter-state gangs, etc. These cases will be taken up only at the request of or with the concurrence of the State Government /Union Territories Administrations concerned.
- 10) Collection of intelligence about corruption in the public service and projects and undertakings in the public sector.
- 11) Prosecution of cases investigated by this Division.
- 12) Presentation of cases before Enquiry officers in which departmental proceedings are instituted on the recommendation of this Division.

3.4 Functions of the Technical Division

Following are the functions of the Technical Division

- 1) Technical assistance in investigation of cases involving accounts.
- 2) Specialized assistance incases involving Railway and Postal accounts.
- 3) Assistance in cases involving assessment of Income-Tax, Excise Duty etc.
- 4) Examination of accounts and assets etc., in cases relating to allegations of disproportionate assets.
- 5) Examination of cases investigated by the Bureau which have an Income-Tax aspect, and communication of information with a view to enabling the Income-Tax Department to recover the evaded tax.

3.5 Crime Records and Statistics Division

- 1) Maintenance of All-India Statistics of crime.
- 2) Study of All-India trends in thefts and losses, and recoveries of fire-arms and ammunition, and note forgery and counterfeit coining.
- 3) Collection and dissemination of information about important Inter-State criminals.
- 4) Preparation and circulation of reports and reviews relating to crime in India

3.5 Functions of Research Division

- 1) Analysis and study of specialized crimes and of problems of a general nature affecting the Police, *e.g.*
 - i) trends and causes of serious crimes in different areas.
 - ii) Preventive measures, their effectiveness and relationship with crime.
 - iii) Improvement in methods of investigation, utility and results of introducing scientific aids and equipment.
 - iv) Inadequacy of laws; co-ordination of laws relating to crime in various States.
 - v) Criminal gangs operating in more than one State wandering gangs-Ex-criminal Tribes-habitual offenders.
 - vi) Crime amongst the Tribal people
 - vii) Inter-state note-forgery and counterfeiting.
 - viii) Social factors in crime.
 - ix) Industrialization and crime.

- x) Juvenile delinquency.
- xi) Kidnapping of women and children.
- 2) Participation in the work of Central Forensic Science Advisory committee and the Central Medico Legal Advisory Committee.

3.7 Functions of Legal and General Division

3.7.1 Legal Division

- 1) Legal advice in cases investigated by the investigation and Anti- Corruption Division.
- 2) Conducting prosecution in important cases.
- 3) Review of judicial decisions relating to criminal law and procedure for publication in the Central Bureau of Investigation Gazette.
- 4) Compilation and circulation of Law Digest.
- 5) Inadequacy of and amendments to laws.
- 6) Co-ordination of laws relating to crime in various States.

3.7.2 General Division

- 1) Matters relating to organization, policy and procedure.
- 2) Inter-State conference relating to crime and anti-corruption work.
- 3) Appreciation reports regarding modes of corruption in various Government Departments and Public Undertakings.
- 4) Correspondence with Ministers and States on general questions relating to Policy, procedure, etc.
- 5) Training Courses in Anti-corruption work.
- 6) C.B.I. Gazette.
- 7) Photographic section.

3.7.3 Administration Division

All establishment and accounts matters.

CBI investigations have a major impact on the political and economic life of the Nation. The following broad categories of criminal cases are handled by the CBI:

- i. **Anti Corruption Division:** Cases of corruption and fraud committed by public servants of all Central Govt.

Departments, Central Public Sector Undertakings and Central Financial Institutions.

- ii. **Economic Crimes Division:** Deals with cases including bank frauds, financial frauds, Import Export & Foreign Exchange violations, large-scale smuggling of narcotics, antiques, cultural property and smuggling of other contraband items etc.
- iii. **Special Crimes Division:** Deals with cases such as cases of terrorism, bomb blasts, sensational homicides, kidnapping for ransom and crimes committed by the mafia/the underworld.

Table 1 CBI Convictions

<u>Year</u>	<u>Conviction Rate</u>
<u>2008</u>	<u>66.2%</u>
<u>2007</u>	<u>67.7%</u>

Source: CBI manual 2009

The Central Bureau of Investigation is the Principal investigative agency of the Union Government in anti-corruption matters. It is observed that the conviction rate of CBI is nominal because it is the highest anti-corruption agency to prevent corruption in India. Even though this institutions conviction rate is not up to the mark. It shows that so many lacunas in investigation division and prosecution division. The prosecution has failed to prove the guilty of the accused person.

This makes one doubt the sincerity of CBI. This data clearly suggests that the CBI has to be strengthened more legally and more powers should be entrusted so that it could function effectively and afford for the benefit of many and for the nation's development.

4. Hong Kong's Independent Commission Against Corruption (ICAC)

Although it may seem unimaginable today, corruption was widespread in Hong Kong during the 1960s and early 1970s. Bribery was regarded as a necessary evil and a way to get things done. The police department was in charge of investigating corruption offences. The effectiveness of the Police, however, was limited as corruption

syndicates within the force were particularly prevalent and bribe-taking was institutionalized in most city administrations. A turning point was reached first due to a corruption scandal involving a senior police officer. Peter Godber's flight from prosecution. Shortly thereafter, Governor Sir Murray MacLehose empanelled a commission under the chairmanship of Justice Alastair Blair-Kerr¹³. The Blair-Kerr Commission concluded that corruption was systemic in Hong Kong; high level officials as well as police officers on the street were accepting bribes. In response, the Blair-Kerr Commission recommended the establishment of a special agency to investigate allegations of corruption, prevent bribery in business and government, and educate citizens about corruption through outreach programs.

It was against this background that the Independent Commission Against Corruption (ICAC) was established in February 1974 in order to respond to the public's call for action against widespread corruption by the Crown Colony. The ICAC was given the two main tasks of rooting out corruption and restoring public confidence in Government. In order to win the confidence of the public, the ICAC was separated from the rest of the civil service and made directly accountable to the Governor of Hong Kong. In order to enable the Commission to tackle the problem at the source, the ICAC was given the task of carrying out an integrated three-pronged attack on corruption—*investigation, prevention and public education*. Political authorities recognized that “an essential part of the strategy was to ensure that the legal framework within which [the ICAC] was contained was as strong, clear and effective as it could be made¹⁴.”

To achieve the objectives set out for it, the Commission was provided with the necessary legal powers as well as sufficient resources. Tough and high-profile law enforcement action quickly convinced the public that the government and the ICAC were serious about curbing corruption, with the ICAC making every effort to plug corruption loopholes in both the public and private sectors. In order to foster a culture of integrity, the Commission also launched public education campaigns aimed at impressing upon the people that corruption was an evil as well as to enlist their support in reporting on corrupt individuals.

13 Bertrand De Speville, “Hong Kong: Policy Initiatives Against Corruption” (Paris: OECD Development Centre Studies, 1997).

14 *ibid.*

ICAC is often cited as an example of a successful anti-corruption agency, and has been used as a model for the establishment of agencies in both developed and developing countries. ICAC's strategy has proven effective because of a combination of factors including its legal framework, budget and staffing capacity, and the work of the commission in both prevention and prosecution¹⁵.

4.1 Legal framework

Essential to the work of ICAC is the legal framework within which it operates: The Prevention of Bribery Ordinance (POBO) enacted in 1971, and amendments made to the Prevention of Corruption Ordinance (POCO), and Corrupt and Illegal Practices Ordinance (CIPO) to make these legal instruments stronger, clearer and more effective.

4.2 Scope of action

At its creation ICAC was given a three-pronged strategy: to investigate allegations of corruption, to prevent corruption by the improvement of public sector procedures and systems, and to educate the public about corruption and secure their support in the fight against it. Additionally, Isaac's operational arms were given the backing and support of the highest governmental authorities in order to, not only investigate all public officials without regards to their position, but also to pursue corruption in the private sector. ICAC however, cannot prosecute suspects. This is the responsibility of the country's Secretary for Justice, a prosecutorial restriction that is maintained as a safeguard against the possible misuse of power by the commission. It is the Commissioner's responsibility to present the evidence to the Secretary for Justice so he/she can decide whether or not to proceed with a criminal prosecution

4.3 Independence and accountability

ICAC was specifically designed as an independent agency, separate from the police force and other crime prosecution units, with the head of the organization, the Commissioner, responsible directly to the country's Governor (Chief Executive after 1997). The commission was

15 Pope J. "Confronting Corruption: The elements of a National Integrity System" in Transparency International Source Book, 2000. Berlin: T.I.

given the resources and manpower necessary to fund and perform its operations, and provided with independence of action as reflected by:

Commissioner's responsibilities are

- i. freedom from the direction or control of any organization or person,
- ii. accountability directly to the Chief Executive, Executive Council, Legislative
- iii. Council and to five citizen committees
- iv. freedom in the management of staff and resources,
- v. total access to vital information,

The ability to investigate the highest levels of public authority, the powers of search, seizure of assets and arrest of suspects conferred to the officers of the commission¹⁶.

4.4 Staffing and budget

Isaac's success is also derived from the ability of the Commission to employ professional, qualified and unquestionably honest staff. Appointments are made for a fixed 2-3 year period, and the officer's background, including potential conflicts of interest is scrutinized carefully. Officers are restricted from political activity and the highest standards of conduct and discipline are expected. Dismissal need not be justified on the grounds of conduct, as a loss of confidence in the integrity of the officer is enough to remove him/her from the post¹⁷.

4.5 Community participation

From the onset, ICAC sought the public's involvement and support to conduct its activities. It carried out educative and awareness campaigns with the support of community educators, convincing citizens of the need to report and denounce corrupt activities, monitoring public perceptions on corruption, and using the media to publicize the achievements of the organization. In addition, citizens play a vital role in monitoring the commission's actions, as four committees comprised of

16 Quah J. "Accountability and Anticorruption Agencies in the Asia Pacific Region in Combating Corruption in Asia Pacific Economies" Paper presented at the joint ADB-OECD Workshop. Manila, ADB.

17 Independent Commission Against Corruption, ICAC: www.icac.org.hk/

prominent community members scrutinize the activities of the each of the Commission's departments and provide advice to the Commissioner, while the ICAC Complaints Committee handles all public complaints made against the Commission and its officers.

It is Isaac's three-pronged strategy that has merited the attention of other countries, which have tried to copy it and apply it to their own circumstances, specifically, the recognition that prosecution of corruption cannot work separately from a campaign to educate the public and change public perceptions on the dangers of corruption. The successful work of ICAC in controlling a deeply rooted, systemic corruption problem is recognized to stem from its independence of action and strong legal powers. Apart from its effectiveness in curbing corruption, Isaac's special success lies in the change of public attitudes that has occurred in the Hong Kong community, from a widespread tolerance of corrupt activities to the public's outright rejection of corruption¹⁸.

The ICAC controls corruption through three functional departments: investigation, prevention, and community relations. Largest among the departments is the Operations Department that investigates alleged violations of laws and regulations. Almost three-fourths of the ICAC's budget is allocated to the Operations Department and many talented officials gravitate to that department. The Corruption Prevention Department funds studies of corruption, conducts seminars for business leaders, and helps public and private organizations identify strategies to reduce corruption. The Prevention Department has funded several thousand studies for public sector agencies and businesses in Hong Kong. These studies inform an interested public about how corrupt officials adjust to changes in laws and regulations. The Prevention Department therefore regularly reviews laws and suggests revisions on the basis of conclusions from its studies. The Community Relations Department informs the general public of revisions of laws and regulations. Its role is to build awareness of the dangers of corruption by poster campaigning, television commercials, and even films dramatizing the investigation and apprehension of corrupt officials by ICAC officers.

18 *ibid.*

4.6 Mandate and institutional links of the key anti-corruption agency

The Independent Commission against Corruption (ICAC) was established on 15 February 1974, by virtue of Section 3 of the ICAC Ordinance as the primary body for combating corruption applying the three-pronged approach of prevention, investigation and public education. The ICAC consists of the Commissioner as the head, together with the Deputy Commissioner – both of whom are appointed by the Chief Executive (Subsection 5[3] and Section 6, ICAC Ordinance) – and officers as appointed. The ICAC Ordinance also provides the charter of the Commission and, together with the POBO, also provides for the ICACs mandate. Section 6 of the ICAC Ordinance provides that the Commissioner is responsible for direction and administration of the ICAC, subject to the orders and control of the Chief Executive. Furthermore, the ICAC Ordinance provides that the Commissioner shall not be subject to the direction or control of any person other than the Chief Executive. The Commissioner has the power to appoint officers to the ICAC (Section 8, ICAC Ordinance). Under Section 17 of the ICAC Ordinance, the Commissioner shall submit, on an annual basis, a report on the activities of the ICAC to the Chief Executive. In accordance with Section 4 of the ICAC Ordinance, the expenses of the Commission are charged to the general revenue, i.e. the ICAC receives its resources from the government. The ICAC is independent in terms of structure, personnel, finance and power. Organizationally the ICAC comprises the office of the Commissioner and three functional departments – Operations; Corruption Prevention; and Community Relations – serviced by the administration branch. The division of labor between these departments mirrors the three-pronged approach of the ICAC in the fight against corruption: investigation, prevention and public education.

4.7 Operations Department

The Operations Department is the investigative arm of the ICAC and is its largest department. Operations include investigations into the law-enforcement services, the public service, banking, the private sector and elections. Fraud is a police responsibility, but the receiving of illegal commissions is handled by the ICAC. In that respect, by virtue of Section 10 (a to g) of the ICAC Ordinance, the Director of the Operations Department is enabled to authorize his or her officers to

restrict the movement of a suspect, to investigate bank accounts and safe deposit boxes, to restrict disposal of a suspect's property and to require a suspect to provide full details of his financial situation. The ICAC may arrest and detain persons (without a warrant) in its own centre for up to 48 hours (for the offences indicated in the ICAC Ordinance and the POBO). The Department can also collect and detain any evidence for such offences. From time to time, ICAC officers engage in undercover activities. While initially, the ICAC was allowed to issue search warrants, this has now become the sole responsibility of the courts.

4.8 Corruption Prevention Department

The Corruption Prevention Department is the smallest unit within the ICAC. The role of the Department is to examine practices and procedures of government departments and public bodies, identify corruption loopholes and make recommendations to reform work methods for reducing the potential for graft. Prevention is claimed to be more cost-effective than prosecution. Prevention includes making recommendations on good business practice to minimize temptation and risks. Recommendations are mandatory for the public sector and advisory for private businesses. Focus is given to changing systems rather than people. To this end, corruption prevention specialists are dispatched to various government departments to examine their procedures and practices with a view to removing all loopholes for corruption. Assistance is also rendered when necessary to help departments produce codes and guidelines on staff conduct. The Department is also involved in the early stages of policy formulation and in the preparation of new legislation to close down opportunities for corruption.

4.9 Community Relations Department

The Community Relations Department consists of two divisions dealing respectively with the mass media and the public. The Department is responsible for educating the public about the evils of corruption and for harnessing popular support for the ICAC. It conducts an intensive education programmed in the community. Every year, staff of the Department meets managers of the business sector, head teachers, teaching staff and students of schools and tertiary institutes, anti-bribery legislation, especially relevant past cases, penalties and consequences of

corruption. Community relations and education are concerned with helping people to develop attitudes against corruption. The success of these efforts depends in part on successful court cases and their publicity, thus providing a credible threat of prosecution. Workshops, seminars, training programmes and various formats are adapted to reach the targets and so-called prevention packages are handed out. The Department has brought about a revolution in the public's attitude towards corruption. An important tool for the ICAC in combating corruption is Section 10 of the POBO—possession of unexplained property—which provides that individuals who maintain a standard of living or have financial resources which are beyond his or her levels of income and cannot provide a satisfactory explanation for how he/she can maintain such a standard of living or how the financial resources were gained is considered guilty of an offence. The ICAC uses the media for deterrence and educational purposes. A series of announcements in the public interest have been produced for television and radio explaining the efforts of the ICAC with three main themes: appeals to the public to report corruption; warnings that corrupt practices are likely to be discovered and that dire consequences will follow; and pleas for honest dealings for the benefit of society. Education packages are also provided for schools.

The ICAC is the primary body responsible for fighting corruption and as such, extensive powers have been vested in it in order to enable the Commission to effectively fulfill its mandate. In view of the extensive investigative powers enjoyed by the ICAC, a system of checks and balances has been put in place in order to prevent these powers from being abused.

The ICAC functions only according to law, and there are numerous structures that provide at least some scrutiny of its operations. "The ICAC is often likened to the watching of society," ICAC literature says. "But who watches the watchdog?"¹⁹ There is a compliant committee; an Advisory Committee on Corruption, which looks into ICAC actions; and a separate committee to oversee the activities of each of the three divisions. These are the Operations Review Committee, the Corruption Prevention Advisory Committee on Community Relations.

19 Max J. Skidmore, "Promise and Peril in Combating Corruption: Hong Kong's ICAC: Annals of the American Academy of Political and Social Sciences, 547, September 1996, pp 118-30.

The Governor appoints the members of all these groups. Additionally, there is “an internal monitoring system” that is “so secretive that few in the Commission know how it works²⁰”.

To thus ensure the Commission’s integrity, its activities are scrutinized by four independent committees made up of citizens from different sectors of the community appointed by the Chief Executive. These committees receive reports and complaints and monitor the work of the ICAC in order to ensure that the Commission itself does not abuse its powers or become corrupt. The committees are:

- i. The Advisory Committee on Corruption, which oversees the general direction of the ICAC and advises on policy matters;
- ii. The Operations Review Committee, which oversees the work of the ICAC's investigative arm;
- iii. The Corruption Prevention Advisory Committee, which advises on the priority of the corruption prevention studies and examines all the study reports; and
- iv. The Citizens Advisory Committee on Community Relations, which advises the ICAC on the strategy to educate the public and enlist their support²¹.

4.10 ICAC complaints committee

A further accountability mechanism is the independent ICAC Complaints Committee—chaired by an Executive Council member—which receives monitors and reviews all complaints against the ICAC. The ICAC does not have the mandate to prosecute corruption cases. The power to prosecute after the completion of investigations is vested in the Secretary for Justice, thus ensuring that no cases are brought to the courts solely on the judgment of the ICAC. The Secretary for Justice heads the Department of Justice, which is responsible for the conduct of criminal proceedings. In the discharge of this function, the independence of the Department is constitutionally guaranteed by virtue of Article 63 of the Basic Law, which stipulates that the Department “shall control criminal prosecutions, free from any interference”. Within the Department the Prosecution Division – headed by the Director of Public Prosecutions – has the role of prosecuting trials and appeals on behalf of

20 On advisory committees, ICAC’s Annual Reports.

21 Institutions Arrangement to Combat Corruption: A Comparative Study, United Nations Development Programme, Bangkok, Keen Publishing (Thailand) Company, Ltd. 2005.

the State, to provide legal advice to law enforcement agencies upon their Investigations, and generally to exercise on behalf of the Secretary for Justice the discretion of whether or not to bring criminal proceedings.

4.11 Office of the Ombudsman

The Office of the Ombudsman—headed by the Ombudsman, who is appointed by the Chief Executive (Subsection 3 [3]), serves to ensure that the public is served by a fair and efficient public administration that is committed to accountability, openness and quality of service. This is achieved through independent, objective and impartial investigation, to redress grievances and address issues arising from maladministration in the public sector and bring about improvement in the quality and standard of and promote fairness in the public administration. The functions of the Office of the Ombudsman are thus to ensure that:

- i. Bureaucratic constraints do not interfere with administrative fairness;
- ii. Public authorities are readily accessible to the public;
- iii. Abuse of power is prevented;
- iv. Wrongs are righted;
- v. Facts are pointed out when public officers are unjustly accused;
- vi. Human rights are protected; and
- vii. The public sector continues to improve quality and efficiency.

Each oversight committee responds to the competencies of the three ICAC departments. The Operations Review Committee (ORC) examines reports on current investigations.

Five months old, cases involving individuals on bail for more than six months, and searches authorized under Section 17 of the Prevention of Bribery Act. The ORC enforces a level of accountability that prevents the ICAC from evolving into a tool of repression or political favoritism. For example, the ORC maintains both a supervisory and advisory role over any investigation and a case cannot be dropped without its approval. The other two committees examine and approve outreach strategies to increase public awareness of the costs of corruption and what may be done to combat it. The Corruption Prevention Advisory Committee receives reports on strategies to demonstrate the costs of corruption to private sector actors. Activities of the Prevention Department complement those outreach programs of the

Community Relations Department. Hence, the Citizens Advisory Committee has a crucial role in the content of films, billboards, and other forms of advertising to educate the public. Again, the distinguished composition of both of these committees endows them and the ICAC with a high degree of credibility. By 1977, it was thought that all the major corruption syndicates had been broken. In particular, efforts had been made to root out corruption within the police. In light of its success, the ICAC was now able to turn its attention to addressing the problem of corruption in the private sector. The change in the character of corruption can also be seen from that of the 4,310 reports on corruption received by the ICAC in 2003—57.4 percent were on the private sector, with government departments, the police and public bodies accounting for 23.4 percent, 12.3 percent and 6.9 percent respectively (ICAC, 2003:35). In the same year, 421 persons were prosecuted in 207 cases with a case-based conviction rate of 85 percent (ICAC, 2003:12-13). In 1974, corruption within the public sector had accounted for over 80 percent of reports received by the Commission. Some recent developments in the fight against corruption have included the 1994 review of the powers and accountability of the ICAC, which was completed within the context of political changes and the Hong Kong Bill of Rights Ordinance 1993. The aim of the review was to ensure that the ICAC remained effective against corruption without itself becoming corrupted. The changes introduced as a result of the review included more outside control over some investigating powers; search warrants, for example, are now issued by the courts and not by the ICAC. In 1995, six major chambers of commerce, together with the ICAC, helped found the Hong Kong Ethics Development Centre to promote ethics and corporate governance. Nowadays, nearly one in ten reports of corruption in the private sector is made by senior business managers²².

Today the corruption in the Hong Kong under control placing 12th position out of 180 countries²³. While no government can expect to eradicate corruption completely, improvements in the area of integrity are encouraging. The efficiency and honesty of the civil service has been acknowledged by the world community and syndicated corruption is something which belongs to the past. The change in public attitude, from accepting bribery as a necessary way of life to actively helping to bring

22 <http://www.icac.org.hk/hkedc/eng/main2.asp>.

23 Transparency International (2009): Global Corruption Report 2009.
<http://GlobalCorruptionReport.Org.gcr.2009.html>.

corrupt individuals to justice was achieved through extensive media campaigns and face-to-face contact with various members of the community. The trust in the ICAC is high, with over 98 percent of respondents expressing support for the work of the ICAC. The proportion of respondents agreeing that the ICAC was impartial in its investigation rose to an all-time high of 74.6 percent in 2000, up from 56.4 percent in 1994.

When first established, the ICAC had marginal success; domestic constituents mocked its efforts and its signals lacked credibility. However, the repatriation and successful prosecution of Peter Godber increased the ICAC's credibility and Hong Kong's citizens began to report incidents of bureaucratic corruption. Since that time, the ICAC has built an impressive record of investigations that have resulted in numerous convictions. Nowadays, Hong Kong ranks one of the least corrupt jurisdictions in East Asia, and this reputation is despite its free-wheeling market economy.

Table 2 Summary of findings

Characteristics	Hong Kong ICAC	India CBI
Legal framework	Created by statute Reports to the Chief to the Executive of HK Accountable to Exec. Council, Secretary for Justice and Review Committees, including citizens committees	Created by the resolution adopted by the Government of India pursuant to the recommendations of the Committee on Prevention of Corruption (<u>Santhanam Committee</u>).in 1963.
Scope of Action	Receive complaints, Investigate allegations Prevention by improving systems Educating the public Capacity to search, seize and arrest.	Registration and investigation of complaints of corruption. Enquire and recommend actions on allegations of corruption against Government and public servants. Advises and guides on internal vigilance in Government departments. Advises public on course of action on matters of corruption
Degree of Independence	Independence of structure, personnel, finance and power	Independence of structure,

Internal Structure	Commissioner, Operations, Corruption prevention, Community relations, Administrative, Eight regional offices	Director, Investigation & Anti-Corruption, Technical Division., Crime Records and Statistics Division., Research Division., Legal and General Division., Administration Division..
Community Participation	Active participation surveys of public opinion. Active use of the media.	No community participation.

5. Conclusion and Suggestions.

The fight against pervasive, institutionalized corruption is a daunting task, yet it is as necessary as breathing for the survival of government, a state or a civilized society. This fight needs to be systematic, incremental and collective, guided by a national anti-corruption strategy that institutes structural reforms to minimize the opportunities for corruption in institutions, establishes ethical codes of conduct and strategies that stigmatize corrupt behavior, and uses the power of punishment to effectively deter corrupt activities.

Anti-corruption agency in Hong Kong proven to be successful operational arms of this national effort to reduce corruption. The experience of this agency suggests that their efforts must not be isolated from other anti-corruption mechanisms, but that they must work simultaneously to enforce, prevent and punish illegal activities in both the public and private sectors. The success of Hong Kong is also based on a strong legal framework that provides them with the power to conduct their strategies, the cooperation and determination of other government agencies to fight corruption, the political willingness and leadership to support the agency's actions, and the involvement and support of the wider community in expanding, disseminating and practicing the anti-corruption message.

While certain countries are achieving success in combating corruption, India despite its long cherished glorious cultural heritage and customs still is facing the problems of corruption precariously. It is because, though Indian Constitution provides laws to fight-against corruption and anti-corruption agencies have been established, the obstacles created by undue interference of politicians are laming the effective implementation of those laws. Ultimately this precarious

prevalence of cancerous corruption contaminates the whole society and shows its adverse impact on the democratic system of the nation victimizing the weaker sections of the society. There is a grave need to constitute a new anti-corruption agency in India to eradicate the evil of corruption like Independent Commission Against Corruption in Hong Kong.

LEGAL STATUS OF BCCI AS INSTRUMENTALITY OF STATE UNDER ARTICLE 12 OF THE INDIAN CONSTITUTION

Dr. M. Suresh Benjamin and Sanu Rani Paul***

Introduction

In the era of globalization when the power is given to private bodies within the state the enforcement of Constitutional Rights is a matter of concern. Political theories underlying globalization rested on the contention that reduction of law to state law is unsustainable and therefore it posited multitude sources of law by non-state actors and private actors. The germinating factors behind this idea of thought emerged with Washington Consensus which sowed the seeds of Economic Neo-liberalism worldwide.¹ With neo-liberalism the concept of 'global economy' emerged which is characterized by global production and global markets for goods, services and finance.² With globalization Sports is now a global phenomenon affected by the emergence of a world media system, especially television and corporate capitalism. In the contemporary world sports has become a business for the corporate world and the consumers are the global audiences.

Besides, globalization of sports has shifted the focus of legal regulation increasingly onto certain international and national sports federations which controls and governs international sport. They have their own rulebooks and constitutions, often catered to their own convenience. They take decisions that can have profound effects on the careers of players and that have important economic consequence. They are autonomous organizations and are independent of national governments.³ When it comes to cricket it is International Cricket

* Assistant Professor, Department of Studies in Law, University of Mysore

** Research Scholar, Department of Studies in Law, University of Mysore

1 In fact the concept of Neo-liberal state underlying globalization took its shape on the New Right philosophy emerged in Thatcher rite England in the 1970's and Reagan governments in U.S.A in 1980's. It was emerged as an attack on Keynesian Welfare State and has become a global phenomenon since the "Washington Consensus". The Thatcherism and Raeganism type of governance pushed the State into the very basic functional role of role of security, law and order maintenance, and protection of weaker sections. "Economic Policy". A. Adonis., T. Hames. A Conservative Revolution? The Thatcher-Reagan Decade in Perspective. USA: Manchester University Press, 1994

2 Gavin W. Anderson. Constitutional Rights after Globalisation. USA: Hart Publishing, 2005 at 7

3 Ken Foster. "Is there a Global Sports Law?" Entertainment Law 2.1 2010: 1-18, at 1 Warwick University, <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number1/foster.pdf> 22.04.2013 <<http://www2.warwick.ac.uk>>

Conference and Board of Control of Cricket in India⁴ which occupies these positions. ICC regulates International Cricket whereas BCCI regulates cricket in India at all the levels.⁵

Cricket originated in England during 1300 as an aristocratic pastime and it was embraced by Indians during the colonial period.⁶ In India the game acquired popularity mainly because it helped in the socialization process as it allowed the commoner to mingle with the aristocrats and for both to meet their master i.e. the Englishmen as equals on the fields of play.⁷ Imperial Cricket Conference, the then ICC was formed in 1909 and it was viewed as an appendage of British Colonial State⁸. With the entry of Indian team into ICC and eventually to international cricket, BCCI was formed with the support of the elites.⁹ Initially it was functioning as an unregistered association and in 1940 it got registered under the Societies Registration Act of 1860. Later with the enactment of Tamil Nadu Registration Act, 1975 BCCI came to be registered under it.

Cricket as a sport attracts the attention of a vast majority of population in India. It has deep implications for the notions of Indian ness and national identity.¹⁰ Internationally and nationally the wide popularity for the game have exemplified in the recent years because of the success of Indian Premier League introduced by BCCI in 2008.¹¹

4 Hereinafter called as ICC and BCCI respectively

5 At the grass-root level, national level, international level and it also regulates private cricket i.e. Indian Premiere League. See BCCI Regulations 2.1

6 The game was deliberately exported to the colonies as part of colonizing policy of transferring British moral code from the messengers of empire to the local population. Parsis who were good at embracing British tradition took interest in Cricket and formed cricket clubs from the year 1848 and subsequently Madras and Calcutta cricket clubs were formed and the game was widely played between Britishers and Indians. Narottam Puri. "Sports v. Cricket", India International Centre Quarterly 9.2 (1982): 146-154, Somshankar Rai. "The Wood Magic: Cricket in India- A Post- Colonial Benediction". The International Journal of History of Sports 25.12 (2008): 1637-1653

7 Puri, *ibid* at 145-146

8 Until 1965 ICC retained its old name and it was the policy of the ICC to admit only Commonwealth countries as members. Id. Jason Kaufman and Orlando Patterson. "Cross-National Diffusion: The Global Spread of Cricket". American Sociological Review 70.1 (2005): 82-110 at p. 85

9 BCCI was formed at Delhi with the initiation of A.S. DE Mellow and support of Maharaja of Patiala in 1927. During those times cricket was a well administered sport in India and was funded mainly by the *nawabs, maharajas*, princes who were at the helm of administration of cricket and they set a noble tradition of managing the game in India. Puri *supra* note 6, at 152

10 Boria Majumdar. "Soaps, serials and the CPI (M), Cricket bet them all: Cricket and Television in the Cotemporary India". Sport in Society 11.5 (2008): 570-582

11 Chris Rumford and Stephen Wagg. Cricket and Globalisation. UK: Cambridge Scholars Publishing, 2010; The success is marked by the fact that in a short span of three years the first franchise based

Internationally IPL is marked as the rise of the non-Western nations primarily India. This changing scenario has also shifted the control and regulation of cricket from ICC TO BCCI.¹² Even then BCCI runs cricket as a private venture least accountable towards the public, players and with no transparency. Now BCCI is an unruly horse wielding enormous power economically as well as politically and enjoys monopoly status in every sense. Simultaneously BCCI could be compared to Black Hole which would eventually bring cricket to nothingness due to the prevailing corruption and irregularities within.¹³

India's Globalised Cricket Regime – the Indian Premier League

IPL was the brainchild of Lalit Modi, unveiled in the year 2008 in lines with the European Premier League. It was the first franchisee based Twenty 20 cricket competition. It was created at a time when cricket started losing its popularity after World Cup 2007 when India could not even make it up to the final ten teams. Lalit Modi, the protagonist of IPL foresaw that IPL would be a great success taking into account the emerging Indian economy and the multibillion population of India. With IPL cricket became a media enterprise-corporatized and catered to fit the needs of sponsors, media corporations and other stakeholders rather than the fans that are also sold as consumers in the commodification process of cricket.¹⁴

The major breakthrough in cricket in India was the opening up of market and liberalization policies of Narasimha Rao government in 1991.¹⁵ It eventually had put an end to the monopoly of state run Doordarshan in broadcasting the game. This deregulation and subsequent entry of ESPN, Zee sports etc made cricket a global media event having high television rating point.¹⁶ In fact it is “Perfect Television Sport” as

Twenty 20 cricket has grown into one of the world sports' foremost properties. ShakyaMitra. “India's Foray into World's Sports Business”. *Sport in Society* 13.9 (2010): 1314-1333

12 Amit Gupta. “The Globalization of Sports, the Rise of Non-Western Nations, and the Impact on International Sporting Events”. *The International Journal of the History of Sports* 26.12 (2009): 1779-1790, Amit Gupta. “India and the IPL: Cricket's Globalized Empire”. *The Round Table* 98.401 (2009): 201-211

13 P. Sainath. “BCCI: Billionaires Control Cricket in India”. *The Hindu* 17 Jan. 2012

14 Shakya Mitra. “The IPL: India's Foray into World's Sports Business”. *Sport in Society* 13.9 (2010): 1314-1333

15 M. K. Raghavendra. “Paan Singh Tomar- the Nation and the Sports person”. *Economic and Political Weekly* 28.17 (2012): 20-22

16 The commercial success of the game could be gauged from the fact that in 2008, the IPL captured 9.5% of the Indian television market compared to soap operas and reality shows that made up 5% of the market reflecting the affection of South Asians for the game. David Rowe and Callum Gilmour. “Global

called by Appadurai.¹⁷ IPL is a mix masala of all the things which people of emerging India keep close to their heart viz; Bollywood, corporate culture and finally cricket –the defacto national game of India. Cheerleaders and film stars added new colour to the game and with the new schedule cricket became a “mega one-day soap opera” starring cricketers and film stars.¹⁸

The cricket -Bollywood nexus is a neo-liberal mechanism to market entertainment products and celebrities which produces increased profits by captivating televised audiences through the appeal of cricket and Bollywood.¹⁹ The game became a vehicle through which increasingly global but also national commercial brands are launched and maintained particularly Bollywood stars as brand ambassadors.²⁰ This new Hegemonic Sports Culture²¹ dominated by cricket in India is intrinsically related to the forces of capitalism. Capital societies heavily depend on cultural products, including sports as they are directly linked to the performance of economy by providing new avenues for growth, dynamism, profit and control. By converting sporting events (not only cricket) into a spectacle major corporations compete for profits, growth and control over the market.²²

Deregulation without any mechanism for enforcement in the globalized free market era has in fact lead to the weakening of state and

Sport: Where Wembley meets Bollywood Boulevard”. *Contium: Journal Of Media And Cultural Studies* 23.2 (2009):171-182, 178

17 Jason, *supra* note 8, at 90

18 Vikram Bedi. “India Cricket as Synecdoche for Our Times”. *Economic and Political Weekly* 41.25 (2006): 2520-2522

19 Azmat Rasul & Jennifer M. Proffitt. “Bollywood and the Indian Premier League (IPL): The Political Economy of Bollywood's New Blockbuster”. *Asian Journal of Communication* 21.4 (2012): 373-388 (India, being an emerging economic power with a large middle class, has assumed a unique position among cricket playing nations in large part due to the millions of spectators willing to spend money not only on attending matches but also on tourism, shopping, and other consumerist practices following the neoliberal economic policies of the Indian government.) Also see Amit Gupta, *supra* note 12

20 Azmat. al. *supra* note 19, at 380, (Even *Lagaan*, which marked a new awakening in the Indian cinema combined nationalism with cricket and was widely acclaimed for its professionalism besides promoting cricket in rural areas.) M. K. Raghavendra, *supra* note 15; Florian Stadler. “Cultural Connections: *Lagaan* and its audience responses”. *Third World Quarterly* 26.3 (2005): 517-524

21 A hege-monic sports culture is one that "dominates a country's emotional attachments" Markovits., Andrei S., Steven L. Hellerman. *Offside: Soccer and American Exceptionalism*, (2001) as cited in Jason, *supra* note 8, at p. 84

22 Azmat. al. *supra* note 19, at 375; also see Nalin Mehta et al., “Bombay Sport Exchange’: cricket, globalization and the future”. *Sport in Society* 12.4/5 (2009): 694-707

incidental to it is the social acceptance of corruption.²³ Cricket and IPL is no exception to it. Indian cricket has a long tradition in match fixing and betting, with IPL even BCCI officials came to be involved in corruption, thereby tainting the old reputation of cricket as “gentlemen’s game”.²⁴ Government is giving tax exemption to BCCI, writing-off its debts, also leases and stadiums are given at a cheaper rate for the game but at the same time subsidies to the poor are savaged and this is a clear negation of the social justice principles embodied under the Indian Constitution.²⁵

The game of cricket is now part of the entire polity and the politicians also has to share the burden for downfall of cricket.²⁶ It does not matter which party they belongs to it is all about money making,²⁷ as rightly noted by Susan Strange “economic globalization signals supremacy or triumph of the market over the nation-state and of economics over politics.”²⁸ Economic globalization coupled with political globalization²⁹ has made BCCI enormous power wielding machinery both nationally and internationally, enjoying an economy scale that could be equal to a small nation.³⁰ Existing situation within BCCI demands transparency in administration and integrity on the part of officials and furthermore a legislation to regulate its affairs.³¹

23 M.K. Raghavendra, *supra* note 15, Prabaht Patnaik. “Ways of Neoliberalism”. Frontline 15 Dec. 2012 at 6.

24 Amit Gupta. “The IPL and India’s Domination of Global Cricket”. Sport in Society 14.10 (2011): 1316-1325, at 1323, “ED probes Money Laundering complaints against IPL”. The Hindu 30 Aug. 2012

25 P. Sainath. “How to feed your billionaires”, The Hindu 17 April 2010, Also see Karan Thaper. “IPL has made cricket just business: MS Gill”, CNN-IBN, 27 Apr. 2010, <http://ibnlive.in.com/news/ipl-has-made-cricket-just-business-ms-gill/112266-5-24.html> 22.04.2013 <<http://ibnlive.in.com>>; (Also government is giving a blind eye to the organised black market dealing in betting on India and the betting in cricket is often organised by the mafia that abets and aids the *fidayeen* funds.) Aditya Sondhi. “The Legal Status of BCCI, Unwarranted Ad-Hocism, Constitutional Hurdles and the Pressing Need for a Cricket Legislation”. Manupatra 22.2 (2010): 1-13

26 AM. “Culcutta Diary”. Economic and Political Weekly 35.38 (2000): 3374-3375

27 Sainath, *supra* note 25

28 Susan Strange. The Retreat of The State: The Diffusion of Power in the World Economy. (1996) as cited in Nilüfer Karacasulu Göksel. “Globalization and the State”. <http://sam.gov.tr/wp-content/uploads/2012/02/1.-NiluferKaracasuluGoksel.pdf>, 22.04.2013, < <http://sam.gov.tr>>

29 (Political Globalization is interpreted as “the shifting reach of political power, authority and forms of rule”, it is characterizes with increasing influence of international organizations, non-state actors, national pressure groups into the international arena.) David Held, A. McGrew. “The End of the Old Order?” Review of International Studies 24.5 (1998): 219-243 as cited in id. at 6

30 The 2013 Pepsi Indian Premier League Player Auction, held in Chennai on Feb 3, 2013, saw 37 players being bought for a whopping sum of USD 11.89 million. <http://www.iplt20.com/news/2013/more-news/2491/2013-ipl-player-auction-at-a-glance>, 22.04.2013. < <http://www.iplt20.com>>

31 (But when discussions on making BCCI under the purview of the National Sports Authority Bill, 2011 came up there had been strong oppositions from the ministers holding positions in the BCCI and they vehemently opposed government regulation in the activities of BCCI.) A. G. Noorani. “Wail of Zamindars”. Frontline 24 Sep. 2011

Equally important is ensuring 'fairness' and 'good faith' in the activities of BCCI by subjecting it to the process of judicial review under Article 32 and 226 of the Indian Constitution and also to make it an instrumentality of the State under Article 12. Courts' supervisory jurisdiction helps to ensure that private bodies like BCCI do not abuse their power and do not act arbitrarily, capriciously, unreasonably or unfairly. Litigation and the possibility of litigation can play a useful regulatory role.³² And this requires introspection into the judicial stand on BCCI as 'State' under Article 12.

Legal Status of BCCI

The question regarding legal status of BCCI under Article 12 came before various cases viz; *Mohinder Amarnath & others. v BCCI*,³³ *Ajay Jadeja v Union of India & others*³⁴ and *Rahul Mehra And Anr. v Union Of India*³⁵ before the Delhi High Court. The other decisions are by the Supreme Court: *BCCI v Netaji Cricket Club and Ors.*³⁶, *Zee. Telefilms Ltd & Anr v. Union India & Ors.*³⁷ and *A.C. Muthiah v BCCI & Anr.*³⁸ In *Mohinder Amarnath's case* BCCI was held not to be an instrumentality of State whereas in *Ajay Jadejas' case* writ petition against BCCI was held to be maintainable by Delhi High Court. But decision in *Ajay Jadeja's case* was held as not a precedent subsequently in *Rahul Mehra Case*³⁹ and it was affirmatively held that writ against BCCI is maintainable although Court declined to express any opinion regarding status of BCCI as an instrumentality of the State or not.⁴⁰

32 *Ajay Jadeja v Union of India* 95 (2002) DLT 14, 2002 (61) DRJ 639 [*Ajay Jadejas' case*]

33 CW.NO.632/89

34 *Ibid* note 33

35 (2005) 4 Comp. LJ 268 Del, 114 (2004) DLT 323 [*Rahul Mehra's case*]

36 (2005) 4 SCC 741 [*Netaji's Case*]. Per Santosh Hegde J. and S.B. Sinha J.

37 (2005) 4 SCC 649, [*Zee Telefilms case*] (Santhosh Hegde J. and Sinha J. who were the authors of *Netaji case* split over the status of BCCI and majority in the words of Santhosh Hegde J. held BCCI as not a 'State' under Article 12.)

38 (2011) 6 SCC 617 [*Muthiah's case*]

39 (Since petition filed by Ajay Jadeja was withdrawn by him as he agreed to have the matter settled by an Arbitrator, court ordered the decision to be treated not as a precedent in another case of whatsoever nature.) *Supra* note 33, para. 4

40 (The decision was made by virtue of the monopoly nature of BCCI in regulating and controlling the game of cricket and the nature of the duties and functions performed by it. According to the Court the words "any person or authority" used in Article 226 may cover any other person or body performing public duty.) Para 20.

Subsequently in *Netajis' case* Supreme Court upheld the monopoly status of BCCI and further held that having regard to the enormity of power exercised by it the Board is bound to follow the doctrine of 'fairness' and 'good faith' in all its activities and further held that having regard to the fact that it has to fulfill the hopes and aspirations of millions, it has a duty to act reasonably and it cannot act arbitrarily, whimsically or capriciously. As the Board controls the profession of cricket, its actions are required to be judged and viewed by higher standards."⁴¹

In *Zee Telefilms case* Apex Court elaborately discussed about the position of BCCI as an instrumentality of State under Article 12. Court squarely applied the test in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*⁴² and held that since BCCI is not financially, functionally and administratively controlled by government cumulatively and so it cannot be held as a State and thus writ petition under Article 12 is not maintainable. Later in *Muthiahs' Case* Supreme Court reaffirmed the decision in *Zee Telefilms Case* and it was held categorically that BCCI is a private autonomous body and its actions have to be judged only like any other similar authority exercising public functions. The Court also rejected the claim that every entity regulating the fundamental rights under Article 19 (1) (g) is a 'State' within the meaning of Article 12.⁴³ It was held that the functions of the Board do not amount to public functions. In view of this decision observations made by Sinha in *Netajis Case* stands no longer as good law.⁴⁴

Supreme Court has held in *Zee Telefilms Case* that in cases involving violation of fundamental rights the petitioner has to establish as a pre-requisite that the Board is a State for invoking Article 32 and that unless this is done the petitioner cannot allege that the Board violates fundamental rights and therefore it is a State within Article

41 *Supra* note 36, at para 80 and 81

42 (2002) 5 SCC 111 at 40 [*Pradeep Kumar Biswas Case*] the question was whether CSIR is a State or not under Article 12.

43 (Court denied the claim of the petitioners that the functions of the Board amount to public functions, as the State/Union has not chosen the Board to carry out the duties and as it is not legally authorized by it carry out those functions under any law or agreement and that instead it has voluntarily chosen to perform those functions under its own guidelines which makes it an autonomous body.) *Supra* note 37, at para 28

44 *Ibid* para 34

12.⁴⁵ Thus according to the Court it is only in situations involving ‘State Action’ that the fundamental Rights can be enforced. In the era of globalization this vertical approach of Fundamental Rights is no longer accurate because now economic and political power are increasingly given to private actors too.⁴⁶ In this situation judiciary has a potent role in protecting and upholding the fundamental rights under the Constitution. But as far as enforcement of fundamental rights against private or non-state actors is concerned our judiciary is constrained in a set of narrow doctrines evolved from time to time.⁴⁷ In the present scenario an innovative and liberal approach in tune with the spirit and fundamental values of the constitution is the need of the hour.⁴⁸

Relevance of Public Functions Test in the era of Globalization

So far there have been two ways in which judiciary has responded to the call of Globalization as far as interpretation of the term “other authorities” under Article 12 is concerned.⁴⁹ The first approach of judiciary could be seen in the majority decision in *Sukhdev Singh v. Bhagatram*⁵⁰ whereas the second view is embedded in Mathew J.’s opinion in the same case.⁵¹ The first approach culminated into the

45 *Ibid* para 28; (A similar approach by the judiciary can be seen in the case of *Zoroastrian Coop. Housing Society Ltd. v. District Registrar, Coop. Societies (Urban)*, (2005) 5 SCC 632 wherein the issue was whether bye-law of housing society contravened public policy under Section 4 of the local act under which it was established in so much it was inconsistent with Article 15 of the Constitution and Supreme Court declined to apply constitutional principles to the bye-laws.)

46 V.N. Shukla. Constitution of India. Lucknow: Eastern Book Company, 2003, 10th ed. p.20

47 *Rajasthan Electricity Board v. Mohan Lal* AIR 1967 SC 1857, *Sukhdev Singh v. Bhagath Ram* AIR 1975 SC 1331, *R. D. Shetty v. International Airport Authority* AIR 1979 SC 1628, *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*(2002) 5 SCC 111.

48 Sanu Rani Paul. “Need for Horizontal Application of Fundamental Rights in the Era of Globalization”. *Christ Uni. Law Journal* 2.2 (2012): 81-96, Ashish Chugh. “Fundamental Rights: Vertical or Horizontal?”. *SCC(J)7.9*: (2005)

49 Constitution of India Art. 12 (Definition of State: “In this part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India”)

50 AIR 1975 SC 1331 [*Sukhdev Singh*’s case] (The question that arose for consideration in this case was whether statutory corporations such as the Oil and Natural Gas Corporation, Life Insurance Corporation and the Finance Corporation would fall within the definition of State under Article 12.)

51 He observed that the test to determine whether an entity would satisfy the requirements of Article 12 can be stated as thus - (a) a finding of state financial support together with an unusual *degree of control* over the management and policies of the body may lead to an inference that the body is a State entity; (b) another important indicator is discharging of important *public function* with state support being an irrelevant consideration (c) a corporation is an *agency or instrumentality of the government* for carrying on a business for the benefit of the public.

decision in *Pradeep Kumar's Case* whereas the second one partially lead to the view of minority decision in *Zee Telefilm's Case*.

It was Mathew J. in his concurring opinion in *Sukhdev Singh's case* who propounded Public Functions Test as a criterion to find out instrumentalities of state under the expression 'other authorities' within Article 12.⁵² Public Functions Test lays down that when the functions performed by private bodies could be identified with state functions, they would become State Actors in relation to the public functions performed by them. Subsequently in *M.C. Mehta v. Union of India*⁵³ Supreme Court of India encountered the question whether a private entity discharging important public functions can be a State. Bhagwati J., though expressed his intention to include private authorities under State left the matter undecided on grounds of laxity of time⁵⁴ but in spite of this the case remains important as the Court observed that the American doctrine of State Action might be applicable in India, and therefore, all the functions of a body judged as "State" need not be public functions.⁵⁵

Regarding BCCI, starting from *Mohinder Amarnaths' Case* the public functions performed by BCCI was put into limelight. In *Ajay Jadejas' Case* Delhi High Court held that the function like selecting team is a public function and the same has been reiterated by Supreme Court in *Rahul Mehra's Case*.⁵⁶ Later in *Netajis Case* also Apex Court

52 (Opinion of Mathew J. can be taken into consideration in this regard, "Another factor which might be considered is whether the operation is an important public function. The combination of state aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a state agency. If a given function is of such public importance and so closely related to governmental functions as to be classified as a government agency, then even the presence or absence of state financial aid might be irrelevant in making a finding of state action. If the function does not fall within such a description, then mere addition of state money would not influence the conclusion.") Id. note 51, at para 98

53 AIR 1987 SC 1086 [*M.C. Mehta Case*] (The question that arose in *MC Mehta's case* was whether victims of a gas leak from a private chemical and fertilizer plant could sue for compensation under Article 32 of the Constitution.)

54 It must be noted that the matter was left undecided by the Court in spite of the fact that the activity of producing chemicals and fertilizers is deemed by the State to be an industry of vital public interest, whose public import necessitates that the activity should be ultimately carried out by the State itself. In fact Chemicals and Fertilizers industries are placed in the First Schedule as Items 19 and 18 respectively which according to the objectives of the Policy Resolutions the Industries (Development and Regulation) Act of 1951 and Section 2 of the same to be controlled by the Union in public interest.

55 This view was later upheld by the minority in the *Zee Televisions case* by Sinha J.

56 ("When the Government stands by and lets a body like BCCI assume the prerogative of being a sole representative of India for cricket by permitting BCCI to choose the team for India for appearance in events like the World Cup, then it necessarily imbues BCCI with the public functions at least in or far as the selection of the team to represent India and India's representation in International Cricket for a and regulation of Cricket in India is concerned.") *Supra* note 32, para 15.

reaffirmed this view and imposed upon BCCI the duty to act fairly and reasonably in the manner of conducting elections.

Subsequently in *Zee Telefilms Case* there had been a detailed discussion on the public functions performed by BCCI and it was observed by the Minority Bench that a body discharging public functions and exercising monopoly power would be an authority under Article 12. BCCI exercises functions like controlling and regulating the game of cricket. It has final say in the matters of selection and disqualification of players, umpires and others connected with the game touching their right to freedom of speech and occupation. It makes law on the subject which is essentially a state function in terms of Entry 33 of the Seventh Schedule⁵⁷ to the Constitution;⁵⁸ it thus acquires status of monopoly.⁵⁹

It must also be noted that with the coming of IPL the powers of BCCI has extended by leaps and bounds. It is the sole body which regulates television and broadcasting rights which also involves the rights of the viewers to witness the match on television and other visual media.⁶⁰ It has powers relating to awarding of franchises, endorsements, distribution of prize money, selection of players, their disqualification etc. BCCI thus enjoys unbridled monopoly power. But it is not bound by any effective provisions of law or regulations or control by the government also it is not bound to act fairly and reasonably within the meaning of Article 14 of the Constitution. According to minority view performance of a public function in the context of constitution would be to allow an entity to perform as an authority under Article 12 which makes it subject to constitutional discipline of fundamental rights. Except in the case of disciplinary measures, the Board has not made any rule to act fairly or reasonably.⁶¹

57 Constitution of India Entry 33 of the Seventh Schedule: ("Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.")

58 *Supra* note 37, para 173

59 (It (BCCI) has, thus, enormous power and wields great influence over the entire field of cricket. In sum, the control of the Board over the sport of competitive cricket is deep and pervasive, nay complete. Its monopoly status is undisputed.), *supra* note 37, para. 227 and 229

60 As held by the Court in *Secretary, Ministry of Information & Broadcasting, Government of India and Others v. Cricket Association of Bengal and Others* (1995) 2 SCC 161 at para 75, ("the game of cricket involves the right of the telecaster and that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game.)

61 *Supra* note 37, para 142, also see *Ramana Dayaram Shetty v. International Airport Authority* (1979) 3 SCC 499 at 503

Position in U.S.A.

In US corporations or associations private in character but dealing with public rights have already been held subject to constitutional standards by applying various tests.⁶² Public Functions test implies that “when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.”⁶³ According to this doctrine “when private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the State.”⁶⁴ Later in 1974 Court held that in order to attract the doctrine of State Action, the functions carried out by the Corporation must be ‘public function closely related to the governmental functions.’⁶⁵

In U.S. Public functions doctrine became stronger with the decision in *Marsh v. Alabama*,⁶⁶ wherein the question arose was whether a private township could prevent a person from distributing religious literature i.e.; applicability of the first and fourteenth amendments to the conduct of the corporation that owned the town. The majority opinion delivered by Black J. was premised on the notion that the more an owner opens up his property for use by the public in general for his advantage, the more do his rights become circumscribed by the statutory and Constitutional rights of those who use it. Interestingly, the Court opined that even in cases where the State had merely acquiesced to an entity performing an important public function, the entity would be subject to Constitutional standards.

62 John E. Nowak., Ronald D. Rotunda and J. Nelson Young, *Constitutional Law*. U.S.A: West Publishing Co., 1983, 497-525; In United States of America a public body would answer the description of a state actor if one or the other tests laid down therein is satisfied on a factual consideration and therefore the cumulative effect of all or some of tests is not required to be taken into consideration. *Supra* note 37, para 124

63 Hale C.J. in *Munn v. Illinois* 94 U.S. 113 (1877)(Further in *Civil Rights Case*109U.S.3(1883)Harlan J. in his dissenting opinion observed that railroad carriers and inn keepers performed important public functions and were akin to public servants. Therefore, the protection afforded by the Thirteenth Amendment would be applicable against them. Interestingly, in analyzing the case of places of public amusement, he found that Congress could enforce the rights of blacks in relation to public accommodations, facilities and public conveyances since discriminations in those “public” or a “quasi-public” function was a continuing badge of servitude.)

64 *Evans v. Newton* (1966) 382 U.S. 296

65 *Jackson v. M.E. Co.* (1974) 419 U.S. 345

66 326 U.S. 501 (1946)

Another test which is applied by the Court is 'Entanglement Test'. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*⁶⁷ Court held that sport-association can be sued as a state actor because its actions and history have been "entangled" with state action. The Court acknowledged that the analysis of whether state action existed was a "necessarily fact-bound inquiry" and noted that state action may be found only where there is "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself".⁶⁸ Following the judgment, in *Communities for Equity V. Michigan High School Athletic Association*⁶⁹ US Supreme Court held that Michigan High School Athletic Association is a 'state actor' and thus is subject to the Equal Protection Clause of the Fourteenth Amendment.

If these principles are squarely applied to bodies like BCCI it would become an instrumentality of State under Article 12. The traditional principles are inappropriate to meet the ends of justice in cases like BCCI. As opined by the minority bench in *Zee Telefilms case* "the traditional tests of a body controlled financially, functionally and administratively by the Government as is laid down in *Pradeep Kumar Biswas* would have application only when the body is created by the State itself for different purposes but incorporated under the Companies Act or the Societies Registration Act. Those tests may not be applicable in a case where the body like the Board (BCCI) was established as a private body long time back."⁷⁰

Earlier there had been instances like *Netaji case* and *Central Inland Water Transport Corporation v. Brojonath Ganguly*⁷¹ wherein Court translated public law norm of anti-arbitrariness contained in Article 14 into private law norm of public policy as required under

67 531 US 288; (The question was whether the actions of an interscholastic sport-association that regulated sports among Tennessee schools could be regarded as a state actor for First Amendment and Due Process purposes. The Court stated that TSSAA's "nominally private character... is overcome by the pervasive entwinement of public institutions and public officials in its composition and workings.")

68 *Supra* note 37, para. 123.

69 377 F3d 504; (This case posed a question regarding the application of the state action doctrine of the Fourteenth Amendment to a state high school athletic association that sets rules for athletic programs throughout the State of Michigan.)

70 *Supra* note 37, para. 173.

71 (1986) 3 SCC 156

Section 23 of the Contract Act.⁷² Similar was the dictum of Saghir Ahmad, J. in awarding compensation to a rape victim for the violation of her right to live life with dignity under Article 21, independent of any constructive causal link with the State authorities.⁷³ There are similar instances in environmental pollution cases.⁷⁴ But judicial activism regarding horizontal application of fundamental rights is halted and is not found as a welcome trend by Indian judiciary.⁷⁵

Conclusion

The vertical application of fundamental rights is based on the theory of ‘Classical Liberalism’ which emphasizes on the preservation of the private sphere against coercive State intrusion.⁷⁶ With the foray of neo-liberalization governmental policies like deregulation, privatisation, disinvestment etc. has whittled down the extent of state power. As a result of neo-liberalization private actors can infringe the fundamental rights of the people. This state of affairs poses a challenge to the rights constitutionalism as to whether it can protect the freedom and autonomy of the individuals in the age of globalization. An apt solution to this is subjecting the private actors to constitutional limits by expanding the definition of “State” under Article 12.⁷⁷ Only then the aims and aspirations of Constitution makers can be realised to the fullest extent possible. As Holmes put it “a word in the constitution is not a crystal clear, transparent and unchanging; in the more important interpretative

72 Udai Raj Udai. *Fundamental Rights and their Enforcement*. New Delhi: PHI Learning Private Limited, (2011) at 714

73 *Bodhisattwa Gautam v. Subra Chakraborty*, (1996) 1 SCC 490 at 499; Ashish Chugh. “Fundamental Rights: Vertical or Horizontal”. SCC (J) 7:9(2005); also see ‘X’ v. Hospital ‘Z’ 1998 (8) SCC 296, *Vishaka v. State of Rajasthan* AIR 1997 SC 3011; V.N. Shukla. *Constitution of India*. Lucknow: Eastern Book Company, 2003, 10th ed., p.20

74 *M.C. Mehta v. Union of India*, (1987) 1 SCC 395 at 419, *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212 at 238, *M.C. Mehta v. Kamal Nath* 2000 (6) SCC 213

75 Hina Doon. “The Doctrine of State Action - Politics of Lawmaking: A Comparison of US & Indian Constitutional Law”. *Nalsar Students’ Law Rev.* 5.4 (2009): 1-6; (to Anderson, two developments in particular have resulted in (some) constitution lawyers no longer treating private power as a peripheral issue: the extent to which, as result of the reconfiguration of the state, private actors are now deeply involved in the performance of traditional state function, and the political concern over the exercise of private power, and the extent to which this threatens rights constitutionalism’s goals of protecting freedom and autonomy), Gavin W. Anderson. *Constitutional Rights after Globalisation*, USA: Hart Publishing, 2005

76 Ashish, *supra* note 74 (In the liberal philosophy of the moderns the most rational form of organisation was one that gave priority to individual freedom and that was to be delivered through the modern state upon which political and legal sovereignty is located. It is this power which makes the state as the supreme source of laws and guarantees protection of individuals from capricious interference with their liberty.) *Id.* at 5

77 Gavin, *ibid* at 9, V. N. Shukla, *supra* note 74, at 20

parts, the constitutional words are the skins of living thoughts which change with the times and as society changes.”⁷⁸

Suggestions

Lord Denning recognised many years ago that domestic bodies like the Stock Exchange, the Jockey Club, the Football Association and major trade union have "quite as much power as statutory bodies and that they can make or mar a man by their decisions."⁷⁹ Similar is the case of BCCI. It is quite true that BCCI is an autonomous body having its own rules and regulations and it do not take any financial aid from the government. But that does not belittle the importance of the public functions and duties performed by it. Besides there is state encouragement for the game directly as well as indirectly which gives it a 'state-like' identity. Taking this into account BCCI can be held as an instrumentality of State under Article 12 of the Indian Constitution. As recommended by National Commission on the Review of the Working of the Constitution amendment to Article 12 of the Constitution must be carried out in order to include private non-state entities like BCCI which discharge important quasi-governmental or important public functions, which have repercussions on the life and welfare of the community under the definition of 'State'. Moreover the 'public policy' with regard to BCCI should not be limited to BCCI Rules and Regulations and Societies Registration Act rather it has to be judged in the light of constitutional provisions also.

78 Arthur Selwyn Miller. *Social Change and Fundamental Law: America's Evolving Constitution*. USA: Greenwood Press, 1979, p. 349

79 *Breen v. Amalgamated Engineering Union* (1972) 2 Q.B. 175, 190

PLEA BARGAINING IN US AND INDIAN CRIMINAL LAW CONFESSIONS FOR CONCESSIONS

*K.V.K. Santhy**

Introduction

It is appropriate to begin this paper with the famous quote of Indian Jurist and leading lawyer Nani Palkhivala: “the greatest drawback of the administration of justice in India today is because of delay of cases...The law may or may not be an ass, but in India, it is certainly a snail and our cases proceed at a pace which would be regarded as unduly slow in the community of snails. Justice has to be blind but I see no reason why it should be lame. Here it just hobbles along, barely able to work”¹.

India’s ‘efficiency’ in crime investigation, prosecution and trial process is under a shadow of doubt and crisis of credibility because more than seventy per cent accused are acquitted. When it is difficult or impossible to secure evidence to establish crime through able investigation, what are the alternatives to send the criminals to jails? One limited answer is ‘plea bargaining’ where confessions will be bargained from criminal under judicial supervision which might result in speedy trial and sentencing. This article intends to examine the utility of plea bargaining.

In India the conviction rate is gradually falling which indicates an abysmal state of ‘law and order’ or lack of it. The statistics relating to crimes in 2011 released by National Crime Record Bureau reflect the inefficient functioning of ‘system’². In 2011, the violent crimes were 2.56 lakhs while in only 84.5 per cent of these crimes marched to the stage of charge sheeting while just 28 percent ended in conviction. Maharashtra state recorded lowest conviction rate at 8.2%. The conviction rates for different kinds of crimes in the country is: a) for crimes against women 26.9 per cent, b) Economic Crimes 28.6 per cent, c) Crimes against SCs 31.8%, d) Property Crimes: 34.5 % as per the

* Author is a member of Faculty & Coordinator of Center for Criminology, NALSAR University of Law, Hyderabad

1 Nani A Palkhivala, “We the nation...lost decade (1994) UBS Publications, p 215

2 5th July 2012, <http://www.jagranjosh.com/current-affairs/national-crime-record-bureau-released-the-crime-statistics-for-2011-1341490766-1>

NCRB Records³. The Union Minister told Rajyasabha in December 2011⁴, that around 3.2 crore cases were pending in high courts and subordinate courts across the country while 56,383 cases were pending in the Supreme Court. It also said 74% of the total 3.2 crore cases were less than five years old⁵. Similarly, 20,334 out of 56,383 pending cases in the apex court were less than one year old. There are more than 72 lakh criminal cases such as murder, rape and riots are pending in different courts across the country with Maharashtra having a highest backlog of over 13 lakh.

Bargain in Criminal Case

The question is can we bargain a conviction and negotiate some sentence without 'much' trouble for the state. The plea bargaining is somewhat an answer. It is also called: plea agreement, plea deal or copping a plea, which is an agreement between the prosecutor and defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor. It is a Pre-Trial procedure whereby a bargain or deal is struck between the accused of an offence and the prosecution with the active participation of the trial judge. It can further be explained as:

- (i) Withdrawal of one or more charges against an accused in return for a plea of guilty,
- (ii) Reduction of a charge from a more serious charge to a lesser charge in return for a plea of guilty.
- (iii) Recommendation by the prosecutor to sentencing judges as to leniency of sentence in lieu of plea of guilty.

Charge Bargaining: It is basically an exchange of concessions by both the sides which may also mean that the defendant will plead guilty to a less serious charge, or to one of several charges, in return for the dismissal of other charges; or it may mean that the defendant will plead guilty to the original criminal charge in return for a more lenient sentence.

3 July 4, 2012, the Hindu, <http://www.thehindu.com/news/states/karnataka/article3599124.ece>

4 http://articles.timesofindia.indiatimes.com/2011-12-20/india/30537308_1_subordinate-courts-pendency-core-cases

5 http://articles.timesofindia.indiatimes.com/2012-05-31/mumbai/31920171_1_court-posts-district-and-subordinate-courts-core-cases

Sentence bargaining, is the process which is introduced in India where the accused with the consent of the prosecutor and complainant or victim would bargain for a lesser sentence than prescribed for the offence.

Besides the above two kinds of bargaining there is **count bargaining**, wherein they plead guilty to a subset of multiple original charges, and **fact bargaining** where the defendants plead guilty pursuant to an agreement in which the prosecutor stipulates to certain facts that will affect how the defendant is punished under the sentence guidelines.

Coercive plea bargaining has been criticized as it infringes an individual's rights under Article 8 of the European Convention on Human Rights. Another argument against plea bargaining is that it may not actually reduce the costs of administering justice. Eg. if there is only a 25% chance of conviction and punishing for 10 years imprisonment, defendant may make a plea agreement for one year imprisonment and if plea bargaining is unavailable, the prosecutor might drop the case completely⁶. Plea bargaining should consist of two important qualities i.e., voluntariness and judicial scrutiny.

Plea Bargaining in US

The Sixth Amendment to US Constitution enshrines the fair trial principle. But it did not mention the practice of plea bargaining. However the US judiciary has upheld the constitutionality of this process. The classic case of adoption of plea bargaining is the case of assassination of Martin Luther King Jr⁷. In 1969 accused James Earl Ray pleaded guilty to the murder of Martin Luther King Jr to avoid death penalty⁸. He got 99 years of imprisonment⁹. Today the Plea bargaining became a significant part of the criminal justice system in the United States; as the vast majority (roughly 90%) of criminal cases are settled by plea bargain rather than by a jury trial. In a criminal trial in the United States, the accused has three options as far as pleas are concerned: A)

6 http://legalpundits.indiatimes.com/_nl_january_2006.html 18-7-2006

7 Huie, William Bradford (1997). *He Slew the Dreamer: My Search for the Truth About James Earl Ray and the Murder of Martin Luther King* (Revised ed.). Montgomery: Black Belt Press. ISBN 978-1-57966-005-5.

8 <http://www.history.com/this-day-in-history/ray-pleads-guilty-to-king-assassination>

9 Ray was convicted on March 10, 1969, after entering a guilty plea to forgo a jury trial. Had he been found guilty by jury trial, he would have been eligible for the death penalty. He was sentenced to 99 years in prison. He later recanted his confession and tried unsuccessfully to gain a new trial. He died in prison of hepatitis C.

guilty, B) not guilty or C) plea of *nolo contendere*=(I do not wish to contend). At every minute, a criminal case is disposed off in a US court based on guilty plea bargained or *nolo contendere* plea.

As held in "*Fox v. Schedit* and in *State exrel Clark v. Adams*¹⁰", the plea of "Nolo Contendere" sometimes called also "Plea of Nolvut" or "Nolle Contendere" means, in its literal sense, "I do no wish to contend", and it does not origin in early English Common Law. This doctrine, is also, expressed as an implied confession, a quasi-confession of guilt, a plea of guilty, substantially though not technically a conditional plea of quality, a substitute for plea of guilty, a formal declaration that the accused will not contend, a query directed to the Court to decide on plea-guilt, a promise between the Government and the accused, and a Government agreement on the part of the accused that the charge of the accused must be considered as true for the purpose of a particular case only.

Be it noted, that raising of plea of "Nolo Contendere" is not *ipso facto*, a matter of right of the accused. It is within the particular discretion of the Court concerned to accept or reject such a plea. However, if the Court accepts such plea, it must do so unqualifiedly. It is, therefore, clear that if such plea is once accepted, by the Court, the accused may not be denied, his right to raise such plea. The Court cannot accept such plea having rights of the accused and determination of facts on any questions of law. Of course, the discretion of the Court, if plea is accepted, has to be exercised in light of special facts and circumstances of the given case. It is, also held at times that such discretion vested in the Court has to be used only when special considerations are present. It is, also important to mention, at this stage that in the absence of statutory provisions to the contrary, consent of a prosecutor is not required as a condition for refusing the plea of 'Nolo Contendere' by the Court. And the fact that the prosecutor's consent is not generally required would not tantamount to non-consideration of his version or attitude. The Court is required to consider the prosecutor's version as an important factor in influencing the Court in deciding whether such plea should be accepted or not.

10 363 US 807

Upon the acceptance of a plea of "Nolo Contendere" for the purpose of the case in which such a plea is made, it becomes an implied confession of the guilt equivalent to a plea of guilty; that is the incidence of plea. So far as a particular criminal action in which the plea is offered is concerned, rather than the same, as of a plea of guilty, of course, it is not necessary that there should be adjudication by the Court that the party whose plea is accepted as guilty, but the Court may immediately impose sentence. This proposition is very well elucidated in "*United States v. Risfeld*, 340 US 914". However, it may be noted a new dimension was evolved in "*Lott v. United States*, 367 US 421", where the Court, after stating that the plea is tantamount to an admission of a guilt for the purpose of the case, added that the plea itself, does not constitute a conviction, and hence, is not a determination of guilt. As found from some of the judicial pronouncements, it is beyond the purview of the Court once a plea of "Nolo Contendere" is needed to make in adjudication to the guilt of the accused.

The plea of "Nolo Contendere", barring a few percentages of cases, has been recognised in the administration of criminal justice in many countries, including the United States, and has resulted into substantial reduction in the workload of the criminal justice system. Such a plea, it has been stated, has a success of practical aspect over the technical one¹¹.

As there is no possibility of punishment or retaliation so long as the accused is free to accept or reject the prosecution offer. This is the rationale behind the US Supreme Court's judgment in *Bordenkircher v Haynes*¹². While accepting the constitutionality of the plea bargaining, the US Supreme Court upheld the sentence of life imprisonment to the accused, who rejected the 'plea guilty' offer in return to 5 year imprisonment. The US apex court of course did not rule out the possibility of duress the accused might suffer to choose the lesser of two evils.

11 Observations of Ahmadabad High Court in *State of Gujarat v Natwar Harchandji Thakor*, (decided on 22 February, 2005), 2005 CriLJ 2957, <http://indiankanoon.org/doc/1439610/> (Ahmadabad High Court) paras 73-78

12 434 US 357 1978, Hayes was indicted on charges of forgery. He and his counsel met with the prosecutor who offered a lesser sentence if he pled guilty. Hayes decided not to plead guilty and the prosecutor asked that he be tried under the Kentucky Habitual Criminal Act. Hayes was found guilty and sentenced to life as a habitual offender.

Plea bargaining was initially not favored in colonial America but it gained increasing acceptance with the rise in population by which courts became overcrowded, and trials became lengthier. The first case of US Supreme Court noticed in this regard is *Brady v. United States*¹³. In this case the Supreme Court held that merely because the agreement was entered into out of fear that the trial may result in a death sentence, would not illegitimise a bargained plea of guilty. The U.S. Supreme Court has approved practices such as plea bargaining when properly conducted and controlled. By the twentieth century, guilty pleas dominated the majority of criminal cases. Almost every criminal case is now conducted by Plea bargaining and today it is often said that the American Criminal Justice would collapse if plea bargaining is removed from it. In U. S, it is a deal struck between prosecution and defense. It is much broader and fairness is writ large over it. Voluntariness and judicial scrutiny are two important aspects. The courts have been given a very vital role to play and it has to see that the entire thing is voluntary and the accused is given the protection of secrecy and all the parties may participate freely and no one is subjected to any coercion or duress of another.

Harvard Law School Discussion paper has, recently concluded with: Higher levels of crime and a greater social emphasis on ensuring that guilty individuals are punished lead to a greater use of plea bargaining, while lower levels of crime and a greater social emphasis on ensuring that innocent individuals are not punished leads to less use of plea bargaining¹⁴.

In India, Response of Judiciary

After the US has experimented, reformed and practiced the process of plea bargaining in 19th Century, India, a century after, now discussing the implementation of the provisions which brought plea bargaining in very limited cases in a limited manner.

It is termed as immoral compromise in criminal cases, or trading out in India. The moral question dominates the criticism of plea bargaining concept. Apart from academia the apex court also was not in

13 397 U.S. 742 (1970)

14 Yehonatan Givati, Harvard Law School Discussion Paper June 2011. Comparative Law & Economics of PB: Theory and Evidence

favour of this practice in the circumstances prevailing in India. While Law Commission of India was continuously researching and recommending introduction of plea bargaining, the Supreme Court of India was questioning its moral base and apprehending its consequences because of dishonest circumstances prevailing around. The Supreme Court criticized it in its judgment namely, *Murlidhar Meghraj Loya v. State of Maharashtra*¹⁵, as follows:

“...call ‘plea bargaining’, ‘plea negotiation’, ‘trading out’ and ‘compromise in criminal cases’ and the trial magistrate drowned by a docket burden nods assent to the sub rosa ante-room settlement. The businessman culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a prison cell, ‘trades out’ of the situation, the bargain being a plea of guilt, coupled with a promise of ‘no jail’. These advance arrangements please everyone except the distant victim, the silent society...”

The Supreme Court in *Kachhia Patel ShantilalKoderlal v. State of Gujarat and Anr*¹⁶ strongly disapproved the practice of plea bargain again. It observed that practice of plea bargaining is unconstitutional, illegal and would tend to encourage corruption, collusion and pollute the pure fount of justice. In yet another case *Kripal Singh v. State of Haryana* observed that neither the Trial court nor the High Court has jurisdiction to bypass the minimum sentence prescribed by Law on the premise that a plea bargain was adopted by the accused.

In *Kasambhai v. State of Gujarat*¹⁷, expressed an apprehension of likely misuse. In *State of Uttar Pradesh v. Chandrika*¹⁸, the Supreme Court held that it is settled law that on the basis of Plea Bargaining court cannot dispose of the criminal cases. Going by the basic principles of administration of justice merits alone should be considered for conviction and sentencing, even when the accused confesses to guilt, it is the constitutional obligation of the court to award appropriate sentence. Court held in this case that mere acceptance or admission of the guild

15 AIR 1976 SC 1929

16 1980 CriLJ553

17 AIR 1980 SC 854

18 2000 Cr.L.J 384 (386)

should not be reason for giving a lesser sentence. Accused cannot bargain for reduction of sentence because he pleaded guilty.

Shift in judicial thinking:

But it was Gujarat High Court that recognized the utility of this method in *State of Gujarat v. Natwar Harchandji Thakor*¹⁹, as an alternative measure of redressal to deal with huge arrears in criminal cases. The court reasoned the change as follows: “the very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. It can thus be said that it is really a measure and redressal and it shall add a new dimension in the realm of judicial reforms.”

The seed of the process of plea bargaining is found in Section 206(1) and 206(3) of the Code of Criminal Procedure and Section 208 (1) of the Motor Vehicles Act, 1988. Under these provisions the accused can plead guilty of petty offences or less grave offences and settle with penalties for small offences to close the cases.

“Plea of guilty” and “plea bargaining”

Ahmadabad High Court brought out distinction between ‘plea of guilty’ and ‘plea bargaining. The Court said: “...But the 'plea bargaining' and the raising of "plea of guilty", both things should not have been treated, as the same and common. There it appears to be mixed up. Nobody can dispute that "plea bargaining" is not permissible, but at the same time, it cannot be overlooked that raising of "plea of guilty", at the appropriate stage, provided in the statutory procedure for the accused and to show the special and adequate reasons for the discretionary exercise of powers by the trial Court in awarding sentences cannot be admixed or should not be treated the same and similar. Whether, "plea of guilty" really on facts is "plea bargaining" or not is a matter of proof. Every "plea of guilty", which is a part of statutory process in criminal trial, cannot be said to be a "plea bargaining" ipso facto. It is a matter

19 (2005) Cr.L.J. 2957

requiring evaluation of factual profile of each accused in criminal trial before reaching a specific conclusion of it being only a "plea bargaining" and not a plea of guilty simpliciter. It must be based upon facts and proof not on fanciful or surmises without necessary factual supporting profile for that"²⁰.

It is interesting to note that Sub-section (2) of Section 240 provides that the charge shall then be read and explained to the accused and he shall be asked as to whether he pleads guilty of the offence charged or claims to be tried. Section 241 provides that if the accused pleads guilty Magistrates shall record the plea and may in his discretion convict him thereon. Now, it is not obligatory on the part of the Magistrate to convict him even if the accused pleads guilty, he may proceed with the trial.

Every "plea of guilty" during the course of observance of the mandatory procedure prescribed in Code and particularly in Sections 228(2), 240(2), 252 and also in Section 253 for the trial of case by the Magistrates, when plea of guilty is recorded as per the procedure prescribed cannot be said to be a "plea bargaining".

Research of the Law Commission:

The Law Commission of India advocated the introduction of 'Plea Bargaining' in the 142nd, 154th and 177th reports. The 142nd Report set out *in extenso* the rationale and its successful functioning in USA and manner in which it should be given a statutory shape. This Report recommended that the said concept be made applicable as an experimental measure to offences which are punishable with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Code. It was also recommended that plea-bargaining can also be in respect of nature and gravity of the offences and the quantum of punishment. It was observed that the said facility should not be available to habitual offenders and to those who are accused of socio-economic offences of a grave nature and those accused of offences against women and children. The 154th report recommended dealing with huge arrears of criminal cases. This recommendation of the

20 *State of Gujarat v Natwar Harchandji Thakor*, (decided on 22 February, 2005), 2005 CriLJ 2957, <http://indiankanoon.org/doc/1439610/> (Ahmadabad High Court) para 68

154th Law Commission Report was supported and reiterated by the Law Commission in its 177th Report.

The Report of the Committee on the reform of criminal justice system, 2000 under the Chairmanship of Justice (Dr) Malimath stated that the experience of United States was an evidence of plea bargaining being a means for the disposal of accumulated cases and expediting the delivery of criminal justice²¹. In its report, the Malimath Committee recommended that a system of plea-bargaining be introduced into the criminal justice system of India to facilitate the earlier resolution of criminal cases and reduce the burden on the courts²².

Process of Plea Bargaining: Amendment to Criminal Law

The process of plea bargaining was brought in as a result of criminal law reforms introduced in 2005²³. Section 4 of the Amendment Act introduced Chapter XXIA to the Code having sections 265 A to 265 L which came into effect on 5th July, 2006 The Cr.P.C. Chapter XXI A, allows plea bargaining to be used in criminal cases where:

1. Plea-bargaining can be claimed only for offences that are penalized by imprisonment below seven years. 265 A
2. If the accused has been previously convicted of a similar offence by any court, then he/she will not to be entitled to plea-bargaining.
3. Plea-bargaining is not available for offences which might affect the socio-economic conditions of the country.
4. Also, plea-bargaining is not available for an offence committed against a woman or a child below fourteen years of age 265 L.

The opportunity of plea bargaining is not acceptable for accused in serious crimes such as murder, rape etc. It does not apply to serious cases wherein the punishment is death or life imprisonment or a term exceeding seven years or offences committed against a woman or a child below the age of 14 years²⁴.

21 <http://www.hrdc.net/sahrdc/hrfeatures/HRF88.htm>

22 Recommendation 106 Malimath Commission Report,
<http://www.hrdc.net/sahrdc/hrfeatures/HRF88.htm>

23 The Criminal Law (Amendment) Act, 2005 (Act 2 of 2006).

24 Section 265 L of CrPC, 1973

Offences affecting the socio-economic condition of the country:

The Government Order issued in 2006 explains emphatically that this process is not available in the offences affecting the socio economic conditions of the country. Thus there is no plea bargaining for accused, who are charged with offences under the enactments such as, Dowry Prohibition Act, 1961, the Commission of Sati Prevention Act, 1987, the Indecent Representation of Women (Prohibition) Act, 1986, the Immoral Traffic (Prevention) Act, 1956, Protection of Women from Domestic Violence Act, 2005, Provisions of Fruit Products Order, 1955 (issued under the Essential Commodities Act, 1955), the Infant Milk Substitutes, feeding Bottles and Infants Foods (Regulation of Production, supply and distribution) Act, 1992, Provisions of Meat Food Products Order, 1973 (Issued under the Essential Commodities Act, 1955), the SC and ST (Prevention of Atrocities) Act, 1989., Offences mentioned in the Protection of Civil Rights Act, 1955, Offences listed in Sections 23 to 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000, the Army Act, 1950, the Air Force Act, 1950, the Navy Act, 1957, the Explosives Act, 1884 and Cinematograph Act, 1952.

For the crimes under 16 laws there is no provision for plea bargaining. Where the offences are compoundable, the process of plea bargaining may not add any improvement. Because of these limitations and many charges were kept beyond scope of the process of plea bargaining, a very few sections of crimes besides petty cases like a scuffle, misappropriation of accounts, forgery, defamation, illegal threat, rash driving, food adulteration and other offences can be solved with mutual consent of both the parties using the law of plea bargaining. Though disputed the offence of causing death by negligence, mostly the accidental deaths are negotiated under this process.

Early cases of plea bargaining:

First case, Plea Rejected: Mr. Sakha-ram Bandekar, a grade I employee of RBI, was accused of siphoning off Rs 1.48 crore from the RBI by issuing vouchers against fictitious names from 1993 to 1997 and transferring the money to his personal account. The CBI arrested him on October 24, 1997, and released on bail in November. The Court of

Special CBI judge A R Joshi had framed charges on March 2, 2007²⁵. The accused made an application for Plea Bargaining on the ground of old age, ie., 58 years and tried to take the benefit of just passed amendment to criminal law providing for this new process. The CBI opposed plea bargaining attempt saying; "The accused is facing serious charges and plea bargaining should not be allowed in such cases...Corruption is a serious disease like cancer. It is so severe that it maligns the quality of the country, leading to disastrous consequences. Plea bargaining may please everyone except the distant victims and the silent society." Agreeing with the CBIs reasoning the court rejected Bandekar's application. Still the lawyers came to know that a procedure where concessions can be gained for confessions is now available as an alternative to languishing in courts and jails²⁶.

*Vijay Moses Das v CBI*²⁷, The second reported case from Uttarakhand was successful. A person who was accused of supplying substandard material to ONGC and that too at a wrong Port causing immense losses to ONGC sought the plea bargaining. The CBI investigated and initiated prosecution under sections 420, 468 and 471 of IPC. Accused proposed to plea bargaining and the ONGC (Victim) and CBI (Prosecution) had no objection to such request, but trial court rejected on the ground that Affidavit under section 265B was not filed by accused and compensation was not fixed. Justice Prafulla Pant of Uttarakh and High Court, hearing the Criminal Miscellaneous Application directed the trial court to accept the plea bargaining application.

Case in Mumbai: A magistrate's court on 25th may, 2011 accepted a plea bargain application and convicted four foreign nationals-who were accused of stealing diamonds worth Rs 6.6 crore at an international jewellery show 2010, to 21 months rigorous imprisonment. The maximum punishment in such cases is usually seven years. The foreigners, three Mexicans and one Venezuelan, were convicted by the 37th Esplanade court, after they had pleaded guilty to their offence and sought a plea bargain under the provisions of the Criminal Procedure Code.

25 Times of India: Oct 15, 2007

26 http://articles.timesofindia.indiatimes.com/2007-10-15/mumbai/27960117_1_plea-bargaining-application-sessions-court

27 Crim.Misc. Appln 1037/2006

Panaji case: Bombay High Court at Goa on 13th July, 2011 held that it was mandatory for a court to follow the procedure prescribed while deciding accused's petition for plea bargaining. The High Court set aside an order passed against a foreigner's application for plea bargaining, by a judicial magistrate first class court in a case of overstaying. Mr. Okeke Nwabueze Nnabuike, a Nigerian national, has challenged the order passed by the JMFC court, rejecting his application for PB.

Plea bargaining in 304A cases and sentencing: In *Ranbir Singh v State*²⁸, the Petitioner challenged sentencing accused to imprisonment for six months besides penalty of Rs.5000 under Section 304A IPC and in default to undergo an additional imprisonment for one month and also the sentence to pay the fine of Rs. 5,000/- under Section 279 IPC and in default of payment of fine to undergo Simple Imprisonment for one additional month in a case where the Petitioner had entered into plea bargaining. The Trial Court has power to direct the sentence for imprisonment of 1/4th of the sentence provided if an accused enters into plea bargaining however, while awarding the sentence of 1/4th of the sentence provided the learned Trial Court is bound to look into the mitigating circumstances. None of the mitigating circumstances were considered while awarding the maximum punishment. Petitioner is the only bread earner and has two minor children and old parents to support. Despite being poor the Petitioner gave an amount to the satisfaction of the victims. He has also placed on record the affidavit of the legal heirs of the deceased to state that the parties have entered into a settlement and no dispute remains between them. The prosecution on the other hand contended that the offences under Section 304A IPC of killing by rash and negligent driving are on the rise and stern action was needed for deterrent effect. Even Section 265E Cr. P.C. permitted the Court to award a sentence to 1/4th of the punishment provided even on the mutually satisfactory deposition being arrived at between the parties. Moreover the judgment by the trial court is final and no appeal lies against it as prescribed under Section 265G of the Code.

Delhi High Court held that "though it cannot be said that in view of these mitigating circumstances the Petitioner should not be awarded any imprisonment and should be let off, however, he should not have

28 <http://indiankanoon.org/doc/115079753/> decided on 5th September, 2011 by Delhi High Court

been awarded the maximum punishment as done by the learned Trial Court. The court modified the sentence to four months imprisonment under Section 304A IPC and a fine of Rs. 1,000/- Section 279 IPC and in default to undergo Simple Imprisonment for a period of one week.

2012 case of Bombay High Court: In *Guerrero Lugo Elvia Grisselv The State Of Maharashtra* on 4 January, 2012, the Bombay High Court Bench: A.M. Khanwilkar, Rajesh G. Ketkar reviewed the procedure prescribed for plea bargaining and upheld the opinion of the trial Court that the Court has no discretion to award sentence other than one-fourth of the punishment provided for or extendable, as the case may be, for the offence in question in cases covered by clause (d) of Section 265-E of the Code. On this finding, the final order passed by the Magistrate of awarding sentence of 21 months to the petitioners is unassailable. High Court was considering a pure question of law as to the interpretation of Section 265-E of the Code of Criminal Procedure, 1973.

The accused (foreign nationals) were arrested on charge of theft of diamond worth crores of rupees from a jewellery shop in an international exhibition during August 2010. Under Section 265-B accused applied for plea bargaining.

The Additional Chief Metropolitan Magistrate examined the plea of the accused, as required under Section 265-B (4) of the Code, and recorded his satisfaction that, from the plea of the accused, they have moved the application for plea-bargaining voluntarily and without any sort of pressure on them. The parties followed the guidelines given under section 265-C and finally arrived at the mutually satisfactory disposition. The complainant claimed that he had received Rs. 55 lakhs in cash at Hong Kong and that he had accepted the said money from the accused as satisfactory disposition as compensation. As agreed, the accused are willing to deposit Rs. 5 lakhs in the Court as expenses incurred during the case by the State. The State is agreeable to the disposition and the said money may be deposited with the Registrar of the Court on behalf of the State of Maharashtra. Under section 265-E, the court shall dispose of the case in the manner provided under the section as sub-section (a) and (b) are not applicable to the accused. The benefit of releasing the accused on probation of good conduct under the Probation of Offenders Act is not attracted as the crime is exceptional and daring committed in India by foreigners. The case of the applicant falls under section 265-

E(d) as the offence committed by the accused is punishable with 7 years, the court may sentence the accused to one-fourth of the punishment provided or extendable, i.e. offences under sections 380, 34, 109, 120 (B) of IPC. Court gave judgment in terms of section 265 (F) by convicting the accused for 1/4th of the maximum punishment extendable i.e. 7 years, which comes to 21 months. Bombay High Court while confirming the sentence, justified the scheme of plea bargaining as recommended by Law Commission in its 142nd report and provided by the amendment to criminal procedure in 2005²⁹.

David Headley Case: Pakistani-American David Headley 49, LeT operative, charged with conspiracy in the Mumbai terror attacks, has pleaded guilty before a US court to bargain for a lighter sentence to avoid capital punishment. He was arrested by FBI in October 2009. David Headley has moved the plea bargain at a court in Chicago. He was facing six counts of conspiracy involving bombing public places, murdering and maiming persons in India and providing material support to foreign terrorist plots and LeT; and six counts of aiding and abetting the murder of US citizens in India³⁰.

India questions: Former Union Home Secretary G K Pillai questioned the motive behind the US entering into the plea bargain with Headley, who did a recce of the 26/11 targets for the Lashkar-e-Taiba, which carried out the attacks on Mumbai three years ago. In India plea bargaining is not allowed in such serious anti national crimes.

Poor usage: Apart from reported cases (above referred) of plea bargaining, there is a very poor usage of this process in India. According to official figures received through RTI, during 2006 to 2010, only 22 cases have been reported and solved in the state that too in the court of chief metropolitan magistrate in Ahmedabad. Courts in most of the other cities including Gandhinagar, Vadodara and Rajkot have never registered a case for plea bargaining. It is estimated that around 21.5 lakh cases are awaiting trial in Gujarat. Here an NGO started creating awareness about plea bargaining.

29 *Guerrero Lugo Elvia Grissel v The State Of Maharashtra* <http://indiankanoon.org/doc/173657747/>

30 Times of India 18th March 2010

Duty of defence counsel:

Accused is entitled to efficient, fair and honest advice from the defense counsel especially in plea bargaining. During March 2012, two US Supreme Court decisions are very significant to explain this responsibility.

In *Missouri v. Frye*, No. 10-444 (2012)³¹, the US Supreme Court found that a Defense Attorney had a duty to convey all written plea offers to the criminal defendant and the failure to do amounts to ineffective assistance of counsel and a violation of the defendant's sixth amendment rights. While it is true, though some attorneys acting on previous instructions of their defendants refuse plea offers without communicate such offers to the defendant, very few of these offers are in writing. Typically a plea agreement, or "green sheet" as they are called in Massachusetts are not drafted until there is an agreement between the parties. An assistant district attorney, particularly in the face paced hurly burly of the District Court, would be unlikely to draft plea offer without the prior acquiescence of the defendant.

In *Lafler v. Cooper*, No. 10-209 (2012)³² however, the court held that bad advice from defense counsel about whether or not to take a plea agreement may amount to ineffective assistance of counsel and a violation of the defendant's sixth amendment rights. Where a defendant refused a plea offer from the prosecution which he or she would otherwise accepted, on the basis of an attorney's recommendation which itself was grounded in an error in law, the split court found the criminal defendant's sixth amendment rights were violated. In this case, the defense attorney told his client that the prosecution would not be able to prove "intent" to kill, where the victim was shot below the waist.

Advantages of 'Plea Bargaining'

Time saving: Examining possible plus points of Plea bargaining in India, it will help in cutting short the delay, backlogs of cases and speedy disposal of criminal cases, saving the courts time, which can be used for hearing the serious criminal cases, putting a certain end to uncertain life of a criminal case from the point of view of giving relief to

31 <http://supreme.justia.com/cases/federal/us/566/10-444>

32 <http://supreme.justia.com/cases/federal/us/566/10-209>

victims and witnesses of crime, saving a lot of time, money and energy of the accused and the state, reducing the congestion in prisons, raising the number of convictions from its present low to a fair level to create some sort of credibility to the system, not to facilitate making of criminals by allowing innocents or unproven accused to live with the company of hard core criminals during the trial and after conviction through making guilty plea.

Compensation to victims: The victims of crimes might be benefited as they could get the compensation. They need not get implicated or involved either as witness or seeker of compensation or justice any longer than required for acceptance of plea bargaining. Whether they get money or not their time might be saved.

Benefits for Accused: The accused might be a beneficiary as he might get half of minimum prescribed punishment. If no such minimum is prescribed, accused might get one fourth of punishment prescribed, or released on probation or after admonition or get concession of considering the period of undergone in custody as suffering the sentence under section 428 of CrPC. He will be relieved of extended trial i.e., appeals consuming unending time. Accused is also benefited even when plea bargaining fails as his admission cannot be used for any other purpose. Ultimate benefit for him is that his time and money are saved.

Disadvantages

Unfair: The system will be too soft for the accused and allow them unfair means of escape in a dishonesty ridden society in India. It is an alternative way of legalization of crime to some extent and hence not a fair deal. It creates a feeling that Justice is no longer blind, but has one eye open to the right offer. Prosecutors and police, foreseeing a bargaining process, will overcharge the defendant, much as a trade union might ask for an impossibly high salary. It is inherently unfair, assuming you have two defendants who have engaged in the same conduct essentially similar circumstances, to treat one more harshly because he stands on his constitutional right.

Contempt for system: It may create contempt for the system within a class of society who frequently come before the courts. A shortcut aimed at quickly reducing the number of under-trial prisoners

and increasing the number of convictions, with or without justice. While countless numbers of poor languishing in the country's prisons while awaiting trial, only a few might get a chance of bargaining.

Conviction of innocents: This process might result in phenomenal increase in number of innocent convicts in prison. Innocent accused may be paid by the actual perpetrators of crime in return to their guilty plea with assured reduction in penalty. Thus illegal plea bargaining between real culprits and apparent accused might get legalized with rich criminals corrupting police officials ending up in mockery of justice system. When plea bargaining is certainly not resulting in acquittal or limited to penalties or payment of damages, accused may not find it as useful and plea bargaining may not operate as incentive at all.

Coercion: Element of coercion is not ruled out as the police is involved in the process.

Derailment of Trial: Once the guilty plea comes forward and recorded on the file and in the mind of the judge, the trial will be surely derailed. The court may not strictly adhere to or depart from the requirement of proof of beyond reasonable doubt and might lead to conviction of innocent.

Conclusion:

This disputed concept of Plea Bargaining is more a mechanism of convenience and mutual benefit than an issue of morality, legality or constitutionality. There is an inevitable need for a radical change in criminal justice mechanism. It may be a welcome change but only when there is possibility of swift and inexpensive resolution of cases. If the sole purpose of criminal justice system is to rehabilitate criminals into society, by making them undergo specified sentences in prison, then plea bargaining loses most of its charm.

Whether it is known or not, plea bargaining is being practiced by the various stakeholders of 'crime' and criminal justice system. Putting this process under judicial scrutiny opens up the possibility of fair dealings in these bargaining. In the present atmosphere plea bargaining is inevitable component of adversarial system.

However, to make use of the available process and to secure the gains from these reforms, the plea bargaining process could be successfully used, for which the police, judiciary and the bar need to understand it in first place, and try to adopt. Defending Advocates should encourage the litigant to opt for the plea bargaining rather than to treat the plea bargaining as threat to their profession. It is obvious that the capacity building of police and judges should be the high priority and a pre-requisite for experimenting the plea bargaining. It can be given a chance of survival. From the experience in US it can be said that the plea bargaining remains a disputed concept and a doubtful practice. As the overloading of courts with piling up of criminal cases is threatening the foundations of the system, the plea bargaining may be accepted as one of the required measures for speeding up caseload disposition. After giving a rigorous trial to this mechanism, there should be a thorough study of its working, its impact on crime rate, conviction rate, and ultimately how the rule of law is affected.

**JURISDICTIONAL WATERS DELIMITATION: INDIA'S
EXCLUSIVE ECONOMIC ZONE (EEZ) IN MV ENRICA
LEXIECASE**

*Dr. Jayan P.A.**

Italian shooting in the Arabian sea occurred within the Indian Contiguous Zone on 15 February 2012, off the coast of southern India sparked a major diplomatic row between Italy and India, with Indian police immediately opening a murder enquiry and later arresting two members of the Italian Navy security team over the shooting the use of live fire from automatic weapons by members of an Italian Vessel Protection Detachment (VPD) on board oil tanker MV *Enrica Lexie* was linked to the death of two Indian fishermen on board a fishing boat. Ajesh Binki and Valentine aka Gelastine, natives of Tamil Nadu and Kerala respectively, were allegedly shot dead by Italian marines of the Reggimento San Marco, Marina Militare.* In this backdrop, the article focuses on India's maritime interest in relation to the exclusive economic zone (EEZ) and related issues arising out of shooting.

*Italian Marines Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, on board the Italian cargo vessel *Enrica Lexie* had shot dead two Indian fishermen suspecting them to be pirates. See more details, India police open murder case against Italian ship crew". BBC News. 17 February 2012.

"Since the seventeenth century, when the development of seaborne trade and the emergence of powerful maritime nations led to a shift from the notion of closed seas claimed by a few countries to the concept of open seas, the two basic principles of the law of the sea have been that a narrow strip of coastal waters should be under the exclusive sovereignty of the coastal state and that the high seas beyond should be freely accessible to all. These principles were originally intended to satisfy and reconcile the requirements of national security with freedom of trade

* Assistant Professor, School of Maritime Management, Indian Maritime University, Chennai. E-mail: jayanpa@imu.co.in

and navigation. But they were applied to all activities in both areas and ipso facto defined the legal framework within which fishing activities were carried on.

At the Conference on the Law of the Sea, there was only limited support for maintaining the status quo..."¹

The concept of the exclusive economic zone is an essential element of compromises and trade-offs that constitutes the 1982 Convention on the Law of the Sea.² It is a concept which has received

1 Carroz, J.E. 1982. The living resources of the sea. In the management of humanity's resources: The Law of the Sea. Workshop 1981 organized by The Hague Academy of International Law and the United Nations University. The Hague, Martinus Nijhoff, pp. 193-207. Sourced from Food and Agricultural Organization (FAO) Corporate Document Repository titled FAO Essays in memory of Jean Carroz, The Law and Sea... It is in the article by S.N. Nandan, 'The Exclusive Economic Zone: A Historical Perspective' in <http://www.fao.org/docrep/s5280t/s5280t0p.htm>. Accessed on February 11, 2013.

Nandan elaborates in his article the SEZ as well. It goes like this: "...the concept of the exclusive economic zone is one of the most important pillars of the 1982 Convention on the Law of the Sea. The regime of the exclusive economic zone is perhaps the most complex and multifaceted in the whole Convention. The accommodation of diverse issues contributed substantially to the acceptance of the concept and to the Convention as a whole. The 1982 Convention on the Law of the Sea is often referred to as a package. The metaphor is derived from a decision made during the Third United Nations Conference on the Law of the Sea that the Convention would be adopted *in toto*, as a "package deal". No single issue would be adopted until all issues were settled. This decision provided an essential mechanism for reconciling the varied interests of the states participating in the Conference. If a state's interests in one issue were not fully satisfied, it could look at the whole package and find other issues where its interests were more fully represented, thereby mitigating the effects of the first. Thus, the Convention became an elaborately-constructed document built on trade-offs, large and small.

The larger package consists of: a twelve-nautical-mile territorial sea; an exclusive economic zone of up to 200 nautical miles in which coastal states have preeminent economic rights and which obviates the need for a territorial sea of 200 nautical miles claimed by some states; extension of the continental shelf regime to the margin, with revenue-sharing obligations beyond the exclusive economic zone; a regime for transit passage through straits used for international navigation and for archipelagic sea-lanes passage; guaranteed access to and from the sea for land-locked states; a regime for the administration and development of the common heritage resources of the international sea-bed area; protection and preservation of the marine environment; and adequate mechanisms for settlement of disputes concerning the interpretation and application of the provisions of the Convention.

Within this larger package are many smaller packages of which the exclusive economic zone is one of the most interesting examples....."

2 See United Nations Convention on the Law of the Sea (Unclos) available at www.un.org/Depts/los/convention_agreements/texts/unclos_e.pdf

Each coastal State may claim a territorial sea that extends seaward up to 12 nautical miles (nm) from its baselines. The coastal State exercises sovereignty over its territorial sea, the air space above it, and the seabed and subsoil beneath it. Foreign flag ships enjoy the *right of innocent passage* while transiting the territorial sea subject to laws and regulations adopted by the coastal State that are in conformity with the Law of the Sea Convention and other rules of international law relating to such passage. For more details see, various articles under Part ii

Territorial sea and contiguous zone in the Unclos. See also, under the lecture series Maritime Delimitation Principles of Maritime Delimitation Prof Malcom Shaw (The Sir Robert Jennings Professor of International Law University of Leicester) lectured on Territorial Disputes the International Legal Principles Relating to Territorial Disputes: The Acquisition of Title to Territory. Available in http://untreaty.un.org/cod/avl/ls/Shaw_BD.html#

rapid and widespread acceptance in state practice and is thus now considered by some to be part of customary international law.

India's maritime core interests lie in protecting exclusive economic zone (EEZ). Since the adoption of United Nations Conference on the Law of the Seas (UNCLOS) a new International order of economic jurisdiction of 200 nautical miles (1 nm= \sim 1.85 for the coastal states were established. India has obtained a wide exclusive economic zone (EEZ) of about 2.172-million km in all along the 7500 km long coastline³ around it. By volume, ninety per cent of India's global trade is carried out through sea-borne. Over 65% of the world's known oil reserves are located in the Indian Ocean Region (IOR), and 40% of the world's offshore oil production comes from the countries bordering the Indian Ocean⁴. Seventy per cent of the petroleum products of the world are transported across the Indian Ocean.

The living and nonliving resources in this zone, which measures about two-third of the landmass of the country, are exclusive to India, so also the trading and transport facilities navigated through this area. Moreover, several million people living along the coastline are directly influenced by oceanography of the EEZ, various environmental hazards and related social issues. Indian EEZ sustains one of the last healthy Tuna populations in the world. The Greenpeace, in its report 'Licensed to Loot' released on March 13, the non-profit, claims that several vessels of foreign origin are misusing the Letter of Permit (LoP) scheme of the Indian government to exploit lucrative Indian fish resources.⁵

Article 55 of the UNCLOS creates the legal regime and distinguishes it from the territorial sea: "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

3 http://www.nio.org/index/option/com_newsdisplay/task/view/tid/4/sid/23/nid/35

4 Pradeep Kaushiva, "India's Maritime Interests and Future Engagement in South China Sea" in National Maritime Foundation website, <http://maritimeindia.org/article/indias-maritime-interests-and-future-engagement-south-china-sea>, accessed on February 2013

5 <http://www.downtoearth.org.in/content/how-foreign-vessels-exploit-india-s-loopholes-fishing-laws>. Accessed on February 18, 2013.

Moreover, peninsular configuration juts out 1,500 miles into the sea and places her at the focal point of shipping lanes which are the arteries of world trade.⁶ Apart from other vital commodities, millions of tons of hydrocarbons travel from the Persian Gulf and Middle East to feed the hungry industrial and economic engines of China, Japan and many Southeast Asian countries. Geography has placed a heavy responsibility on India's shoulders and made India as the natural region for trade routes. India's vast exclusive economic zones which are like treasure-houses laden with unimaginable and as yet unexploited mineral wealth.

Proper demarcation, systematic scientific research is an ongoing process under the auspices of National Institute of Oceanography.

The Supreme Court of India pointed out recently that while quoting in the case of *Enrica Lexie* India is a signatory to the United Nations Convention on the Law of the Sea (Unclos) and is bound to adhere to it. Article 97 of Unclos says that in case of a navigation incident such as collision in the high seas India cannot detain a vessel registered in another country or initiate proceedings against the crew if they are not Indian nationals. The Court said Article 97 will not apply in the case of *Enrica Lexie* as the shooting was a criminal action, not a navigation incident. Court asserts that India's Exclusive Economic Zone, a distance of 200 nautical miles from the shore, high seas where Unclos 97 could apply for collisions.

The recent Supreme Court judgment in the *Enrica Lexie* case set up a Special Court to try the Italian marines.⁷ The judgment declares the EEZ of India — the region between the contiguous zone and 200 nautical miles into the sea — as the high seas. The United Nations Convention on the Law of the Sea (Unclos) defines high seas as the area beyond the EEZ, contiguous zone and territorial waters. But the Court has brought the high seas much closer to India's coast and no nation can claim sovereignty over the high seas. This may prevent India from taking unilateral action in case of collisions happening just outside of the contiguous zone.

6 Arun Prakash, "A Vision of India's Maritime Power in the 21st Century" in *Air Power Journal*, Vol. 3 No. 1 WINTER 2006 (October-December), p.2.

7 See, M. Kalyanaraman, "SC's *Enrica* judgment may restrict action against erring ships" *The Hindu* (Chennai edition), January 23, 2013. See also, <http://www.thehindu.com/news/national/scs-enrica-judgment-may-restrict-action-against-erring-ships/article4333292.ece>

Meanwhile, Article 100 of Unclos says that nations must cooperate to curb piracy. If the Special Court finds that the shooting is an anti-piracy action gone awry then Unclos could bring Italy into the trial process. The Special Court can then be asked to decide if Italy also has jurisdiction over the case.

The Supreme Court ruled that the Kerala government has no independent jurisdiction to try two Italian marines for shooting down two Indian fishermen off the Kerala coast last year. The bench of Chief Justice Altamas Kabir and Justice J. Chelameswar held that it was only the Union of India that had the jurisdiction to hold the trial of the two marines Massimiliano Latorre and Salvatore Girone.

The court said the central government, in consultation with the chief justice, will set up a special court to hold the trial. Upon raising this issue of jurisdiction, the special court will decide the question whether the government of India or the Italian government has the jurisdiction to conduct the trial of the two marines under the maritime law.

Territorial Rights and Delimitation of Jurisdictional Waters

Within its EEZ, a coastal State has: (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, whether living or nonliving, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in international law with regard to the establishment and use of artificial islands, installations, and structures, marine scientific research, and the protection and preservation of the marine environment, and (c) other rights and duties provided for under international law.⁸

There has been an increase in maritime transport since the integration of world economy to national economy. This also has led to piracy incidents that frequently jeopardize the safe navigation of ships. The regime for the exclusive economic zone is *sui generis* for every country. As a sea-faring nation, India is not an exception to the rule. In 2010, India had submitted to the United Nations Commission on the Law

⁸ National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce, http://www.gc.noaa.gov/gcil_maritime.html accessed on February 22, 2013.

of the Sea for its claim to extend its coastal EEZ from 200 nautical miles to 350 nautical miles.⁹ Under a provision of U.N. Convention on the Law of the Sea, a coastal country can seek an extension of its EEZ beyond the approved 200 nautical miles if it can demonstrate that the continental shelf of the country extends beyond that distance. The approval can be given up to a maximum of 350 nautical miles.

The historical underpinnings of the concept in the Truman proclamations on the continental shelf and coastal fisheries of 1945, the unilateral declarations of sovereignty by Chile and Peru in 1947 and the declarations by a number of Arab states in 1949. He then traces the development of the idea in Latin America, through the Santiago Declaration of 1952 which first proclaimed 200-miles zones off Chile, Ecuador and Peru, the Montevideo and Lima Declarations of 1970 and the Declaration of Santo Domingo in 1972, which articulated the notion of the patrimonial sea. The African and Asian contributions to the development of the concept of the exclusive economic zone, focusing on the work of the Asian-African Legal Consultative Committee and the proposals presented by Kenya, the Yaoundé Conclusions of 1972 and the Addis Ababa Declaration of 1973, before moving on to the Kenyan draft articles presented to the Sea-bed Committee in 1972. It then reviews the negotiations at the Third UN Conference on the Law of the Sea on this issue and the various trends apparent in those negotiations.

The aspects of the exclusive economic zone relating to the conservation and management of living resources and the opposing interests of the coastal states and major fishing nations. He reviews a number of proposals put before the Sea-bed Committee in 1972 and 1973 reflecting changes in the balancing of these opposing interests as the fishing nations sought to protect their economic interests and the coastal states to establish their sovereign rights.

9 On the sidelines of an event at the National Centre for Antarctic and Ocean Research (NCAOR), Goa in 2011, the then Union Minister of State for Earth Sciences Ashwani Kumar mentioned that the United Nations Commission on the Law of the Sea would soon accept its claim of almost doubling its Exclusive Economic Zone (EEZ), which could give it access to a larger wealth of oil, natural gas and other off-shore resources. At the event, the Minister, who was on a five-day tour of scientific institutions in Hyderabad, Bangalore and Goa, interacted with Indian scientists stationed at Indian missions at the Antarctic through video-conferencing. The claim, if ratified by the UNCLOS, would help India in exploring the area and exploiting oil, natural gas and mineral resources in the extended area too. The project was started in 1999 with a team of 60 scientists from different national institutions. See P. Sunderarajan, India hopes to double its EEZ. <http://www.thehindu.com/news/national/article2096905.ece>. Accessed n February 10, 2013.

According to the International Trade Statistics 2000 published by the World Trade Organization (WTO), as the data for the first six months of 2000, global commodity trading showed a growth of 14% in value. This is four times 1999. In addition, the amount of commodity trading has grown 12%. It is predicted that the real growth rate of world merchandise exports in 2000 to exceed 10%.

Maritime trade of the world to reflect the development of world trade, recorded an increase of 14 consecutive years in absolute terms in 1999, reaching 5.2 billion 3 million tons to update the record. It is revealed by numerical Maritime Transport 2000 Report of: (United Nations Conference on Trade and Development UNCTAD) United Nations Conference on Trade and Development. We have described the recovery of stable demand and Asia is the driving force behind the expansion of the U.S. global trade in the year 2000 - 1999, UNCTAD, and to underpin the sustainable growth of the world's seaborne trade.¹⁰

Regional and maritime export of petroleum products is the largest in Asia and the Far East. And at the same time, a major supplier of petroleum products, (newly industrialized economies) is also a major consumer country NIEs Far East. About half of imports of petroleum products in these countries is the shipping of NIEs and in between.

Crude oil is a strategic commodity, he has been generally believed and also has a large share in terms of amount and therefore that is. However, although When you examine the structure of maritime trade, goods of low value crude oil, coal, and grain has a share of # 1 in tonnage, the goods communications equipment, computer parts, automotive parts, high-value I found that the transport container handling occupies the # 1 share of seaborne trade in monetary.

Through the initiatives of the Nippon Foundation, these will provide financial support based on the concept of corporate social responsibility (CSR) from user states and the maritime industry. The fund will provide maintenance and upgrade of aids to navigation in the Straits and is the world's first realization of cooperation between user states and user industries based on the UN Convention on the Law of the Sea.

10 <http://nippon.zaidan.info/seikabutsu/2001/00801/contents/00005.htm>, accessed on February 15, 2013.

For most of recorded history there have been only two uses of the oceans that mattered:¹¹ fishing and navigation. At a time when fishermen and most ships stayed close to the shoreline, the oceans and the supply of living resources beneath them seemed truly inexhaustible. Only with the advent of worldwide exploration in the sixteenth century and the flurry of colonial claims that followed did attention begin to be paid to the need for resolution of two conflicting philosophies of ocean use:¹² national ownership (implicit in Spanish and Portuguese claims to the Gulf of Mexico and the entire Atlantic Ocean) and freedom of movement (important to the great trading companies such as The Dutch East India Company).¹³

Article 55 of the UN Convention on the Law of the Sea¹⁴ states that Specific legal regime of the exclusive economic zone The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 56 also stresses the rights, jurisdiction and duties of the coastal State in the exclusive economic zone. In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures;

11 John Temple Swing, "Who Will Own the Oceans?" *Foreign Affairs*, Vol. 54, No. 3 (Apr., 1976), pp. 527-546.

12 *Ibid.*

13 *Ibid.*

14 From Art.55 to Art. 75 of the United Nations Convention on the Law of the Sea which deals with Exclusive Economic Zone (EEZ). See Part V of the Convention titled 'Exclusive Economic Zone'. Available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf .Accessed on February 11, 2013.

The provisions contained in articles 55 and 75¹⁵ reflect interests of states: the sovereign rights of coastal states to manage the zone in good faith; the regard for the economic interests of third states; regulation of certain activities in the zone, such as marine scientific research, protection and preservation of the marine environment, and the establishment and use of artificial islands, installations and structures; freedom of navigation and over flight; the freedom to lay submarine cables and pipelines; military and strategic uses of the zone; and the issue of residual rights in the zone.

The political, strategic, and economic benefits to India in securing rights to vast areas of the ocean and seabed need no elaboration in the current context and pertaining to the *Enrica Lexie* case, but these come with significant responsibilities in relation to delineation, administration, exploitation, and conservation of the marine environment.

Delimitation of the Maritime Zones

In the EEZ, a State has sovereign rights to explore, exploit, conserve and manage the natural resources of the waters superjacent to the seabed and of the seabed and its subsoil; sovereign rights with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and jurisdiction over artificial islands, installations and structures¹⁶. Beyond the EEZ/continental shelf lie the high seas which

15 See, *The Law of the Sea*, United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea, United Nations Sales No. E.83.V.5 (UN: New York, 1983)

16 This is the text of the second Wang Tieya Lecture in Public International Law delivered by H.E. Judge SHI Jiuyong on the occasion of the second Wang Tieya Award in Public International Law on 11 March 2010 at Wuhan University Institute of International Law. The Wang Tieya Award in Public International Law and the Wang Tieya Lecture in Public International Law are sponsored by the National Key Research Center, Wuhan University Institute of International Law, China and the Chinese Journal of International Law. This programme was inaugurated in 2009 by: Ian Brownlie, *The Peaceful Settlement of International Disputes*, 8 Chinese JIL (2009), 267-283. See, Shi Jiuyong, "Maritime Delimitation in the Jurisprudence of the International Court of Justice", see Chinese Journal of International Law (2010) 9 (2): 271-291 See. http://www.oxfordjournals.org/our_journals/cjilaw/about.html, accessed on February 21, 2013.

Shi elaborates while using *Qatar v. Bahrain* as an illustration, this Wang Tieya Lecture provides an overview and analysis of the case law of the International Court of Justice on maritime delimitation. The issues covered include: maritime zones recognized under UNCLOS, the development of the law of maritime delimitation, identification of relevant coasts and baselines, pre-existing agreement, delimitation of the territorial sea, delimitation of the continental shelf and the EEZ, and the starting point and end point of delimitation

are open for use by all States, except in respect of resources of the seabed of the ocean floor and subsoil thereof, exploitation of which is to be managed by the International Seabed Authority, set up under UNCLOS for the common benefit of mankind.¹⁷

Comparative Sizes of the Various Maritime Zones

Areas of the Earth covered by the Oceans	approx. 335.0 million km²
High Seas	200.4 million km²
Territorial Seas	22.4 million km²
Contiguous Zones	6.6 million km²
Exclusive Economic Zones	101.9 million km²
Total areas under national jurisdiction excluding extended continental shelves beyond 200 nm	131.0 million km²

Source: UNEP/GRID-Arendal, Continental Shelf: The Last Maritime Zone (2011) at 28. See also http://www.gc.noaa.gov/gcil_maritime.html.

Changes made in the international Law of the Sea, the Indian Parliament extended constitutional recognition to the new concept of the EEZ in May 1976. As a result, Article 297 of Chapter III, Part XII of the Constitution reads as follows:

"All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone of India, shall vest in the Union and be held for the purposes of the Union".

Three months later, in August 1976, the "Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act" entered into force (with the exception of Section 5—Contiguous Zone—and Section 7—EEZ—which entered into force in January 1977). This Act made provisions for India's territorial waters, contiguous zone, EEZ, and continental shelf. In December 1982, India signed the United Nations Law of the Sea Convention, and ratified it (along with the implementation of Part XI) in June 1995.

¹⁷ Ibid.



EEZ Waters of India Mainland

Source: <http://www.searoundus.org/eez/357.aspx>

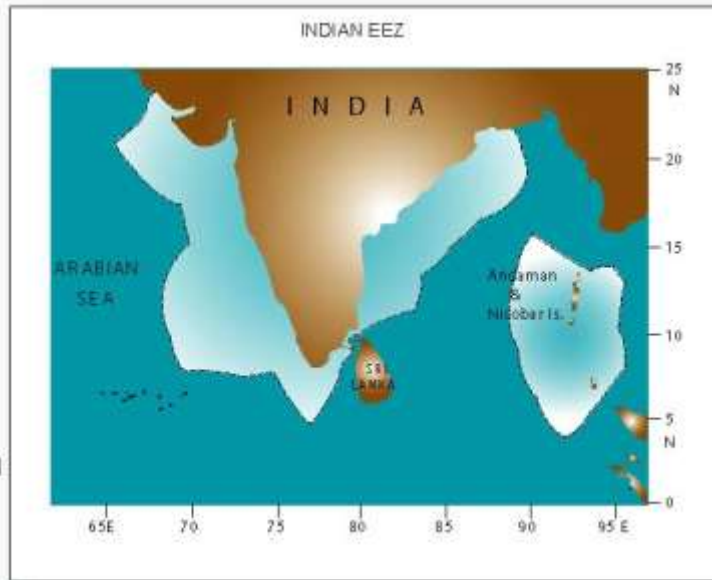
The size of the Indian EEZ is estimated at 2.02-2.2 million sq km, covering both the western and eastern coasts, as well as the island territories of Lakshadweep in the Arabian Sea and the Andaman and Nicobar Islands in the Bay of Bengal. The variance of 180,000 sq km is due to the absence of published baselines of the country (from which maritime zones are calculated), as well as a series of minor hydrographic differences. Moreover, the size of the EEZ is expected to increase even further by the year 2004, in view of the legal provision of extending the continental shelf to 350 nm, if preliminary exploration of the extended area is completed by then. This could provide India an additional EEZ of approximately 1.5 million sq km, if its continental shelf extends well beyond 200 nm. or 100 nm. beyond the 2,500 metre isobath.¹⁸



18 Department of Ocean Development, Annual Report 1996-97 (1997), p. 22.

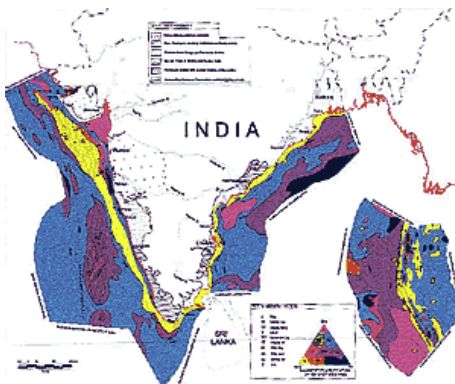
EEZ Waters of Andaman and Nicobar Isl (India)

Source: <http://www.seararoundus.org/eez/357.aspx>



EEZ of India (Shaded area)

Source: National Institute of Oceanography (NIO) Bioinformatics Centre
<http://www.niobioinformatics.in/other2.php>



Marine Maps

The above marine maps of Exclusive Economic Zone (EEZ) and territorial water of India display the surficial sediment distribution in a 2° by 2° format. This series of maps also show bathymetry, sample location, offshore mineral resource potential, deep borehole logs accompanied by magnetic anomaly maps, seismological section, etc.

Source: Geological Survey of India, available at http://www.portal.gsi.gov.in/portal/page?_pageid=127,529486&_dad=portal&_schema=PORTAL

In the EEZ, India possesses the following rights and jurisdictions: sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the seabed, subsoil, and the waters; rights and jurisdiction with regard to the establishment of artificial islands, installations and structures; exclusive jurisdiction with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and jurisdiction with regard to the preservation of the marine environment, including pollution control. Other states could utilize the resources of the EEZ only with the prior permission of the Indian government.⁴ In terms of warfare, the EEZ is to be considered similar to the high seas, but for the additional obligation to have "due regard to the rights and duties of the coastal state".¹⁹

Unilateral delimitation and international law; the need for delimitation; delimitation of the territorial seas, article 12 of the 1958 convention on the territorial sea and article 15 of the 1982 convention on the law of the sea; continental shelf and exclusive economic zone delimitation, article 6 of the 1958 convention on the continental shelf and articles 74 and 83 of the 1982 convention on the law of the sea.

In any analysis of the development of the concept of the exclusive economic zone, it would be apparent that much of its content is based on preexisting ideas. The notion of "sovereign rights" over natural

¹⁹ Horace B. Robertson, Jr, *The "New" Law of the Sea and the Law of Armed Conflict at Sea*, *The Newport Papers*, no. 3, October 1992, pp. 22-23.

resources was already contained in the 1958 Convention on the Continental Shelf. It was expanded to cover living and non-living resources of the exclusive economic zone. The inspiration for the regime for installations and artificial islands and the establishment of safety zones around them is to be found in that same Convention. The "consent regime" for marine scientific research in the exclusive economic zone is also based on the Continental Shelf Convention. As regards fisheries provisions, in particular those relating to their conservation and management, many useful proposals were listed in the "Main Trends" paper. Proposals from the United States, Japan, the USSR and Canada, among others, contributed substantially to provisions in the Convention on this aspect, even though they were made in the context of preferential fishing rights of coastal states.

The regime gives to coastal states sovereign rights over the natural resources and control of resources-related activities in the zone, while preserving for the international community the freedoms of navigation, over flight and the laying of submarine cables and pipelines.

Coastal states have sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the exclusive economic zone (Article 56). The provisions relating to non-living resources are subsumed in the continental shelf provisions, although jurisdiction over the part of the continental shelf which lies within the exclusive economic zone is not dependent on geophysical considerations. With respect to living resources, the coastal state has broad regulatory and management powers. The coastal state, however, must ensure that the resource is not endangered by over-exploitation and it must do this through proper conservation and management (Article 61). Such measures must be designed to ensure that the populations of harvested species are maintained or restored at levels which can produce the maximum sustainable yield as qualified by relevant environmental and economic factors (Article 61).

Coastal states also have the obligation to promote the objective of optimum utilization of the living resources. The coastal state is obliged to assess the allowable catch and to determine its own capacity to harvest the resources. If it does not have the capacity to harvest the entire allowable catch, it must give other states access to the surplus (Article 62).

Land-locked and geographically disadvantaged states have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources subject to arrangements with the coastal state involved (Articles 69 and 70).

There are special provisions for straddling stocks (Article 63), anadromous species (Article 66), catadromous species (Article 67), sedentary species (Article 68) and marine mammals (Article 65). With respect to highly migratory species, the coastal state and other states whose nationals fish in the region shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species, both within and beyond the exclusive economic zone (Article 64).

In exercising its sovereign rights, the coastal state is empowered to take a wide range of enforcement measures such as boarding, inspection, arrest and judicial proceedings (Article 73).

Finally, a description of the regime would not be complete without mentioning the subject of dispute settlement as it is detailed in Article 297(3). With regard to fisheries disputes concerning the interpretation or application of Convention provisions, they are to be settled by a binding form of dispute settlement. However, coastal states are not obliged to submit disputes relating to the exercise of sovereign rights with respect to living resources in the exclusive economic zone to any form of compulsory dispute settlement procedures. The issues under this exception include the coastal state's discretionary powers for determining allowable catch, its harvesting capacity, the allocation of surpluses to other states and the terms and conditions established in its conservation and management laws and regulations.

The regime of the exclusive economic zone is clearly a revolutionary legal concept which evolved very quickly. In about a 30-year time span, an ocean regime has emerged from many diverse ideas and interests and has found universal acceptance establishing the unlikely proposition that the whole is greater than the sum of its parts.

Balancing balance of legal, economic and political interest pertaining to the EEZ is challenging in contemporary times. In today's

world, more interdependence between nations and more integration of world economy through trade by seaborne makes EEZ of India and Andaman and Nicobar Islands key element in movements of ships in the Indian waters.

Even though countries now hold sovereign rights in the EEZ, the zone remains a commons, i.e. a property with open access.²⁰ Governance of commons comes with a unique set of challenges. Considering the size, dynamic nature, and unpredictability of the EEZ, it is particularly difficult to design a governance regime. There are three mechanisms generally used for overcoming the challenges of governing the commons:²¹ the government mechanism, the market mechanism, and co-management, which entail the government and the community managing the resources together in some way.

The regime for the exclusive economic zone is *sui generis*. Under it the coastal states and other states have specific competences. The legal regime of the exclusive economic zone is thus different from those of the territorial sea and the high seas. It is a zone which incorporates certain characteristics of both regimes but belongs to neither. The zone represents a politico-legal compromise and its various elements constitute a complete unit whose structural harmony and functional balance will be destroyed if it were to be assimilated into any pre-existing concept.²²

In the exclusive economic zone a coastal state has been given sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources. In exercising its rights and performing its duties under the Convention (Law of the Sea), the coastal state is obliged to have due regard to the rights and duties of other states and to

20 Governing the Exclusive Economic Zone: The Ocean Commons, Cumulative Impacts and Potential Strategies for Improved Governance, Prepared by Katherine Andrews, With funding from the sponsors of the Ian Axford (New Zealand) Fellowships in Public Policy, Published by Fulbright New Zealand, July 2008. Available at http://www.fulbright.org.nz/wp-content/uploads/2011/12/axford_2008_andrews.pdf. Accessed on February 18.

21 Ibid.

22 For a detailed analysis and understanding on this point from a legal angle, see the leading cases such as North Sea Continental Shelf cases, ICJ Reports, 1969, p. 3; Gulf of Maine, ICJ Reports, 1984, p. 246; Nicaragua v Honduras, ICJ Reports, 2007; Qatar v Bahrain, ICJ Reports, 2001, p. 40; Guyana/Suriname, 17 September 2007; Barbados/Trinidad and Tobago, 11 April 2006; Anglo-French Continental Shelf, 54 ILR, p. 6; Tunisia/Libya, ICJ Reports, 1982, p. 18; Libya/Malta, ICJ Reports, 1985, p. 13; St. Pierre and Miquelon (Canada/France), 95 ILR, p. 645; Jan Mayen (Denmark v Norway), ICJ Reports, 1993, p. 38; Guinea/Guinea Bissau, 77 ILR, p. 636; Cameroon v Nigeria, ICJ Reports, 2002, p. 303.

act in a manner compatible with the Convention (Article 56). The coastal state has been given considerable discretion in the management of the zone; however, the Convention also imposes specific management responsibilities on the coastal state, especially as concerns the living resources of the zone. In the light of these management responsibilities, a coastal state which has claimed an exclusive economic zone cannot pursue a policy of inaction with respect to its living resources.

The Convention refers to specific matters which a coastal state should take into account in the management of the zone. It contains provisions requiring a state to enter into agreements with other states, either bilaterally, sub regionally or regionally. These references in some cases serve to highlight the interests of other states in the zone or to create preferences in their favour and they were essential elements in the compromises which made the concept of the exclusive economic zone generally acceptable. They now require to be implemented in good faith by all concerned.

TYRANNY OVER THE MIND: PAID NEWS AS ELECTORAL CRIME

*Dr. Madabhushi Sridhar**

What amounts to interference with the exercise of an electoral right is ‘tyranny over the mind.

- *Supreme Court*
(in *Shiv Kripal Singh versus V.V. Giri, AIR, 1970, SC 2097*)

1. Introduction: Commerce in News

This paper examines the unethical practice of ‘paid news’ that is spreading its tentacles all over media, as an electoral crime or corrupt practice affecting the roots of democracy¹.

Newspapers sell the space for commercial speech. It is the business of the newspaper industry, without which it cannot survive. Every copy of newspaper is also for sale, without which also print media cannot get circulated. There is nothing wrong in this because it is the legitimate business of the media. When any media organization is committed to promote a particular group, or party or individual that is called as a ‘sold out’ medium. If a reporter is not paid but asked to use his id card as reporter of that medium to earn his wages, it is the example of organized ‘paid news’. From this poisonous seed of unethical practice today’s banyan tree of ‘paid news in elections’ has grown².

In recent years, corruption in the Indian media has gone way beyond the corruption of individual journalists and specific media organizations -- from “planting” information and views in lieu of favours received in cash or kind, to more institutionalized and organized forms of corruption wherein newspapers and television channels receive funds for publishing or broadcasting information in favour of particular individuals, corporate entities, representatives of political parties and candidates contesting elections, that is sought to be disguised as “news”. Corruption for not publishing a particular information is also rampant but

* Professor and Coordinator, Center for Media Law & Public Policy, NALSAR University of Law Hyderabad.

1 Based on the paper presented at International Workshop on “Key Challenges for Journalism in India” on August 8, 2012 at New Delhi, Organized by International Federation of Journalists.

2 See for analysis by P. Sainath, <http://www.thehindu.com/opinion/columns/sainath/article2523649.ece>

difficult to trace. That is totally uncontrollable and confined to personal or institutional ethics.

The news and views are like different groups of blood that runs in the veins and arteries of society which supplies oxygen of truth to the body polity and its general public making the citizen conscious and representative democracy vibrant with which the rule of law survives and people's decision prevails.

Now that blood is getting polluted, instead of truth of oxygen the infected blood full of diseases like untruth, bias, unfair comments and unreasonable exaggerations etc is being pumped. There is a strong need for blood transfusion and to generate new blood after multiple dialyses to cleanse these infections. The need to supply healthy information is a perpetual requirement. But during the crucial hour of decision making, i.e., an election where every citizen has to exercise their right of expression needs extra doses of oxygen so that a proper government of people's choice is constituted for five years. If the cash decides the quality of news one can imagine what kind of a government the people would get. Paid news during an election is capable of ruining the state for five years. Like voter the journalist who sold news has to purchase 'service', and every kind of 'governance' including justice, perhaps. With purchase of votes and sale of news, the democracy will be off the people, far the people and buy the people', instead 'of the people, for the people and by the people'".

a) AP Elections

In 2004 AP elections, the ugly head of 'paid-news' was noticed in one district and by 2009 elections spread its tentacles all over the state and beyond. The District Collector and Returning Officer of Khammam district had reports that some major political party contestants paid huge amounts of money in a package deal for cooked up favourable information to create a false atmosphere influencing electorate. Neither the purchasers nor the selling journalists documented the dirty deal and their expenditure or income statements did not reflect cash for news. Based on the rate for 'column centimeter' of particular media the 'cost' of paid news was assessed and the Returning Officer issued notices to candidates and the media. Before he took action, he was shifted because both opposition and ruling party, besides media, did not want it. It was

hushed up. By the next Assembly Elections in 2009, the news spread, and the individual and isolated phenomenon in a few constituencies became well organized, wide spread, deep rooted with systematic collection as per unwritten(!) tariff. Paid news was institutionalized and journalists sold space to achieve fixed targets. It resurrected with full vigor in every general elections and happening in more focused and concentrated manner in every by-election.

b) Cultural “Paid News”

There are several kinds of unethical ‘paid news’ practices prevalent in cultural activities. As the auditorium was most of the days empty without any activity, the group of enthusiastic entrepreneurs creatively generated a business method, wherein a small time artiste or publicity maniac will be chosen as ‘bakra’ who is ready to pay for his ‘felicitation’. He will bear the cost of memento, shawl, bouquet, and clapping audience, speaking personalities, guests and chief guest besides a presiding personality. They have also lured cultural reporters of all newspapers (now of tv channels also) who would receive gifts or gift cheques for giving a favourable report next day with a facility of publishing a photo at a higher cost. Reporters used to bribe subeditors to secure the publicity. A noted personality who later became an MP and Union Minister is also known for this kind of activity for self-promotion. He used the huge profits he made in big dams and civil constructions, and developed sufficient clout in cinema, culture and religious fields besides wielding high influence in ruling party politics. State level newspapers did not seriously acted on this small time corruption of stringers and part time reporters. It is mainly because these small reporters get paid as per column centimeter rate, (may be original class of ‘paid news’, which means for example Rs 100 per full length of column in a broadsheet newspaper).

c) Examples of Exaggerated Misinformation

Here are two examples of newspaper headlines, one which suggested that a candidate had “divine blessings” while the other claimed on behalf of a candidate that “though others distributed money, votes will be polled in favour of candidate Mr. A.”. While the first headline seeks to influence votes using a divine reference, the second alleges that candidates distributed money. These two statements are potential poll

crimes under both Indian penal Code and Representative of People's Act, 1951.

2. Paid News, as Crime

During 1995 N.T.Ramarao was dethroned with 'paid-news'. Major dailies published a false report that 'NTR is preparing dissolves house'. And that has a dramatic effect of induced dozens of legislators to shift loyalty overnight to Chandrababu Naidu. After taking oath as Chief Minister, Naidu 'paid' a visit to residential houses of those journalists who sold their 'news'.

Recently in Parkal Assembly Constituency in Warangal District where the by-election was held, 'votes for cash' was known to every one. No doubt that the vigilant officers seized huge currency bundles but much before election notification candidates sure to be fielded have completed distribution of cash in selected households³. A huge network was designed as per the voters' list. 'Take notes and give votes if not get ready to lose limbs' was the threat administered. The media was also paid for not reporting any thing about it. Long hand of law can reach if there is fraudulent or false publication 'suppression' for cash gets not noticed. No law on the earth can punish 'paid silence', or 'paid suppression' or 'paid deletion'.

This is not just an unethical practice but a new form of crime on par with economic, white collared and organized crimes of rich and powerful. It has characteristics of perjury, misrepresentation, deceit and cheating, which are well defined crimes under IPC and RP Act.

a) Election Crime: Tyranny over the mind

The "undue influence" which could potentially curb free exercise of electoral rights is an election crime under IPC⁴ and RP Act⁵. While the Act explains "undue influence" in general terms and supplemented the explanation with an example that threatening a candidate or elector with injury, or consequence of divine displeasure if not favoured, would constitute the undue influence. Using similar expressions, Section 171C

3 See <http://www.deccanchronicle.com/channels/cities/hyderabad/results-raise-telangana-hopes-127>

4 Section 171C of Indian Penal Code, 1860

5 Section 123 of Representation of People Act, 1951

of the IPC says it will tantamount to interference or attempt to interfere with the free exercise of an electoral right, which is punishable with imprisonment up to one year and fine or both under Section 171F of IPC. This could cover the media's interference through "paid news". Healthy campaign is 'due' influence which is valid. Voters can be influenced with statements of the good deeds of the candidates and their achievements, but these should not be "undue" and tantamount to "abuse of influence"⁶. The Supreme Court said⁷ that what amounts to interference with the exercise of an electoral right is 'tyranny over the mind'.

Even attempt to interfere with free exercise is an electoral offence. By examining content of "paid news", the possibility of direct or indirect interference or attempt to interfere on behalf of a candidate with the free exercise of electoral right would be discovered. Anyone trying to falsely influence the minds of the voters will vitiate the election. More than money, muscle or any other inducement, the falsity will effectively influence the voter. Such a vote cannot be valid to authorize candidate to represent constituency. The media has to understand that it should not fuel this falsity which undermines democracy and by doing so they are committing crimes.

b) Corrupt Practice & Electoral Offence

Publication of a false statement is both corrupt practice and electoral offence⁸. There is a need to investigate campaign or advertising camouflaged as news during elections and prosecute offenders, either poll agents or media personnel, for violating the provisions of Section 123(4) of the Representation of the People Act, 1951.

Section 123(4) defines a corrupt practice as:

the publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate or in relation to the

6 *Bachan Singh v Prithvi Singh*, AIR, 1975, SC 926

7 *Shiv Kripal Singh v V.V. Giri*, AIR, 1970, SC 2097

8 Section 123 of Representation of People Act, 1951 explains various corrupt practices

candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of the candidate's election.

'Any person' in this definition includes the media person who publishes or broadcasts statements for money which is based on the consent of a candidate or his agent. Adverse remarks about the personal character or the conduct of a rival candidate or propagating false information about other candidates would squarely fall within the ambit of a corrupt practice.

c) Known falsity determines criminality

If a statement published or broadcast is proved to be false, the concerned newspaper publisher or owner of a television channel could be prosecuted under IPC. Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with (imposition of a) fine⁹. This interpretation of the word 'falsity' decides the criminality of the publication or broadcast.

d) Crime of not identifying printer of false information

If newspapers become akin to pamphlets of politicians during election campaigns, they should be treated as such. Every pamphlet has to print the names and addresses of the printer and publisher and that every publisher shall send one copy of such publication to the Chief Electoral officer in the capital or to the District Magistrate and that any person who contravenes this provision shall be punishable with imprisonment for a term which may extend to six months or with a fine which may extend to Rs 2,000 or both¹⁰.

The concerned newspapers might have not violated above Section 127A (1) as they generally publish the name of the printer and publisher every day but by not sending a copy to the Chief Electoral Officer or District Magistrate clearly marking which part of their

9 Section 171G of the Indian Penal Code

10 Section 127A of the Representation of the People Act, 1951

newspaper is in the nature of a pamphlet or advertisement, the newspaper might have committed a crime under Section 127A(2)(b) of the Act. Thus it is no more just an aspect of ethics or code but violation of law.

e) Suppression of expenditure

In case the expenditure on “paid news” together with other expenditures incurred by a candidate exceeds the prescribed limits laid down in the Conduct of Election Rules, Section 77 of the Representation of the People Act would have been violated. Every District Magistrate in his capacity as Returning officer or District Election Officer has the power to issue a notice to each newspaper and candidate to furnish details relating to the “sale” or “purchase” of news columns and also submit copies of the publication to verify whether the reports therein are false or not or cause undue influence that could materially affect the outcome of the election¹¹.

f) Income from paid news: Tax laws breached

The Income Tax authorities have enough power to demand details of such financial transactions and impose a tax if necessary on the concerned media companies. If “paid news” items are found to have materially affected the prospects of a candidate or adversely affected the prospects of his or her rival candidate, it could become a ground for the Election Commission of India declaring the election of the winner as void¹². If it is proved that a candidate is guilty of having indulged in a corrupt practice, then he can be disqualified from contesting elections as per election law¹³. Along with him, those who committed this corrupt practice would also forfeit their right to vote¹⁴. The Election Commission is empowered to enforce these provisions of the law.

The concerned newspapers and television channels typically receive money for “paid news” in cash and do not disclose such earnings in their company balance sheets or official statements of accounts. Thus, by not accounting for the money received from candidates, the concerned media company or its representatives must be violating the

11 Section 77 of the Representation of the People Act, 1951

12 See Section 100 of the Representation of the People Act, 1951

13 Section 8A of the Representation of the People Act, 1951

14 Section 11A of the Representation of the People Act, 1951

provisions of the Companies Act, 1956 as well as the Income Tax Act, 1961, among other laws.

g) Breaching Advertising Code

If what has been published is presumed to be an advertisement, then too the newspaper may be held liable for breach of the advertising code of conduct. The Cable Television Networks Rules, 1994, prescribe a number of guidelines for advertisements broadcast by television channels. Rule 7 says that advertising carried shall be so designed as to conform to the laws of the country and should not offend the morality, decency and religious susceptibilities of the subscriber. No advertisement shall be permitted which:

- derides any race, caste, colour, creed and nationality;
- is against any provision of the Constitution of India;
- tends to incite people to crime,
- cause disorder or violence or breach of law or
- glorifies violence or obscenity in any way; etc.

The rules also specify that no advertisement shall be permitted the objects whereof are wholly or mainly of a religious or political nature and that advertisements must not be directed towards any religious or political end¹⁵.

3. Paid news and its impact on election

True and correct consequence of ‘false and incorrect’ expenditure statement is disqualification. It’s an open secret that every expenditure statement of either elected or defeated candidate is false and its acceptance without any verification is a farce.

a) MLA loses her seat

But for the first time, the untruth of a candidate is unraveled and an elected candidate Ms. Umlesh Yadav, a sitting MLA from Bisauli in UP is disqualified under section 10 A of the Representation of People’s

15 Code of conduct under the Cable Television Networks Rules, 1994

Act 1951¹⁶ for a period of three years for failing to provide a ‘true and correct account’ of her election expenses¹⁷.

The scope of the above section 10A came to be considered by the Supreme Court. The Supreme Court held that an incorrect or untrue account of election expenses could not be said to have been lodged in the manner required by law and that the Election Commission could go into the question of the correctness or falsity of account of election expenses lodged by a candidate under the said section 10A¹⁸.

Following the above dictum of the Supreme Court, the Election Commission passed an order on 2nd April, 2011 in an another case of similar nature of ‘paid news’ against Ashok Chavan, a member of the Maharashtra Legislative Assembly, pending before it, that it can go into the correctness or falsity of the account of election expenses filed by Chavan. The writ petition¹⁹ filed by Chavan has been dismissed by the Delhi High Court holding that:

14. In view of our aforesaid analysis, we are of the considered opinion that the decision in L.R. Shivaramgowda is a precedent in the field and the Commission has correctly appreciated and understood the law laid down therein and, therefore, we concur with the view expressed by it.

15. Consequently, the writ petition, being devoid of merit, stands dismissed²⁰.

Thus EC can go into questions of Paid news phenomenon as a matter of legal issue. Another issue raised in this case was whether expenditure authorized by others or incurred by her friends also is accounted within the limit as per Section 77 of Representation of People’s Act, 1951?

16 RP ACT,10A. Disqualification for failure to lodge account of election expenses.—If the Election Commission is satisfied that a person—(a) has failed to lodge an account of election expenses within the time and in the manner required by or under this Act; and (b) has no good reason or justification for the failure, the Election Commission shall, by order published in the Official Gazette, declare him to be disqualified and any such person shall be disqualified for a period of three years from the date of the order.

17 <http://www.rediff.com/news/report/election-commission-disqualifies-up-mla-for-paid-news/20111020.htm>

18 *LR Shivaramagowda v. TM Chandrasekhar* (AIR 1999 SC 252)

19 No. W.P.(C) 2511 of 2011 dated 30th September, 2011

20 *LR Shivaramagowda v. TM Chandrasekhar* (AIR 1999 SC 252)

Now, if a candidate were to be subject to the limitation of the ceiling, but the political party sponsoring him or his friends and supporters were to be free to spend as much as they like in connection with his election, the object of imposing the ceiling would be completely frustrated and the beneficent provision enacted in the interest of purity and genuineness of the democratic process would be wholly emasculated. The mischief sought to be remedied and the evil sought to be suppressed would enter the political arena with redoubled force and vitiate the political life of the country. The great democratic ideal of social, economic and political justice and equality of status and opportunity enshrined in the Preamble of our constitution would remain merely a distant dream eluding our grasp²¹.

What should be included in the 'expenditure' is further explained by the Supreme Court in another significant case in 1996.

That the expenditure, (including that for which the candidate is seeking protection under Explanation I to Section 77 of the RP Act) in connection with the election of a candidate - to the knowledge of the candidate or his election agent -shall be presumed to have been authorized by the candidate or his election agent. It shall, however, be open to the candidate to rebut the presumption in accordance with law and to show that part of the expenditure or whole of its was in fact incurred by the political party to which he belongs or by any other association or body of persons or by an individual (other than the candidate or his election agent). Only when the candidate discharges the burden and rebuts the presumption he would be entitled to the benefit of Explanation 1 to Section 77 of the RP Act²².

Section 77 underwent some changes in 1974, 1975 and 2003. By the amendments made in 1974 and 1975, the expenditure incurred by the political party sponsoring the candidate or any other person was exempted from the purview of the expenditure incurred or authorized by

21 Supreme Court observed in *KanwarLal Gupta v Amar Nath Chawla* (AIR 1975 SC 308):

22 *Common Cause v. Union of India and Others* (AIR 1996 SC 3081).

the candidate. After several interpretations, finally the section 77 is amended in 2003²³.

From the perusal of the said section 77, as it stands now, it will be observed that what is now exempted from the purview of the expenditure incurred or authorized by the candidate or his/her election agent is only the expenditure incurred on the travel of leaders of the political party for general party propaganda and all other expenditure by the party in connection with, or relatable to, the election of any particular candidate is deemed to be incurred or authorized by him/her and should form part of account of his/her election expenses under section 77 of the Act. After examining these aspects of expenditure and paid news problem in UmleshYadav case, the Election Commission held:

Having regard to the above position of the present law, even if it be assumed that Smt. Umlesh Yadav had not herself incurred the expenditure on the publication of the paid news in Dainik Jagran on 17.04.2007, it shall be deemed to have been authorized by her

23 Section 77.Account of election expenses and maximum thereof.—(1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof, both dates inclusive.

Explanation 1.—For the removal of doubts, it is hereby declared that—

(a) the expenditure incurred by leaders of a political party on account of travel by air or by any other means of transport for propagating programme of the political party shall not be deemed to be the expenditure in connection with the election incurred or authorised by a candidate of that political party or his election agent for the purposes of this sub-section.

(b) any expenditure incurred in respect of any arrangements made, facilities provided or any other act or thing done by any person in the service of the Government and belonging to any of the classes mentioned in clause (7) of section 123 in the discharge or purported discharge of his official duty as mentioned in the proviso to that clause shall not be deemed to be expenditure in connection with the election incurred or authorised by a candidate or by his election agent for the purposes of this sub-section.

Explanation 2.—For the purposes of clause (a) of *Explanation 1*, the expression “leaders of a political party”, in respect of any election, means,—

(i) where such political party is a recognised political party, such persons not exceeding forty in number, and (ii) where such political party is other than a recognised political party, such persons not exceeding twenty in number, whose names have been communicated to the Election Commission and the Chief Electoral Officers of the States by the political party to be leaders for the purposes of such election, within a period of seven days from the date of the notification for such election published in the Gazette of India or Official Gazette of the State, as the case may be, under this Act:

Provided that a political party may, in the case where any of the persons referred to in clause (i) or, as the case may be, in clause (ii) dies or ceases to be a member of such political party, by further communication to the Election Commission and the Chief Electoral Officers of the States, substitute new name, during the period ending immediately before forty eight hours ending with the hour fixed for the conclusion of the last poll for such election, for the name of such person died or ceased to be a member, for the purposes of designating the new leader in his place.

(2) The account shall contain such particulars, as may be prescribed.

(3) The total of the said expenditure shall not exceed such amount as may be prescribed.

as it was incurred by her party, i.e., Rashtriya Parivartan Dal. Pertinent to point out here that the newspaper (Dainik Jagran) in their statement before the Press Council of India stated that the material for publication of the “paid news” under reference was got written by the candidate and not by their correspondent. In view of the above, the expenditure of Rs.21,250/- paid by her party to the Dainik Jagran for the abovementioned publication of paid news with a view to furthering her prospects in the election ought to have been included by her in her account of election expenditure. As the said expenditure has admittedly not been shown in her account of election expenditure filed on 08.06.2007 under section 78 of the said Act, the said account of election expenditure is obviously not the correct or true account as required to be maintained by her under section 77(1) of the Act.²⁴

Umlesh Yadav’s case is strengthened by the investigation and report of the Press Council of India, which has rightly observed in its adjudication order that ‘the format of the impugned material was such that it would appear as a news report to the layman and word ADVT printed at the lowest end rather appeared to accompany a small boxed Appeal by the candidate. There was beyond doubt a possibility of confusing the voters when the elections were just a day away and all campaigning has stopped.’ Such an attempt by the candidate to mislead the electorate runs grossly counter to, and in the face of, the Supreme Court’s solemn declaration in *People’s Union for Civil Liberties v Union of India and others*²⁵ that the electorate should be made aware of the candidate’s antecedents, assets, liabilities and educational qualifications so that they can make an informed choice about their representative while exercising their franchise²⁶.

Either Press Council of India or Election Commission of India, has gone into the question whether it was an advertisement in the guise of news item, resulting in expenditure which was suppressed. But, what about the content of the ‘paid news’? If that is false and misleading, that would constitute another poll offence which if proved would result in disqualification.

24 Para 20 of the Order of the Election Commission of India in UmleshYadav case.

25 AIR 2003 SC 2363

26 Para 26 of Disqualification order by Election Commission in

If this test is applied almost all elected representatives should lose their seats and be disqualified to contest immediately. India will breathe a fresh breeze of political air with all the new faces in Lok Sabha and all Vidhan Sabhas, alas, just a dream. The enormity of false and incorrect statements in this country's elections is obvious, imaginable and also impossible to act upon. The Umlesh Yadav case, is the first but should not be the rarest.

b) Media's Share in Crime

The media which is supposed to report truthful electioneering, has an unsavory link in this murky deal of taking money and spreading falsity. This legislator failed to include in her official poll accounts, spending on paid news, which was dressed up as news in two Hindi dailies Dainik Jaagran and Amar Ujala during her 2007 election. The MLA became a news item 'for purchasing favorable news items', without reflecting it in the statement of expenditure. On a complaint by losing candidate, the Press Council of India did a professional job of inquiry and found two newspapers guilty of ethical violations. Their adjudication report was sent to ECI for an appropriate action. That resulted in a disqualification penalty. The pathetic part of the entire story is that it may not be the end of the story. Even as the 'disqualification' imposed at the fag end of her five year term, this in all probability extended by litigation. If litigated, she would have wonderful time, can contest if she could secure a stay on disqualification and even get elected again. It has to be noted that she was not disqualified for unethical practice of purchasing favorable news but for not reflecting it in the expenditure only. It is still a historic adjudication by ECI because very rarely the falsity of statement became a ground for disqualification. To get elected and after getting elected our representatives violate the law with all impunity and disregard for the 'law' which they promise to comply with.

When ECI is probing the truth or otherwise of 2009 poll expenses of the Maharashtra's former Chief Minister Ashok Chavan; this *netha* questioned the jurisdiction, the court at the preliminary level granted the stay against ECI's process but ultimately former CM's petition was

dismissed²⁷. Good news indeed, indicating action against bad trend of undue influence by money and falsity.

c) Will any MLA survive?

It is not just this disqualified lady legislator Ms Umlesh Yadav or Mr. Chavan who fell in disgrace for Adarsh Housing scam and another former Jharkhand CM Madhukoda who also has record of losing power for graft charges, and similarly almost every legislator's election reflects false and incorrect expenditure. If the all the elected persons could be disqualified on this count alone, the grounds of abuse of money power, electoral malpractices and offences might find no victims at all. This will give rise to question, are we truly democratic?

Where there is legislation, the ECI is bound by it. In the absence of law, the ECI has general powers under Article 324 with regard to conduct of elections under which it can pronounce action. This point is established in Supreme Court in *A.C. Jose v. Sivas Pillai and Others* (AIR 1984 SC 921), where in it was stated:

25. To sum up therefore, the legal and constitutional position as follows:

- (a) when there is no Parliamentary legislation or rule made under the said legislation, the Commission is free to pass any orders in respect of the conduct of elections,
- (b) where there is an Act and express Rules made there under, it is not open to the Commission to override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. In other words, the powers of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of superintendence direction and control as provided by Art. 324.

The agony of common man is reflected in ECI's indictment in its 23 page order, that "by suppressing expenditure on 'paid news' and

27 P. Sainath writes in the Hindu, The former Maharashtra Chief Minister had challenged the power of the Election Commission of India (ECI) to go into the truth or falsity of his 2009 poll expenses. Those proceedings in the ECI had gained infamy as the 'paid news' case. A case which embarrassed major newspapers that had run scores of hagiographic full pages of 'news' on Mr. Chavan during his poll campaign. Pages without a single advertisement on them (*The Hindu*, November 30, 2009). <http://www.thehindu.com/opinion/lead/article2523649.ece>

filing an incorrect or false account, the candidate involved is guilty of not merely circumventing the law relating to election expenses but also of resorting to false propaganda by projecting a wrong picture and defrauding the electorate.”

4. Paid News,2012Electoral Malpractice

a) ECI Monitoring Cells

During elections in May 2011 and March 2012 the Election Commission of India took extraordinary step of forming district level monitoring bodies to closely track media coverage of the campaign process, to detect cases of paid news, which was viewed by ECI as electoral malpractice. In elections to five state assemblies in 2012, a total of 626 suspected cases of ‘paid news’ were detected by the Media Certification and Monitoring Committee MCMC functioning under ECI. Punjab state, where close to 14 million votes were cast and a total of 117 seats contested, reported no fewer than 523 of these suspect cases. In State of Uttarakhand, where just over 4 million votes elected a total of 70 legislators reported 61 cases. The largest state of the nation, Uttar Pradesh, where over 75 million votes were cast in 403 constituencies, recorded remaining 42 cases. On the basis of these figures, the ECI issued notices to 201 candidates in Punjab, all 61 suspect cases in Uttarakhand and 38 individuals in Uttar Pradesh. A large number of the candidates have conceded that they did indeed buy space and time in the media to pitch favourable stories about themselves. They have agreed indeed, to the inclusion of the funds spent within their campaign accounts²⁸.

While Umlesh Yadav case is an example of not giving true account of electoral expenditure, the real issue is what if the candidates include the expenditure. Will ‘paid news’ malpractice be excused if candidates confessed about it? The falsity in the content of paid news has to be probed into and those who used it should be prosecuted for that corrupt electoral practice. We do not have any precedents so far.

28 New Frontiers, New Struggles, Press Freedom in South Asia, 2011-12, Tenth Annual Indian Federation of Journalists Press Freedom Report for South Asia, Edited by Sukumar Muralidharan, New Delhi, p17. see <http://asiapacific.ifj.org>

b) PCI Report

When the paid news syndrome has seriously eroded credibility of media, there was an upsurge of demand to checkmate those who sell falsity through framing a new legislation. The media is a lot to regret for receiving drubbing from Press Council of India and Election Commission of India, but there are no traces anywhere. The powerful lobby of newspaper owners in the Press Council of India's governing body has flexed its muscle and vetoed out the investigative report filed by the two member committee on paid news. They tried to bury the report given by Paranjoy Guha Thakurtha and K. Srinivas Reddy, members of PCI²⁹. But recently the Central Information Commission has ordered the disclosure of full report under right to information³⁰. Even if authorities do not act on complaint at least they should share the information with the people. If not they will be committing same crime, i.e., misleading the people.

5. Criminology of Paid News

a) The first-past-the-post system

The first-past-the-post system of measuring votes for electing a member of legislative house is the real culprit of 'paid news'. This system works only in bi-party democracies like US and UK. In this system a winning candidate need not get 50 per cent plus one vote to get elected³¹. It is enough if he gets a single vote more than nearest rival. With just twenty per cent of valid votes polled, a candidate might get elected to represent all people including voters, voted or not. For that small margin, a candidate is doing everything. Earlier it was rigging, now minds are rigged with falsity through newspapers. If his misleading information could influence and change one mind in his favour momentarily it is enough. He can recover all the expenditure and amass huge wealth to fight next election. Pouring in unaccounted money call it black or criminal, is the real source of paid news. Thus the roots of this poisonous phenomenon can be traced to the manipulative election processes.

29 Paid News Sub Committee Report, www.scribd.com/doc/78431216/Paid-News-Sub-Committee-Report

30 http://dnasyndication.com/dna/top_news/dna_english_news_and_features/CIC_cracks_whip_on_paid_news_phenomenon/DNMUM222972

31 It is considered as simple majority for passing annual budget or any bill in legislature.

b) Fair wages & Fair Pages

If wages are fair one can expect fair pages. In the absence of wages, the pages will be sold in retail and wholesale. It is an open secret in Andhra Media that most of the newspapers give just an accreditation card or id card to their stringers and they are asked make their own money or get advertisements and take commission. Thus they were directly allowed to get paid for news. In corporate press conferences gift cheques and dinners with drinks became routine components. All these together developed into a full fledged and well organized selling of news. (Perhaps it is appropriate to call it as 'paid views'.) Now, with paid news becoming a well laid down policy of almost every newspaper, especially, vernacular newspaper, (which does not mean all English newspapers are exempted), the retail reporters feel totally lost as their managements are gaining in wholesale sale of news.

Very fact that several 'unpaid' or 'under-paid' journalists are working for a newspaper or TV channel, itself is the ample evidence of paid news as encouraged by managements. Non-payment of salary after getting work done for a month is an offence under Payment of Wages Act and it could be a sufficient 'industrial dispute' under Industrial Disputes Act which can be agitated in labour tribunals if at all the Assistant Commissioners of Labour are interested or entrusted with this responsibility. None dares to enter into such a conflict with media for fear of adverse publicity. Even the Working Journalists Act empowers the labour officials to impose penalties and secure payments to unpaid or underpaid journalists. Neither working journalists unions nor the labour department bothers about it. In the result the practice of encouraging reporters to sell their columns in their small towns and villages became an established system.

6. What needs to be done?

Firstly it is for the newspapers and their organizations to do what they can to eliminate the sources of this paid news. Managements should realize that ensuring the fair wages is sure way of securing the fair pages in newspaper if individual journalists are involved in paid news. Unions of working journalist should achieve the implementation of prescribed wages as per Working Journalists Act. The Wage Board's recommendations are now under challenge by the owners of

Newspapers, questioning the constitutional validity of Working Journalists Act and the constitution of Wage Board for newspapers only leaving out other media³². If managements also are involved in ‘paid news’, the companies should be prosecuted for fraud and undue influence in an organized manner.

The “paid news” phenomenon represents a “fatal combination” of three “Ms”, namely, the media, money and mafia that can subvert free and fair elections. Earlier, politicians used to hire musclemen with huge amounts of money and train them in booth rigging. Now...candidates are training media pens instead of mafia guns to ‘rig’ the minds of people with constant opinion bombarding.

It is not just a breach of media ethics or impropriety and not just the concern of the Press Council of India. It is a crime against democracy, punishable under law...the syndrome is just not the concern of the Press Council of India but a real challenge to the Election Commission of India, whose sole aim is to conduct free and fair polls.

The Representation of People’s Act 1951 is a well drafted piece of legislation which can produce genuine representatives if genuinely implemented. Big ‘if’ indeed! Any untruthful influence could be an offense and ground for challenging the election.

Under Section 123 of Representation of People Act 1951, bribery, undue influence, appeal on the ground of religion, caste, etc, publication of false statement relating to a candidate, free conveyance of voters, incurring of election expenditure in excess of the prescribed limit and seeking assistance of government servants are all considered corrupt practices. In 1989, booth capturing was added as another ‘corrupt practice’ in the law. In the present context, the media sold space and time to perpetrate undue influence and by the publication of false statements relating to winning chances of a candidate. In the process, the candidates spent huge amounts of money for coverage ‘packages’ which is a corrupt practice. These aspects have to be considered, investigated and prevented by the machinery of the Election Commission of India, as and when such things are happening. The Commission should not leave it to be decided at the time of hearing of election petitions, which means that the state

32 <http://thehoot.org/web/Media-houses-stall-Wage-Board-recommendations/5424-1-1-4-true.html>

would allow perpetration of corrupt practices and then wait for ‘proof’ of the same before election tribunals.

When the Press Council of India asked Maharashtra Chief Minister Shri Ashok Chavan to answer allegations relating to ‘paid news’ items that were published about him, he reportedly stated that the ‘appropriate forum’ to respond to is a court of law where election petitions are heard. This implies that unless the allegations are meticulously proved, it is almost impossible to handle ‘paid news’ offenders, who might by that time, reap the benefits of getting into positions of ‘power’...In Andhra Pradesh, the election tribunal (or the High Court) admitted an election petition by a candidate who contested and lost the election alleging that massive media opinion rigging was cause of his defeat.

During elections, the Election Commission of India is immune from judicial, legislative and executive interference and has to ensure that candidates do not spend more than the limits prescribed, spread false information or exert undue influence. Even after elections are over, the Election Commission can continue to direct officers through the governments concerned to prosecute offenders in courts of law. In association with ECI the PCI should constitute a special task force in each district during the elections to receive complaints, make preliminary studies and report to returning officers to initiate action against specific candidates, publications or television channels, if necessary. Initiation of proceedings for prosecution against media personnel and media companies could prove to be more effective than the Press Council of India issuing strictures and admonishments against errant media personnel and giving these wide publicity.

Enhance punishments

1. Existing legal provisions are adequate to punish offenders. Still the provisions of the IPC could be amended to enhance the quantum of punishment and fine for electoral offences. After a complaint is received and a press clipping provided alleging publication of “paid news”, it should be presumed that the company or individual against whom such an allegation has been made is guilty and the burden should shift to the accused to prove his or her innocence. If the content of the “paid news” item is

excessively tendentious or exaggerated, the presumption of liability should go up.

Secure Right of People to Know

2. As rightly noted by PCI the press provides a service that is akin to a public utility – it exercises its right to inform because the public has a right to know. The press thus functions as a repository of public trust and has the obligation to provide truthful and correct information to the best of its ability when such information is being presented as news content. Such news content is distinct from opinions that are conveyed through articles and editorials in which writers express their views. It should be truth and should not be false and misleading.
3. There is an urgent need to protect this precious right of the public to accurate information before the voters exercise their franchise in favour of a particular candidate in the electoral fray.

Ombudsman

4. Appointing ombudsmen in media organizations and better self-regulation are options to check the “paid news” phenomenon. However, self-regulation can offer partial solutions to the problem since there would always be offenders who would refuse to abide by voluntary codes of conduct and ethical norms that are not legally mandated. The owners of media companies need to realize that in the long term, such malpractices not just erode credibility of the media but undermine the democracy in the country as well.

Declare Paid news as electoral corrupt practice

5. An amendment to Section 123 of the Representation of the People Act, 1951, to declare the exchange of money for “paid news” as a corrupt practice or an “electoral malpractice” might serve some purpose. It can be effectively argued that the existing laws of the land (including the provisions of the Indian Penal Code, the Criminal Procedure Code, the Representation of the People Act, the Income Tax Act) have the potential to check such

malpractices provided the concerned authorities, including the Election Commission of India, are not just proactive but also act in an expeditious manner to apprehend those indulging in practices that are tantamount to a corrupt practice (including an electoral malpractice) or committing a fraud. As one legislator was disqualified, similar action should be taken against erring news seller also.

Enforce guidelines

6. The guidelines of the Press Council of India that news should be clearly demarcated from advertisements by printing disclaimers, should be strictly enforced by all publications. As far as news is concerned, it must always carry a credit line and should be set in a typeface that would distinguish it from advertisements.

Ensure fair wages to Working Journalists

7. Journalists Trade Unions should work for enforcement of labour laws including Working Journalists Act for securing wages fixed by Wage Board, to ensure fair wages so that the need for money making them to sell news will be eliminated.

Disclose interests and shares

8. It should be mandatory for all candidates/political parties to fully disclose their equity stakes and/or financial interests in newspapers/television channels on which news about their candidates/parties as well as interviews with candidates and/or representatives of the political parties are published or broadcast. If a candidate is being interviewed or given positive publicity on a particular newspaper/television channel, the association (financial or otherwise) of the candidate with the newspaper/television channel if any must be disclosed to the reader/viewer.

Special Cell during elections to check paid news

9. The Election Commission of India should set up a special cell to receive complaints about “paid news” in the run-up to elections

and initiate a process through which expeditious action could be taken on the basis of such complaints. In order to place a check on frivolous complaints being made a time limit of, say, one month from the date of publication or broadcast of the report should be imposed. The Election Commission of India should nominate independent journalists and/or public figures as observers in consultation with the Press Council of India who would accompany the election observers deputed by the Election Commission of India to various states and districts. Just as the deputed election observers are expected to report and keep a check on any malpractices in election campaign and the conduct of elections, these nominated journalists could report on instances of activities of practice of paid news to the Press Council of India and the Election Commission of India.

Active role of PCI

10. The Press Council of India should constitute a body of media professionals with wide representation at the national/state/district levels to investigate (either suo motu or on receipt of complaints of) instances of “paid news” and the recommendations of such a body – after going through an appellate mechanism -- should be binding on the Election Commission of India and other government authorities. The Press Council of India should be open to entertaining complaints about “paid news” from journalists while assuring them of secrecy if they act as whistle-blowers.

Stop Misusing stringers

11. Media organizations should refrain from the practice of engaging stringers and correspondents who double up as agents collecting advertisements for their organizations and receiving a commission on the revenue that accrues from advertisements instead of receiving stipends or retainers, if not, regular salaries.

Improve working conditions of working journalists

12. If working conditions and conditions of job security for journalists are improved and the autonomy of the editorial staff

upheld in media companies, this would to an extent curb the phenomenon of “paid news”.

Give Penalty Powers to PCI

Despite its quasi-judicial status, the Press Council of India has limited powers. The Council has the power to admonish, reprimand and pass strictures but cannot penalize the errant or those found guilty of malpractices. Besides, the Council’s mandate does not extend beyond the print medium. In the absence of an alternative body, the Press Council of India’s mandate should be widened to receive complaints and grievances against and about the working of television channels, radio stations and internet websites. The Press Council should be given legal powers to not merely admonish or pass strictures but also impose penalties against errant individuals and organizations.

Make PCI’s directives Binding

13. A proposal to amend Section 15(4) of the Press Council Act, 1978, to make the directions of the Council binding on government authorities, has been pending for a long time and should be amended to provide the Council more “teeth”.

Proactive role for ECI

14. The Election Commission of India should actively identify instances of “paid news” and if a prima facie case is established, the Commission should initiate action on its own against the errant and, if necessary, seek the assistance of those government-authorities responsible for enforcing the provisions of the Indian Penal Code and other laws.

Declaration by publisher

15. The editor or editor-in-chief of a publication should print a declaration in his or her newspaper stating that the news that is published has not been paid for by any political party or individual. Such disclaimers should be issued when the model code of conduct for elections comes into force and may morally bind the staffers of a media company to adhere to professional

ethical standards while discouraging the management from pushing a particular political agenda. However, self-regulation only offers partial solutions to the problem since there would always be offenders who would refuse to abide by voluntary codes of conduct and ethical norms that are not legally mandated. The owners of media companies need to realize that in the long term, such malpractices undermine not just democracy in the country but the credibility of the media as well.

Halting Campaign in Print Media before Polling

16. Civil society's oversight can also deal with the problem, but only to an extent. New rules and guidelines can be introduced and extant ones modified or amended. For instance, there should be a debate among all concerned stakeholders as to whether a directive of the Supreme Court of India that enjoins television channels to stop broadcasting campaign-related information on candidates and political parties 48 hours before polling takes place can and should be extended to the print medium since such a restriction does not apply to this section of the media at present, because of paid news.

Prevent this print fraud

17. It can be effectively argued that the existing laws of the land (including the provisions of the Indian Penal Code and the Representation of the People Act) have the potential to check the malpractice of "paid news" provided the concerned authorities, including the Election Commission of India, are not just proactive but also act in an expeditious manner to apprehend those indulging in practices that are tantamount to committing a fraud on the public.

Campaign against paid news

18. Conferences, workshops, seminars and awareness-generating campaigns should be organized involving, among others, the Ministry of Information & Broadcasting, the Press Council of India, the Election Commission of India, representatives of editors, journalists associations and unions and political parties to

deliberate on the issue and arrive at workable solutions to curb corruption in the media in general and the “paid news” phenomenon in particular.

All these initiatives, if sincerely implemented, may not entirely stop such malpractices in the Indian media but could reduce their incidence to a considerable extent. Law is there, systems are also in place. The question is where are we (the citizens, public representatives and journalists), and what are we doing?

THE RIGHT OF PEOPLE TO SELF-DETERMINATION AND THE PRINCIPLE OF NON-INTERFERENCE IN THE DOMESTIC AFFAIRS OF STATES

*Eze, Kenneth Uzor & G. N. Okeke**

The right of self-determination is the legal attribution of the authority to a people to freely determine their political status in relation to becoming an independent nation. Generally speaking, existing nations find it extremely difficult in most cases to allow a category of people within the geographical sovereignty to expressly determine to secede from their common wealth bond and form a separate independent and sovereign nation. This is so even in the face of glaring marginalization and oppression of the category of people in question. The principle of non-interference in domestic affairs of the United Nations' members strengthens the traditional practice of holding tight to national integrity of the population of a state and regarding any external effort at securing the self-determination of particular people in a state as amounting to interference in the affairs of that state.

Nevertheless, a United Nations' resolution, that is, Resolution 1514 (XV) of 1960¹ states in clear terms that the people of every state have the right to self-determination². This right has worked favourably in the decolonization of African by Europe. It opened the flood gate of nationalistic movements and campaigns which paid off by the grant of independence to the colonized states and allowing the indigenous people to form and run their own governments and set autochthonous administrative machinery in motion as a display of the power of self-determination³.

According to M. Ozden and C.Golay:

* Faculty of law, School of postgraduate, Nnamdi azikiwe university, awka

1 The resolution is tagged the declaration on the granting independence to colonial countries and peoples.

2 In the natural sense, self-determination is the right of a group of people exercised corporately as a group and not in any way or individual capacity. This right empowers in dangerous people to have a right to determine their political status and fate.

3 Available @ <http://www.law.cornell.edu/wex/self-determination-international-law> last accessed on 15/02/13.

The right of people to self determination is a pillar of contemporary international law... Since the entry into force of the United Nations Charter in 1945, it has constituted the legal and political basis of the process of decolonization which witnessed the birth of over 60 new states in the second half of the twentieth century. This was a historic victory even if it is coincided with the will of certain great powers to break up the “exclusive preserve” of colonial (primarily European) empire of the time⁴.

It is pertinent to note from the foregoing that the interest of the United Nations in relation to self determination covers a matter of general importance especially to African territories and the African people. Infact, mention is made of self determination in the preamble of the UN Charter⁵. It is submitted that a preamble to any law, statute or treaty is part and parcel of that legal instrument and also equally operative as other operative selections of the said legal instrument. Taking this positive raised by the above argument into consideration, it considered a necessary control ary of rule international law that peoples all over the world are legally found to exercise the right of self-determination that is a determination by a group of people in defined territory to form a government indigenous to their aspirations cause and relate with other already formed sovereign state itself.

To this end, it is submitted further that the United Nations Charter recognizes the right of self determination as a pillar in the promotion of international peace and security. In line with this view colonial administrators allowed many nationalist movements calling for the independence of their countries to have their way in accordance with the provisions of the United Nations Charter. The granting of independence⁶ to colonized states helped douse tensions⁷ and made it possible for peace to reign in the territories. It is to be noted that the UN

4 M. Ozden & C. Golay, *The Right of People of Self Determination* @ <http://www.law.Cornell.edu/wex/self-determination-international-law>, last accessed on 15/02/13.

5 Apart from this mention, the Charter has no other provision relating to self-determination. This does not mean that the UN as at today does not have the mandate to decide on matter of self- determination. Infact, Reso.1514(xv) of 1960 which is on self- determination is a United Nation resolution.

6 Such movements featured mainly in Africa which was the bedrock of European colonialism. Nearly all African countries have got their political independence from their colonial masters.

7 This, no doubt facilitated the maintenance of international peace and security in places where the agitation for independence was assuming a dimension threatening to world peace and security.

General Assembly Resolution 2542(XXIV) of 1969 was predicated on the strength given to the principle of self-determination by the UN Charter. There is, however, an issue that arises from this empowerment of the people which relates to whether the right or grant is solely limited to matters of colonization and decolonization or extend to people of the same nationality whereby a minority of people against the wishes of the majority of people decide to secede and form a separate independent sovereign state⁸. The resolution of this issue is a simple thing if the text of the preamble to the UN Charter is given its ordinary grammatical interpretation. To this end, the right of self determination accrues to any group of people that have the craving to stand as a sovereign state who can also get recognized by other states as such. Even though recognition is a purely political tool used by states to advance their interests in international relations, it has come to be cherished by emerging nations as part of the tool of legitimacy which nations desire to attract to themselves in the event of emergence as new states.

1. Introduction

In particular, the principle of self-determination allows a people to choose its own political status and to determine its own form of economic, cultural and social development. Exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state. The importance lies in the right of choice, so that the outcome of a people's choice should not affect the existence of the right to make a choice. In practice, however, the possible outcome of an exercise of self-determination will often determine the attitude of governments towards the actual claim by a people or nation. Thus, while claims to cultural autonomy may be more readily recognized by states, claims to independence are more likely to be rejected by them. For some, the only acceptable outcome of self-determination is full political independence. This is particularly true of occupied or colonized nations. For others, the goal is a degree of political, cultural and economic autonomy, sometimes in the form of a federal relationship. For others yet, the right to live on and manage a people's traditional lands free of external interference and incursion is the

8 According to the Vienna Declaration and programme of Action of 1993, all peoples have the right of self determination. By virtue that right they freely determine their political status, and freely pursue their economic social and cultural development

essential aim of a struggle for self-determination. Nevertheless, the right of self-determination is not complete without political independence. And without full political independence of a people, the doctrine of non-intervention is meaningless to them.

2. A Review of United Nations Involvement in Self Determination

The right to self-determination is the cardinal principle in modern international law, binding, as such, on the United Nations as authoritative interpretation of the Charter's norms.⁹ It states that nations based on respect for the principle of equal rights and fair equality of opportunity have the right to freely choose their sovereignty and international political status with no external compulsion or interference¹⁰ which can be traced back to the Atlantic Charter.¹¹ In 1945, the United Nations was born and the issue of self-determination continued to have meaning even from the United Nations Charter. The ratification of the United Nations Charter in 1945 at the end of World War II placed the right of self-determination into the framework of international law and diplomacy. Chapter 1, Article 1(2) of the United Nations Charter states one of the purposes of the United Nations as: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." Pursuant to self-determination as being part of the purposes of the United Nations, the body continued to expound the doctrine.

On 14 December 1960, the United Nations General Assembly adopted United Nations General Assembly Resolution 1514 (XV) titled Declaration on the Granting of Independence to Colonial Countries and Peoples¹², which provided for the granting of independence to colonial

9 See United Nations General Assembly Resolution 1514.

10 See the Purposes and Principles of Charter of the United Nations, 1945.

11 The Atlantic Charter was signed on 14 August 1941, by Franklin D. Roosevelt, President of the United States of America, and Winston Churchill, Prime Minister of the United Kingdom who pledged The Eight Principal points of the Charter. The principle, however, does not state how the decision is to be made, or what the outcome should be, whether it be independence, federation, protection, some form of autonomy or even full assimilation. Neither does it state what the delimitation between nations should be or even what constitutes a nation. In fact, there are conflicting definitions and legal criteria for determining which groups may legitimately claim the right to self-determination.

12 In Article 5 states: Immediate steps shall be taken in Trust and Non-Self-Governing Territories, or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

countries and peoples and providing an inevitable legal linkage between self-determination and its goal of decolonisation, and a postulated new international law-based right of freedom also in economic self-determination. To monitor the implementation of the above declaration, the General Assembly created the Special Committee referred to popularly as the Special Committee on Decolonization to ensure complete decolonisation in compliance with the principle of self-determination in General Assembly Resolution 1514 (XV). In 1966, the United Nations came up with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Article 1 of both conventions read: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹³

However, the charter and other resolutions did not insist on full independence as the best way of obtaining self-government, nor did they include an enforcement mechanism. Moreover, new states were only recognized by the legal doctrine of *utipossidetisjuris*, meaning that old administrative boundaries would become international boundaries upon independence even if they had little relevance to linguistic, ethnic, and cultural boundaries. Nevertheless, justified by the language of self-determination, between 1946 and 1960, the peoples of thirty-seven new nations freed themselves from colonial status in Asia, Africa, and the Middle East.¹⁴ Most recently, the United Nation monitored, followed-up and ensured the independence of Southern Sudan. The territoriality issue inevitably would lead to more conflicts and independence movements within many states and challenges to the assumption that territorial integrity is as important as self-determination.¹⁵

Self-determination is also recognized as a right of indigenous peoples in the Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in 2007. The declaration sets

13 See also, the United Nations Universal Declaration of Human Rights which states in article 15 that everyone has the right to a nationality and that no one should be arbitrarily deprived of a nationality or denied the right to change nationality.

14 Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples.

15 Gudeleviciute V., "Does the Principle of Self-determination Prevail over the Principle of Territorial Integrity?", *International Journal of Baltic Law*, Vytautas Magnus University School of Law, (April 2005) Vol. 2, No. 2.

out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. Specifically, it "emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations", "prohibits discrimination against indigenous peoples", and "promotes their full and effective participation in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development". Articles 3, 4 and 5 of the declaration read as follows:

- Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
- Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

3. The Need for Setting International Parameters for The Conduct Of Plebiscite

Plebiscite is a binding or non-binding process of political decision-making, especially relating to a proposed law, constitutional amendment, or significant public issue.¹⁶ Under international law, it is a direct vote of a people to decide a question of public importance, such as union within or outside a country, or a proposed change to the constitution. Two categories of plebiscite dominate: the obligatory constitutional referendum¹⁷ which is always binding; and the

16 For example, in Switzerland, the use of plebiscite in decision-making is very common. On March 3, 2002, a majority of 54.6 percent voted in a national plebiscite in favour of entering the UN. However, because a majority in the cantons was also required, ultimately one canton swung the vote in favour of an accession to the UN. Switzerland's full membership of the UN enjoys an especially high level of legitimacy, as being the first country in which the people themselves voted in favour of entry.

17 See for example, article 66 of the Southern Sudan Referendum Act, 2009 (English trans. 2010). Available at <http://saycsd.org/doc/SouthernSudan>, accessed on February 26, 2013, which paved the

consultation exercises initiated by government or parliament, which is mostly non-binding because the consultation exercises initiated by government or parliament is an institutional package and as a dynamic process, can restrict the power of existing institutions.

Plebiscite is a feature of direct democracy. In direct democracy, the peoples' opinions are sought on every question of national importance relating to their governance. The success or failure of direct democracy cannot be measured simply by concrete political outcomes. Direct democracy is a process for political decision-making, which offers the maximum possible participation of the general public in the decision-making process within modern societies, which are organized into states. This participation should be seen as a human right. Within the framework of other fundamental human rights, the recognition of the human right to political co-determination is not dependent on whether the results of plebiscites, either in general or in particular, satisfy one's own personal interests. Such a judgment would in fact reflect a fundamentally anti-democratic attitude. The actual outcomes of direct democracy must therefore be judged against this background. Political awareness/keeping up-to-date with political events and issues is more likely to be advantageous under direct democracy, since one can then play a constructive part in plebiscites. Negative attitudes towards taxation and tax avoidance itself are probably less prevalent under direct democracy, as one has the possibility of sharing in the decisions on public spending and any tax increases have to be approved by the public. It therefore becomes necessary to make very clear what are the advantages which accrue to a modern representative democracy from a combination of indirect and direct institutions, as against the traditional and dominant model of a purely parliamentary democracy. This is especially true for the European Union, where national governments act as European lawmakers and therefore occupy a dual position of power and, thus, such core concepts of democracy as accountability, transparency and participation cannot be met in a satisfying manner. Complementing indirect democracy by adding direct forms of co-determination can be considered as "social innovation with beneficial economic consequences." The benefits of this social innovation include: reduced alienation from politics, greater legitimacy and transparency, a

way for a binding referendum, leading to the successful independence of Southern Sudan on July 9, 2011.

greater identification of citizens with the policies introduced and an increased capacity for learning in civil society. Plebiscite is actually linked to an increase in per capita income and the efficiency of tax regimes evidenced in lower taxes and less tax avoidance. Direct, democracy can raise the quality of life of a society provided that well-designed procedures have been chosen. But in order to achieve these positive effects, plebiscitary processes must meet basic requirements of “freedom” and “fairness”. Free and fair has become the catchphrase of the plebs, but what actually constitutes a “free and fair” plebiscite?

Basically, there is a common understanding that the monitoring of plebiscite must relate to the whole process, not merely to the events of the actual election day(s). The preconditions for democratic plebiscite must also not be ignored, leading Elklit and Svensson to the following definitions:¹⁸

- Freedom contrasts with coercion. It deals primarily with the “rules of the game”, such as the legal/constitutional basis and the timing;
- Fairness means impartiality and involves consistency, i e., the unbiased application of rules and reasonableness; the not-too-unequal distribution of relevant resources among competitors.

In practice these definitions lead us to more concrete monitoring parameters.

Freedom:

- a) The ability to initiate a plebiscitary process: Broad access not restricted to governing majorities increases freedom.
- b) The binding/consultative effect of a decision: Non-binding votes create potential for manipulative actions.
- c) The risk of invalidation of a vote by turnout and approval thresholds: High turnout requirements of up to 50% have undemocratic effects, as non- and ‘no’-voters are counted together. Voter abstention is actually promoted instead of avoided.

Fairness:

18 See generally, Bruno K., “The European Challenge from French Revolution to European Integration Facts, Views, and Prospects”, *International Symposium on Initiatives, Referendums, and Direct Democracy* (2003). Available at en.wikipedia.org, accessed on February 26, 2013.

- a) The disclosure of donations and spending in a plebiscite campaign: This is the first step; a second is to apply spending limits; a third step is to introduce “affirmative action.”
- b) The access to public media ahead of a plebiscite: There should be voluntarily agreed standards of fairness in the print media as well as free air hours/minutes to designated campaign organisations in a plebiscite process.
- c) The role of government and civil servants in a plebiscite debate: This should be based on the principle of neutrality.

The experience in a lot of countries is that plebiscite devices do not work very well because their design is not user-friendly, with high thresholds and the exclusion of important issues from the process. There are neither legal obligations to hold a plebiscite, nor are there insurmountable legal obstacles in the way of citizens’ plebiscite, as a result the political room for manoeuvre is completely wide open. There is therefore, the need for setting international standard for the conduct of plebiscites.

4. An Appraisal of The Role of United Nations in The Southern Sudan Independence

Independence is not an entitlement under international law, not even where clearly supported by the will of the people at an independence referendum.¹⁹ Nevertheless, unilateral secession is not prohibited and foreign states may decide to grant recognition to an entity that is seeking independence unilaterally.²⁰ In such circumstances, recognition may have constitutive effects. In practice, however, foreign states tend to be very reluctant to grant recognition to unilaterally declared independence.²¹ The situation is different where the emergence of a new state is consensual, that is, where the parent state agrees to a

19 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082, at 124 (Oct. 24, 1970).; Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 18.

20 Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, para. 155 (“Although there is no right, under the Constitution or at international law . . . this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on recognition by the international community . . .”).

21 For example, the declaration of the Republic of Biafra.

part of its territory becoming a separate state.²² The parent state thereby waives its claim to territorial integrity and the emergence of a new state is then merely acknowledged by the international community. The parent state may waive its claim to territorial integrity politically, by an explicit endorsement of the declaration of independence by the seceding state, or by adopting underlying domestic legislation that provides for a clear mechanism for secession.²³ Article 1 of the Montevideo Convention on Rights and Duties of States provides: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) [the] capacity to enter into relations with the other States.”²⁴ These qualifications have acquired the status of statehood criteria under customary international law. Practice shows that meeting these criteria is neither necessary nor sufficient for an entity to become a state. Indeed, a state does not emerge automatically and self-evidently when the Montevideo criteria are met.²⁵ If states could emerge automatically, independence would need to be an entitlement under international law. Outside of colonialism, this is not the case. In the United Nation Charter era, self-determination has become codified as a human right under international law²⁶ and an entitlement of all peoples, not only those subjected to colonialism.²⁷ However, as Gregory Fox argues, in the process of decolonization “the only territorial relationship to be altered

22 After a lengthy civil war, Eritrean independence was accepted by the Transitional Government of Ethiopia, which came to power with the help of the Eritrean pro-independence movement. *Id.* at 402–03. Eritrea was admitted to the United Nations on May 28, 1993. G.A. Res. 47/230, U.N. Doc. A/RES/47/230 (May 28, 1993). Although the internal political situation in Ethiopia at that time was very complicated, it is nevertheless notable that from the perspective of international law Eritrea became independent upon the previous consent of its parent state.

23 See for example, article. 60, Constitutional Charter of the State Union of Serbia and Montenegro, Feb. 4, 2003.

24 Article 1, Convention on Rights and Duties of States, December 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 18.

25 See Hersch Lauterpacht, “Recognition in International Law”, 66 (1948) (arguing that if one accepts that a state can emerge automatically and self-evidently when the statehood criteria are met, one needs to accept the rather awkward proposition that a state exists “as soon as it ‘exists’”). Cited in Vidmar J., “South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States”, *Texas International Law Journal*, Vol. 47, Issue 3, Pp. 541 – 559. Available at www.academia.edu, accessed February 27, 2013.

26 Article, International Covenant on Civil and Political Rights, December 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 ; article 1, International Covenant on Economic, Social and Cultural Rights, December 16, 1966, Treaty Doc. 95-19, 933 U.N.T.S. 3.

27 See Dinah S., “Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon”, 105 *AM. J. INT’L L.* 60, 60 (2011) (arguing that the right of self-determination has a universal(i.e., non-colonial) scope, yet relevant sources of international law make it clear that this right is not a synonym for a right to secession). Cited in Vidmar J., “South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States”, *Texas International Law Journal*, Vol. 47, Issue 3, Pp. 541 – 559. Available at www.academia.edu, accessed February 27, 2013.

was that with the metropolitan power. Achieving independence . . . did not come at the expense of another sovereign state's territory or that of an adjacent colony."²⁸ Outside of colonialism, the right of self-determination needs to be squared with the principle of territorial integrity. The Declaration on Principles of International Law, which forms a part of customary international law, provides for the following limitation on the right of self-determination: Nothing in the foregoing paragraphs referring to the right of self-determination shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.²⁹

In this vein, the Supreme Court of Canada in the Quebec Case held that the recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.³⁰

This research work is here considering the role played by the United Nations in the independence of Southern Sudan. However, the essence of the above introduction is to have an overview of the complexity in achieving independence. This will help us to establish the nexus and appreciate this discussion on the independence of South Sudan.

28 Gregory F., "Self-Determination in the Post-Cold War Era: A New Internal Focus?", 16 *MICH. J. INT'L L.* 733, 736 (1994). Cited in Vidmar J., "South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States", *Texas International Law Journal*, Vol. 47, Issue 3, Pp. 541 – 559. Available at www.academia.edu, accessed February 27, 2013.

29 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082, at 124 (October 24, 1970).

30 Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, para. 126.

South Sudan's path to independence followed from the legal regime established under the Comprehensive Peace Agreement.³¹ The Comprehensive Peace Agreement resulted from the efforts of the regional peace initiative to end the civil war.³² The Comprehensive Peace Agreement is comprised of texts of previously signed agreements and protocols.³³

The Machakos Protocol specified "that the people of South Sudan have the right to self-determination . . . through a referendum to determine their future status."³⁴ The Machakos Protocol further established a six-year interim period at the conclusion of which the internationally monitored referendum would take place.³⁵ The parties later also agreed on the implementation modalities of the permanent ceasefire and security arrangement.³⁶ This agreement not only made references to self-determination and the independence referendum but also regulated technical details pertaining to South Sudan's departure from the common state in case of a decision for independence.³⁷ After the adoption of the Comprehensive Peace Agreement, Sudan promulgated a new interim constitution that granted substantive autonomy to Southern Sudan.³⁸ The Constitution further specified that a referendum on the future status of Southern Sudan would be held six months before the end of the six year interim period.³⁹ The United Nations facilitated all these agreements and at the same time spearheaded the peacekeeping efforts in Sudan.

31 Comprehensive Peace Agreement Between the Gov't of the Republic of Sudan and the Sudan People's Liberation Army, January 9, 2005, <http://www.sd.undp.org/doc/CPA.pdf>.

32 The signing of the Agreement was witnessed by African Union, Egypt, European Union, Inter-Governmental Authority on Development, Italy, Kenya, League of Arab States, Netherlands, Norway, Uganda, United Kingdom, United Nations, United States.

33 These were: the Machakos Protocol (July 20, 2002), the Protocol on Power Sharing (May 26, 2004), the Agreement on Wealth Sharing (January 7, 2004), the Protocol on the Resolution of the Conflict in Abyei Area (May 26, 2004), the Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States (May 26, 2004), the Agreement on Security Arrangements (September 25, 2003), the Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices (December 31, 2004), and the Implementation Modalities and Global Implementation Matrix and Appendices (December 31, 2004).

34 Article 1.3, Machakos Protocol, July 20, 2002, *in* Comprehensive Peace Agreement, *supra* note 17.

35 *Ibid.*, art. 2.5. The six-year period started at the time of conclusion of the Comprehensive Peace Agreement.

36 *See* Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities, G.O.S.-S.P.L.M/S.P.L.A., Dec. 31, 2004, *in* Comprehensive Peace Agreement, *supra* note 17.

37 *Ibid.*, articles 17.8, 20.1, 20.2, 21.2.

38 Article 2, Interim National Constitution of the Republic of Sudan, July 6, 2005,

39 *Ibid.*, article 222(1).

To intensify the peace efforts and build on the momentum of the progress made by the signing of the Agreement on Wealth Sharing⁴⁰ and the Protocol on Power Sharing⁴¹ at the talks held in the Kenyan city of Naivasha, the United Nations Security Council, on the recommendation of the Secretary-General, established a special political mission—the United Nations Advance Mission in the Sudan (UNAMIS).⁴² UNAMIS was mandated to facilitate contacts with the parties concerned and to prepare for the introduction of an envisaged United Nations peace support operation.⁴³

On January 31, 2005, 22 days after the signing of the Comprehensive Peace Agreement in Nairobi, the United Nations Secretary-General recommended to the Security Council the deployment of a multi-dimensional peace support operation, consisting of up to 10,000 military personnel and an appropriate civilian component, including more than 700 police officers.

The United Nations Mission in the Sudan had their components focusing on four broad areas of engagement.⁴⁴ As UNAMIS, the Mission would be dealing with a broad range of issues; the Secretary-General stressed the importance of a joint, integrated strategy among the UN agencies, funds and programmes in order to successfully implement the Comprehensive Peace Agreement.

The referendum question was initially indicated in the Interim Constitution by providing that the people of Southern Sudan would either “(a) confirm unity of the Sudan by voting to sustain the system of government established under the Comprehensive Peace Agreement and this Constitution, or (b) vote for secession.”⁴⁵ The referendum rules were subsequently specified by the Southern Sudan Referendum Act on

40 *Loc. Cit.*, note 19.

41 *Loc. Cit.*, note 19.

42 See the Security Council resolution 1547 (2004) of June 11 2004.

43 The Secretary-General then appointed Jan Pronk as his Special Representative for the Sudan and head of UNAMIS, who led United Nations peace making support to the IGAD-mediated talks on the North-South conflict, as well as to the African Union-mediated talks on the conflict in Darfur, a region in the western part of the Sudan.

44 Those areas of engagements include good offices and political support for the peace process; security; governance; and humanitarian and development assistance.

45 Article 222 (2), Interim National Constitution of the Republic of Sudan, July 6, 2005,

December 31, 2009.⁴⁶ The Act repeats the general references to self-determination and the independence referendum, which were previously invoked in the Comprehensive Peace Agreement and the Constitution. It further repeats the referendum choice provided for by the Constitution, that is, either “confirmation of the unity of the Sudan by sustaining the form of government established by the Comprehensive Peace Agreement and the Constitution, or . . . secession.”⁴⁷ Article 41 of the Act specified the referendum rules and made specific provisions for the required quorum as well as the winning majority:

(2) The Southern Sudan Referendum shall be considered legal if at least (60%) of the registered voters cast their votes.

(3) The referendum results shall be in favour of the option that secures a simple majority (50% +1) of the total number of votes cast for one of the two options, either to confirm the unity of the Sudan by maintaining the system of government established by the Comprehensive Peace Agreement or to secede.⁴⁸

The referendum ballot was clear and simple; in accordance with the Constitution and the Southern Sudan Referendum Act, it provided for two options: “unity” or “secession.”⁷³ The referendum rules were thus clear in terms of both the question and the winning majority. Moreover, Article 66 of the Southern Sudan Referendum Act specified that the referendum decision would be binding: The option approved by the people of Southern Sudan by a majority of 50% + 1 of valid votes cast in the referendum in accordance with the present Act, shall supersede any other legislation and shall be binding to all the State bodies as well all citizens of Southern and Northern Sudan. At a referendum held between January 9 and 15, 2011, the option for secession was given the overwhelming support of 98.83%, at a turnout of 97.58%. South Sudan declared independence on July 9, 2011. International recognition followed promptly, and on July 14, 2011, South Sudan became a member of the United Nations.⁴⁹ South Sudan’s path to independence was marked by a lengthy civil war, atrocities, and a grave humanitarian

⁴⁶ The Southern Sudan Referendum Act (2009, trans. 2010). Available at <http://saycsd.org/doc/SouthernSudan>, accessed on January 15, 2013.

⁴⁷ *Ibid.*, articles. 4–5.

⁴⁸ *Ibid.*, articles. 41.

⁴⁹ G.A. Res. 65/308, U.N. Doc. A/RES/65/308 (July 14, 2011).

situation. However, these circumstances did not create a right to independence under international law.⁵⁰

In terms of international law, South Sudan did not become an independent state until the central government formally agreed to hold a binding referendum on independence at which secession was supported by an overwhelming majority. Unlike the example of Kosovo, South Sudan is a state created with the approval of the parent state. The mechanism for secession was rooted in the 2005 Comprehensive Peace Agreement and the constitutional arrangement that resulted from this agreement. South Sudan is thus a rare example of a right to independence being exercised under domestic constitutional provisions. Its example further affirms that such constitutional provisions tend to be implemented exceptionally, as a political compromise and an interim solution aimed at peaceful settlement of the contested entity's legal status.⁵¹

The Sudanese authorities were responsible for the referendum process. In a statement issued by the Security Council President in New York on 6 January 2011, members of the Security Council said that they “welcome the Sudanese parties’ reaffirmation of their commitment to full and timely implementation of the Comprehensive Peace Agreement (CPA), including their commitment to respect the outcome of the southern Sudan referendum, and appreciate, in this regard, the statements by President Omar al Bashir during his visit to Juba on 4 January 2011 and by Vice-President Salva Kiir in his 3 January 2011 New Year message. The members of the Council reaffirm full support for the efforts of the parties.” The members of the Security Council further welcomed “the progress made towards the holding of a peaceful and credible southern Sudan referendum that reflects the will of the people and commend in particular the work of the Southern Sudan Referendum Commission.”⁵²

⁵⁰ In any event, it can be said that decades of violence and oppression created political circumstances in which Sudan accepted South Sudanese independence. Secession still was not an entitlement under international law; it clearly followed from domestic constitutional provisions.

⁵¹ See generally, Vidmar J., “South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States”, *Texas International Law Journal*, Vol. 47, Issue 3, Pp. 541 – 559. Available at www.academia.edu, accessed February 27, 2013.

⁵² See Sudan Referendum Fact Sheet, January 7, 2013. Available at <http://www.unrec.org/eng/conflicts/sudan.htm>, accessed on February 27, 2013.

Under the leadership of the Secretary-General, the United Nations provided technical and logistical assistance to the Comprehensive Peace Agreement parties' referendum preparations through support from its peacekeeping missions on the ground in Sudan, as well as the good offices function provided by the Secretary-General's panel aimed at ensuring the impartiality, independence and effectiveness of the process, and by the United Nations Integrated Referenda and Electoral Division (UNIRED). During the week of polling, the United Nations Secretary General's three members Panel⁵³ visited referendum centres in eight states, and the Panel's staff monitored the process in all Southern states and across the North.

Nearly 340 UNIRED staff (two-thirds of them were UN Volunteers) worked to support the South Sudan Referendum Commission (SSRC) at the headquarters and Juba levels, as well as at the state and county levels in southern Sudan, and in five areas⁵⁴ in the North where there are concentrations of southern Sudanese. The UN, in cooperation with its international partners, also provided other financial and logistical support to the referendum process.⁵⁵ The UN used its air assets to transport materials to and from remote and isolated referendum centres. Distribution of materials was a key challenge to the SSRC given the size of the country and the lack of infrastructure in some areas. UNIRED provided assistance by distributing referendum materials from Khartoum and Juba to the state capitals and onwards to the county level in Southern Sudan. In Southern Sudan, 1.2 million kg of materials⁵⁶ were delivered via domestic flights funded by the UN Development Programme. During the referendum process, UNMIS flights delivered some 30,000 kgs of material to 50 remote drop-off points serving 473 referendum centres in southern Sudan.⁵⁷ UN Police serving with UNMIS trained thousands of Sudanese police throughout the country on

53 The Panel was comprised of Benjamin Mkapa, a former President of Tanzania; António Monteiro, a former Minister of Foreign Affairs of Portugal; and Bhojraj Pokharel, a former Chairman of the Election Commission of Nepal.

54 Those areas included Khartoum, Kassala, El Fasher, Kadugli, and Ed Damazin.

55 The support included procurement and transportation of registration and polling kits, registration books and cards, training materials, voter education material, office furniture and equipment, and vehicles (including cars and motorbikes) throughout Sudan.

56 The materials included voter education posters, stationery, IT equipment, manuals, training kits, polling materials.

57 See Sudan Referendum Fact Sheet, January 7, 2013. Available at <http://unmis.unmissions.org/>, accessed on February 27, 2013.

referendum security.⁵⁸ UN Police also served on referendum security committees to provide advice and support to the Sudanese police.⁵⁹

It was only on May 31 2011, that the UN Secretary-General transmitted a letter from the Government of Sudan to the Security Council announcing the Government of Sudan's decision to terminate the presence of UNMIS as of July 9, 2011.⁶⁰ Then on the said July 9, 2011, the mandate of the United Nations Mission in Sudan (UNMIS) ended following the completion of the six-and-a-half-year interim period set up by the Government of Sudan and Sudan People's Liberation Movement during the signing of the Comprehensive Peace Agreement on January 9 2005.

5. Examining Self Determination as a Tool for the Protection of Human Right

The principle of self-determination is prominently embodied in Article I of the Charter of the United Nations. Earlier it was explicitly embraced by United States President Woodrow Wilson, by Lenin and others, and became the guiding principle for the reconstruction of Europe following World War I. The principle was incorporated into the 1941 Atlantic Charter and the Dumbarton Oaks proposals which evolved into the United Nations Charter. Its inclusion in the United Nations Charter marks the universal recognition of the principle as fundamental to the maintenance of friendly relations and peace among states. It is recognized as a right of all peoples in the first article common to the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966, which both entered into force in 1976.⁶¹

The right to self-determination of peoples is recognized in many other international⁶² and regional⁶³ instruments. It has been affirmed by

58 17,600 officers in Southern Sudan and 4,500 in Northern Sudan were trained.

59 Sudan Referendum Fact Sheet, January 7, 2013, *op. cit.*, note 51.

60 S/2011/333.

61 Paragraph 1 of this common Article provides that all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

62 Such as the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States adopted by the UN General Assembly in 1970

the International Court of Justice in the *Western Sahara case*⁶⁴ and the *East Timor case*⁶⁵, in which its *erga omnes* character was confirmed. Furthermore, the scope and content of the right to self-determination has been elaborated upon by the United Nations Human Rights Committee and the Committee on the Elimination of Racial Discrimination. The inclusion of the right to self-determination in the International Covenants on Human Rights and in the Vienna Declaration and Programme of Action, referred to above, emphasizes that self-determination is an integral part of human rights law which has a universal application.⁶⁶ At the same time, it is recognized that compliance with the right of self-determination is a fundamental condition for the enjoyment of other human rights and fundamental freedoms, be they civil, political, economic, social or cultural. The interrelatedness of individual human rights and the collective right of a people to self-determination are clear to the people involved in struggles for self-determination. In most cases, the individual human rights abuses are a consequence or a symptom of a more fundamental problem, often a conflict over the exercise of self-determination. Those abuses are unlikely to end until the underlying cause is addressed.⁶⁷ The United Nations has called the right to self-determination a prerequisite to the enjoyment of all other human rights. To separate the two issues is, therefore, artificial and not helpful.⁶⁸ This interrelatedness is also clear with respect to the practice of population transfer, which often violates the human rights of peoples transferred but also of the people into whose

63 Such as the Helsinki Final Act adopted by the Conference on Security and Co-operation in Europe in 1975, the African Charter of Human and Peoples' Rights of 1981, the Conference on Security and Co-operation in Europe Charter of Paris for a New Europe adopted in 1990.

64 (1975) I.C.J. Rep.12

65 (1995) I.C.J. Rep. 90.

66 That the right to self-determination is part of so called hard law has been affirmed also by the International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples brought together by UNESCO from 1985 to 1991. It came to the conclusion that (1) peoples' rights are recognized in international law; (2) the list of such rights is not very clear, but also that (3) hard law does in any event include the right to self-determination and the right to existence, in the sense of the Genocide Convention.

67 In South Africa, for example, most human rights abuses were the direct result of the apartheid system which denies the Black people of the country their right to self-determination. In Tibet and East Timor, authorities arrest and/or torture individuals and terrorize others because of their support of the struggle for independence.

68 See Self-Determination in Relation to Individual Human Rights, Democracy and the Protection of the Environment, Conference Report of Unrepresented Nations and Peoples Organisation International Conference, The Hague (1993) Pp. 12 – 13. Available at www.unpo.org, accessed on February 27, 2013.

territories settlers are being transferred.⁶⁹ Population transfer not only violates human rights in this manner, the practice also undermines the right to self-determination, and by intentionally manipulating and changing the demographic composition of the territory whose indigenous people claim the right to self-determination. Individual human rights and the group rights of minorities, religious groups etc. are closely linked to the right to self-determination in other ways also.⁷⁰ This principle of the equal right of self-determination of all peoples and the need to protect all minorities, is enshrined in the Unrepresented Nations and Peoples Organisation Covenant, 1991.⁷¹

Similarly, a recognition of a people's right and ability to act as a separate entity entails also an obligation of that entity to respect universal norms of human rights of the individuals under its authority. The right to self-determination though is a collective right which belongs to a whole people, is also a right possessed by the individual belonging to that people. A violation of the right of the people, is therefore a violation of the individual's right also.⁷²

6. Recommendation/Conclusion

A people can be said to have realised its right to self-determination when they have either (1) established a sovereign and independent state; (2) freely associated with another state or (3) integrated with another state after freely having expressed their will to do so. This is, however, meaningless if external intervention pervades. Thus, the right of self-determination puts upon states not just the duty to respect and promote the right, but also the obligation to refrain from any forcible action which deprives peoples of the enjoyment of such a right. In particular, the use of force to prevent a people from exercising their right of self-determination is regarded as illegal and has been consistently condemned by the international community. The obligations

69 See Human Rights Dimensions of Population Transfer, Conference Report of Unrepresented Nations and Peoples Organisation International Conference, The Hague (1992) P.2. Available at www.unpo.org, accessed on February 27, 2013.

70 For example, if a people claims the right to self-determination for itself, it should recognize the same right to other peoples, even if they share the same state.

71 See the preamble and article 5 of the Unrepresented Nations and Peoples Organisation Covenant, 1991.

72 In this context, it even be stressed that women's rights are equal to those of men, although women are rarely given the same opportunity to exercise their rights to the fullest.

flowing from the principle of self-determination have been recognised as *erga omnes*, namely existing towards the whole international community.

The concept of self-determination is a very powerful one. As Wolfgang Danspeckgruber puts it: "No other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and hopes as self-determination." It evokes emotions, expectations and fears which often lead to conflict and bloodshed. Some experts argued that the title holders should be or are limited in international law. Others believed in the need to limit the possible outcome for all or categories of title holders. Ultimately, the best approach is to view the right to self-determination in its broad sense, as a process providing a wide range of possible outcomes dependent on the situations, needs, interests and conditions of concerned parties. The principle and fundamental right to self-determination of all peoples is firmly established in international law. It would be mutually beneficial for states, claimant peoples and all others whose rights are engaged by a self-determination claim if states were to recognise the capacity of the human rights approach to transform their relationship to the concept of self-determination. With the development of human rights cultures in domestic settings, international legal standards on self-determination and human rights bear greatly enhanced positive potential.

In sum, "National aspirations must be respected; people may now be dominated and governed only by their own consent. Self-determination is not a mere phrase; it is an imperative principle of action. . . ." ⁷³ By extension the term self-determination has come to mean the free choice of one's own acts without external compulsion. All peoples have the right to self-determination. By virtue of that right they shall determine their political status and freely pursue their economic, social and cultural development. ⁷⁴

73 Woodrow Wilson in his famous self-determination speech on February 11, 1918 after he announced his Fourteen Points on January 8, 1918.

74 The Supreme Court of Canada in the Quebec Case [1998] 2 S.C.R. 217, para. 126, held that the recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.

CARTELS VIS-À-VIS COMPETITION LAW: JUDICIAL ANALYSIS

*Dr. R. Y. Naidu**

Introduction:

Cartel is a formal or informal agreement among number of firms in an industry to restrict competition. These agreements may provide for setting minimum prices, setting limits on output or capacity, restrictions on non-price competition, division of markets between firms either geographically or in terms of type of product, or agreed measures to restrict entry to the industry to create a monopoly in a given industry. Usually cartels involve an agreement between business men not to compete with one another and they can occur in any industry and can involve goods or services at the manufacturing, distribution or retail level.¹In this process, industries form combinations of this type to control sales and prices. These restraints are also known as anti-competitive, anti-trust, monopolies, trade combinations, restrictive trade practices, restraint of trade or competition law.

Generally cartels are formed by the industrial undertakings in the same line of business. The basic characteristic of cartel is that the combining enterprises concentrate on production according to the limits of output fixed by the cartel keeping in view the market conditions and to restrain or regulate the distribution of output for maintaining returns or the selling price of certain commodities by restrictive trade or marketing practices. Such trade combinations are used to be challenged in the courts on the ground that they are unlawful conspiracies as these agreements between firms have the potential of restricting competition. Business Houses encourage cartels because there are numerous advantages but law discourages cartels as they are presumed to be against public interest.

* Associate Professor of Law, Andhra University, Visakhapatnam

1 Each of the agreement is prohibited by the Competition Act 1998 in UK and Article 81 of the Treaty of Rome. In addition the Enterprise Act 2000 makes it a criminal offence for individuals dishonestly to take part in certain specified cartels, essentially those that involve price fixing, market sharing, limitation of production or supply, or bid rigging.

Historical perspective of cartels:

The practice of cartels or business combinations has so much historical importance. Combinations are common and they fall into two main categories; those concerned with the regulation of terms of employment,(service cartels) and those concerned with the regulation of trading terms and conditions(trade cartels). In both cases the law relating to such combinations is closely associated with that of conspiracy.²The history in brief about the cartels is legislation in England to control monopolies and restrictive practices were in force well before the Norman Conquest.³ In 1561 a system of Industrial Monopoly Licenses, similar to modern patents had been introduced into England. But by the reign of Queen Elizabeth I, the system was much abused and used merely to preserve privileges, encouraging nothing new in the way of innovation or manufacture.⁴ Three characteristics of monopoly were identified by the court and these are (1) price increases (2) quality decrease (3) the tendency to reduce artificers to idleness and beggary. In 1623 Parliament passed the Statute of Monopolies, which for the most part excluded patent rights from its prohibitions, as well as guilds.⁵

Modern Anti-trust law begins with the United States legislation of the Sherman Act of 1890 and the Clayton Act of 1914. The American term 'anti-trust' arose not because the US statutes had anything

2 By the beginning of the nineteenth century the individual was made free to contract as to the terms of his employment and establishing his right to associate for the purpose. Not only that, the concept of 'collective bargaining' has become the order of the day in labour management relations and significantly the restrictive practices in this field have reached immense proportions.

3 The Domesday Book recorded that fore steel i.e. forestalling, the practice of buying up goods before they reach market and then inflating the prices, was one of three forfeitures that King Edward the Confessor, and could carry out through England. But concern for fair prices also led to attempts to directly regulate the market. Under Henry III, an Act was passed in 1266 to fix bread and ale prices in correspondence with corn prices. A fourteenth century statute labeled forestallers as oppressors of the poor and the community at large and enemies of the whole country. Under King Edward III the Statute of Laborers 1349 fixed wages of artificers and workmen and decreed that foodstuffs should be sold at reasonable prices. Around the 15th century Europe was changing fast. The new world had just been opened up, overseas trade and plunder, was pouring wealth through the international economy and attitudes among businessmen were shifting.

4 When a protest was made in the House of Commons and a Bill was introduced, the Queen convinced the protesters to challenge the case in the courts. This was the catalyst for the Case of Monopolies or Darcy v. Allen. The plaintiff, an officer of the Queen's household, had been granted the sole right of making playing cards and claimed damages for the defendant's infringement of this right.

5 From King Charles I to King Charles II monopolies continued, especially useful for raising revenue. Then, in 1684, in *East India Company v. Sandy's* it was decided that exclusive rights to trade only outside the realm were legitimate on the grounds that only large and powerful concerns could trade in the conditions prevailing overseas. In 1710 the New Law was passed to deal with high coal prices caused by a Newcastle Coal Monopoly.

to do with ordinary trust law but because the large American corporations used trusts to conceal the nature of their business arrangements. Big trusts became synonymous with big monopolies. The perceived threat to democracy and the free market from these trusts led to the passing of Sherman and Clayton Acts. These laws, in part, codified part of American and English common law of restraints of trade.⁶ However, recently there has been a wave of updates especially in Europe to harmonise legislation with contemporary competition law thinking. The European Community has seen healthy competition as an essential element in the creation of a common market free from restraints on trade. In accordance with this many countries enacted competition laws and for example Competition Act 1998 was passed by England and Competition Act 2002 was passed by India.

The problems of these cartel agreements were succinctly expressed by Adam Smith long back as "A monopoly granted either to an individual or to a trading company has the same effect as a secret in trade or manufactures. The monopolists, by keeping the market constantly under-stocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural rate."⁷ He also pointed out that "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary."⁸ By the latter half of the nineteenth century it had become clear that large firms had become a fact of the market economy.⁹

6 Evidence of the common law basis of the Sherman and Clayton Acts is found in the Standard Oil case, where Chief Justice White explicitly linked the Sherman Act with the common law and sixteenth century English statutes on engrossing. As the Sherman Act did not have the immediate effects its authors intended, the Clayton Act of 1914 was passed to supplement the Sherman Act. It was after the First World War, Countries began to follow the United States' lead competition policy. After World War II, the Allies, led by the United States, introduced tight regulation of cartels and monopolies. The United Kingdom introduced the Restrictive Practices Act in 1956.

7 Smith (1776) Book 1, Chapter 7 Para 26

8 Ibid Chapter 10 Para 82 Smith also rejected the very existence of corporations, not just dominant and abusive corporations.

9 Ibid Chapter 5 Para 107

John Stuart Mill observed "Again, trade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society... both the cheapness and the good quality of commodities are most effectually provided for by leaving the producers and sellers perfectly free, under the sole check of equal freedom to the buyers for supplying themselves elsewhere. This is the so-called doctrine of Free Trade, which rests on grounds different from, though equally solid with, the principle of individual liberty. Restrictions on trade, or on production for purposes of trade, are indeed restraints; and all restraint, qua restraint, is an evil."¹⁰ Bork argued that both the original intention of anti-trust laws and economic efficiency was the pursuit, only of consumer welfare, the protection of competition rather than competitors.¹¹ The common theme is that government interference in the operation of free markets does more harm than good.

Cartels: Business Organisations

Business organisations frequently enter into agreements to regulate the production and marketing of the commodities manufactured by them and also to maintain prices and standards in relation to those commodities. Most laws make a distinction between horizontal cartel and vertical cartel agreements between firms. Horizontal agreements refer to agreements among competitors and vertical agreements refer to agreements relating to an actual or potential relationship of buying or selling to each other. A distinction is also drawn between cartels-a special type of horizontal agreements- and horizontal agreements; other horizontal agreements and vertical agreements; vertical agreements between firms in a position of dominance and other vertical agreements. A distinction should also be made between illegal practice of price cartelization and price leadership. The illegal price cartelization should

10 Mill: Treatise on Liberty (1859) Chapter V Para 4 When only one or a few firms exist in the market, there is no credible threat of the entry of competing firms. Hence, prices rise above the competitive level either to a monopolistic or oligopolistic equilibrium price. Production is also decreased resulting in decreasing social welfare. Sources of this market power are said to include the existence of externalities, barriers to entry of the market, and the free rider problem. Markets may fail to be efficient for a variety of reasons, so the exception of intervention of competition laws to the rule of laissez faire is justified.

11 Bork Robert H.: The Anti-trust Paradox: (1978) New York Press p. 405 Hence, only a few acts should be prohibited, namely cartels that fix prices and divide markets, mergers that create monopolies, and dominant firms pricing predatorily, while allowing such practices as vertical agreements and price discrimination on the grounds that it did not harm consumers.

be curbed and punished whereas a perfectly legitimate economic and business behavior of a competitor in price cartelization should be exempted.

Horizontal agreements are agreements between two or more enterprises that are at the same stage of the production chain and in the same market. In law the following kinds of horizontal agreements are often presumed to be anti-competitive. These are: agreements regarding prices; agreements regarding quantities; agreements regarding bids; agreements regarding market sharing. The presumption is that such horizontal agreements and membership of cartels lead to unreasonable restrictions of competition and may be presumed to have an appreciable adverse effect on competition. Vertical agreements on the other hand are agreements between enterprises that are at different stages or levels of the production chain in different markets; this would be an agreement between producer and a distributor. Vertical restraints on competition include tie in arrangements; exclusive supply agreements; exclusive distribution agreements; refusal to deal; resale price maintenance. Generally vertical agreements are treated more leniently than horizontal agreements as these are slightly reduce competition than agreements between firms in a buyer-seller relationship. These are like all other agreements in restraint of trade, prima-facie void at common law but combinations not amounting to contracts in restraint of trade are lawful as every individual has the right of combining with others in a common course of action.

There is another view that there should be competition and at the same time there should not be ruinous competition among the enterprises and the doctrine of restraint of trade should not be employed in the suppression of cartels because a cartel agreement would come before the courts only on the failure of the parties to perform it. The Privy Council while accepting the ruinous competition argument, said "it can never ... be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss or that any profit they make should depend on the miners' wages being reduced to a minimum... Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. The consumers of coal will be affected in the long

run and the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is, in this respect... of interest between all members of the public.”¹²

Public interest was considered paramount importance and hence, the natural and necessary consequences of the contract of combination or monopoly or attempt to monopolise are the evils in fact ensured. The courts in England virtually not excluded the possibility of holding a case ‘contrary to the public interest’ if it was calculated to produce a pernicious monopoly, i.e. a monopoly created to enhance prices to an unreasonable extent.¹³ Conclusion of a contract with conditions to regulate price or output can be a restriction on economic freedom.¹⁴

The trading freedom of a member of society in trade combinations was discussed in many cases but it was held that an attempt to eliminate competition altogether was void.¹⁵ However, the real interest to be consulted in such agreements is that of the public because present century economic theory demanded an attitude of neutrality to a free play of economic forces. The position adopted by the

12 Att. Gen. of Common Wealth of Australia v. Adelaide Steamship Co. (1913) A.C. 781 at pp. 809,810 The economic fallacy of this argument was highlighted in this case is this : “granted the oversupply of coal due to the opening up of the Maitland field, the most satisfactory way of reducing the excess capacity from the point of view both of prices to the consumer and the allocation of capital, was to continue competition to the point where the highest-cost producers to make fair profit; but the sale agreement adopted by the colliery owners and approved by the privy council, kept all the collieries in operation and ensured excessive profits to the low-cost producers; thus both keeping prices above their natural level and working capital.” William H. Good Hart: The Yarn Spinners’ case and the Sherman Anti-Trust Act L Q R Vol. 75. 253at pp. 260,261

13 Att. Gen of Common Wealth of Australia v. Adelaide Steamship co 1913) A.C. 781 at p. 796. The court observed “The whole subject may someday have to be reconsidered; there is at present growth for assuming that a contract in restraint of trade, though reasonable in the interest of the public if calculated to produce that state of things which is a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unseasonable extent --- the monopolies in the popular sense of the word are more likely to arise, and if they do arise, are more likely to lead to prices being unreasonably enhanced in countries where a protection tariff prevails than in countries which there is no such tariff.”

14 Evans (J) & Co v. Heath Cote (1918) 1 K.B. 418.Scrutton L.J. held that the plaintiff was bound not to sell except to five named firms, which were under no obligation to buy from him and the plaintiff had no power to withdraw from the agreement. In this case the court was ready to apply the principle of contrary to public interest against such an insignificant agreement which of course had been beneficial as between the parties themselves. However, this decision was later reversed on Appeal but with no unanimity thus, evidencing judicial conflict on the point with almost equal force.

15 Mc Ellistram v. Ballymacelligott Co-operative Agriculture and Dairy Society Ltd (1919) AC 548.It was held that if a member joined the society young enough and lived long enough, would be precluded for a period of sixty years or more from selling his milk in the market; this arrangement was unreasonable between the parties because the society was not entitled to impose a lifelong embargo upon the trading freedom of its members though it was entitled to protection to ensure stability in the supply of milk. In this case it was found that the obligation of a member to allocate all his milk to the society was for his life, subject to obtain the sanction of the committee to a transfer of his shares which is a very difficult one.

common law sometimes has been regarded cartels as being not injurious to the public and in some cases even as positively beneficial.

Trade combination agreements are in most cases freely negotiated and they are entered into for the purpose of avoiding undue competitions and carrying on trade without excessive fluctuations or uncertainty.¹⁶ The courts are not sympathetic to a trader entered into a restrictive agreement with other traders and attempts to escape from his obligation on the plea that he has imposed an unreasonable burden upon himself.¹⁷

In Cartel agreements the parties can be regarded as the best judges of what is reasonable between them. The reasonableness depends on the concept of equality of the members of the combination. When a person has to preclude himself from earning his living without choice, the law will not take equality principle; but in the case of commercial agreements entered into between two firms or companies for regulating their trade relations, the law adopts a somewhat different attitude. In such cases the courts' prime consideration is the interest of the public.¹⁸ The same principle would apply where the restraint was contained in a contract between employers which indirectly prejudiced their employees' opportunities of finding work.¹⁹ It is now well settled that the courts will view restraints seriously which are imposed between equal contracting parties for the purpose of avoiding drastic competition and carrying on trade without excessive fluctuations and uncertainties.²⁰ Generally, the court will always protect the public from the creation of

16 *Bartley and District Co-operative Society Ltd. v. Windy Nook and District Industrial Co-operative society Ltd.* (1960) 2 Q.B.1 In this case it was held that the co-operative society Ltd. was simply a combination of traders. Hence, the court cannot say that these agreements are unreasonable between the parties and infact; the courts can say that they are unreasonable if such agreement contains no provision for voluntary withdrawal.

17 *English Hop growers v. Dering* (1928) 2 K.B. 174. This plea sounds peculiarly ill in the mouth of a man of business who has negotiated on an equal footing with the other members of the combination. If the restraint is reasonable in the interests of the parties it will be enforceable though it involved some injury to the public; See *Attorney General of Australia v. Adelaide Steamship Co.* (1913) AC 781 at p. 796 per Lord Parker

18 *North Western Salt Co. v. Electrolytic Alkali Co. Ltd* (1914) A.C. 461 at p. 471.

19 *Kores Manufacturing Co. Ltd v. Kolok Manufacturing Ltd.* (1959) Ch. 108.

20 *English Hop growers v. Dering* (1928) 2K.B 174 at pp. 180,181. However, Scrutton L.J. clarified that there was nothing unreasonable in Hop growers combining to secure a steady and profitable price, by eliminating competition amongst themselves, and putting the marketing in the hands of an agent with full power to fix prices and hold up supplies; the benefit and loss being divided amongst the members.

monopoly by a combination of buyers or sellers.²¹

These approaches led to number of actions which have arisen out of agreements with in a particular trade or industry, where the parties agreed to observe a certain price or a production quota, or to form a pool or to employ one or other of the many methods adopted in modern economic life in the common interest. However, these actions are purely contractual, and some court decisions highlighted a definite movement from the protection of individual economic freedom to the legitimate purposes of group control. But, it is difficult to follow a particular line because the decisions avoid any conscious appreciation of the social and economic issues involved and contain haphazard and improvised excursions in the economic theory.²²

Recently due to globalization Competition Act 1998 was enacted in England and many countries followed the same and India is one among them. These enactments intended for promoting competition in the interest of consumer welfare differentiating public interest from consumer welfare. Often consumer interest and public interest are considered synonymous. But they are not and need to be distinguished. In the name of public interest many governmental policies are formulated which are either anti-competitive in nature or which manifest themselves in anti-competitive behavior. If the consumer is at the fulcrum, consumer interest and consumer welfare should have primacy in all governmental policy formulations. Consumer is a member of a broad class of people who purchase, use, maintain and dispose of products and services. Consumers are affected by pricing policies financing practices quality of goods and services and various trade practices. They are clearly distinguishable from manufacturers who produce goods and whole sellers or retailers who sells goods.

Public interest on the other hand is something in which society as a whole has some interest not fully captured by a competitive market. It is an externality. However, there is a justifiable apprehension that in the name of public interest governmental policies may be fashioned and introduced which may not be in the ultimate interest of the consumers.

21 *ibid* at p. 185. Per Sankey. L.J the courts have to consider not only the interests of the contracting parties but also the interests of the public and the public interests always susceptible to influences of current views of public policy.

22 *Bellshill & Mossend Co-operative Society V Dalziel Co-operative Society* (1960) AC. 832

The asymmetry arises from the fact that all producers are consumers but all consumers are not producers as well. What is desirable for them in one capacity may be inimical in the other capacity. In general it can be stated that buyers want competition and sellers monopoly. The economists say that in a society there are too many such divergent interests and therefore the resolution is best left to markets without government intervention. They are all too conscious of the possibility of abuse of the expression public interest by vested interests.

In many cases public interest may be significantly divided and what might consider clearly in the public interest by one party may be seen as less important by another. The complexity of the public interest approach to competition policy may produce significant tension between different stake holders. Implementation of competition policy to serve different interest groups may not be conducive to maintaining or promoting effective competition. In other words though the public interest approach to competition policy permits the consideration and balancing of different economic, social and political objectives the independence with which the policy can be administered can easily become constrained.

Hard core cartel behaviour between competitors is the most serious form of anti-competitive behaviour. Two sets of competition rules apply in parallel in the United Kingdom. Anti-competition behaviour which may affect trade within the UK is specially prohibited by chapters I and II of the Competition Act 1998 and Enterprise Act 2002. Article 81 and 82 of the European Community Treaty prohibited the anti- competitive behaviour extends beyond UK to other European Union member States. Both UK and EC competition law prohibit agreements and concerted business practices which appreciably prevent, restrict or distort competition or have the intention of so doing and which affect trade in the UK or the EC. The Enterprise Act 2002 is a major milestone in the development of competition and consumer law.²³

23 The Act building on previous legislations creates a clearer and sharper frame work for markets and enterprise. Markets that work well are good for consumers and all the fair-dealing businesses that serve them well. The market inquiry regime in the UK is a powerful instrument which enables competition issues to be examined in a way that does not require the focus to be exclusively on the conduct of the market players. It needs to be applied with a proper sense of the general application of Articles 81 and 82 by authorities throughout the EU and the need to pursue a common competition objective. There is plenty left for national authorities like Competition Commission to do and plenty of scope for application of national competition law in UK. (Peter Freeman, UK Competition Law after Modernisation; Lord Fletcher Lecture 15th March 2005)

Cartels: Labour and Services Associations

Agreements between workers binding them to regulate their work in accordance with the decision of some outside body or otherwise, containing the free right to dispose of labour are, at common law, subject to the doctrine of restraint of trade. This is based upon the same principles of agreements between employers to regulate the acquisition of labour.²⁴ However, Scrutton L.J. stated “I take the Mogul case as deciding that a combination to do acts, the natural consequences of which was to injure another in his business, was not actionable if those acts were not otherwise unlawful such as assaults or threats of assault, and were done in furtherance of the trade interests of those combining. I understand *Quinn v. Leatham* to decide that a combination to injure another in his trade and business, but not in furtherance of the trade interests of those combining, but out of spite against a person injured is actionable.”²⁵ Where the predominant purpose of the combination was the legitimate promotion of the interests of the persons combining and since the means employed were neither criminal nor tortuous in themselves, the combination was not unlawful.²⁶

A combination of two or more persons willfully to injure a man in his trade is unlawful and if it results in damage to him, is actionable and if the real purpose of the combination is not to injure another but to

24 *Hornby v. Close* (1867) L.R. 2Q.B. 153. A trade association which had a rule that no member should employ an employee who had left the service of another member until two years had elapsed from the end of his employment. Chitty J. struck down the rule as being in unreasonable restraint of trade because it could have the effect of preventing former employees of any member from finding new work with in the industry in which they were employees as the number of employers bound by the rule being so great. *Mineral Water bottle Exchange and Trade Protection Society v. Booth* (1887) 36 Ch.D. 465 (CA). An association which laid down regulations to be observed by the members there of, while carrying on their respective business were enforced among the members with certain amount of indirect coercion, although it was agreed that any member should be at liberty to withdraw from the association at any time on giving notice provided they were prepared to face the consequences of being a non-member. *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.* (1892) A.C. 25, at pp. 59, 60. Coleridge C.J in the court of first instance, while up holding a principle that a wrongful and malicious combination to ruin a man in his trade might be a ground for action, yet he held that the defendants had not crossed the line which separated the reasonable and legitimate selfishness of traders from wrong and malice. *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.* (1887) 21Q.B.D. 544. This decision was up held by the court of Appeal by a majority. Lord Esher M.R. however, dissented that it was indictable conspiracy (1889) 23 Q.B. 10 59 However, this decision was upheld unanimously by House of Lords.(1892) A.C. 25. It was the other way round in *Quinn v. Leatham* (1901) A. C. 495.

25 *Ware and de Freeville Ltd. V Motor trade Association* (1921) 3 K. B. 40, C.A.at p. 67 All these dicta thus, laid down through the series of cases dealt with, approved by the House of Lords again in *Crofter Hand Woven Harris's Tweed Co. vVeitch*(1942) AC 435 per Viscount Simon L.C. without structurally changing them to any noticeable extent.

26 *Ibid.*

forward or defend the trade of those who enter into it; then no wrong is committed and no action will lie, although damage to another ensues as propositions of law.²⁷ Where the manufacturers of similar products agreed that neither would employ any employee who had employed by the other over the preceding five years was in fact an indiscriminate attempt to prevent workers moving to higher paid jobs. It amounts to do indirectly what could not be done by direct covenant with individual employees.²⁸ Where the interference with the employee's interests by employers who attempted to regulate labour by imposing mutual restrictions upon the re-employment of former employees were struck down as being employer-employee covenants in disguise or as being contrary to the public interest.²⁹ The agreement might have improved the workers' right to offer their labour so as to obtain the best terms for themselves. Former colleagues could perhaps work for the covenanter so long as they took the initiative to seek employment with him. On the other hand, a non-recruitment covenant may affect the worker's position more seriously, as it prohibits their active recruitment by the potential employers with the best information about their skills.

Agreements between employers could be held in unreasonable restraint of trade because they produced results which would have been in unreasonable restraints between employer and employee.³⁰ Employees should be as entitled as the employers as the agreement affected them just as closely as the employers. Since the law considered their freedom to seek employment to be an important public interest it should encourage them to defend it and not to leave it's protection to the employers who had shown every intention of disregarding it.³¹

27 *Sorrel v Smith* (1925) AC 700 per Lord Cave L.C. The decision seems obviously right, not only from a legal point of view but also from the attitude of judicial neutrality towards economic groups struggling for enforcement of their economic aims in a state which has itself no active economic policy to a right, balance of strength between the contending groups, proprietors and retailers. G.M. Sen; *Freedom of contract and social change*: First edn. 1977 at pp. 186-188.

28 *Kores Manufacturing Co. Ltd. v Kolok Manufacturing Co. Ltd.* (1959) Ch. 108. Public policy cannot allow third parties to restrict by contract a person's freedom to work for whom he wish; however, that the governments' ban on employment was upheld by the courts in the interest of the nation John Tillstron; *Contract Law in perspective*: 2nd edn. at pp. 188-89.

29 *Kores Manufacturing Co. Ltd. v Kolok Manufacturing Co. Ltd.* (1959) Ch. 108. See also *Esso Petroleum Co. Ltd. v Harper's Garage (Stou Part) Ltd.* (1968) A.C. 269 at pp. 300, 319.

30 See the judgments of *Mineral Water Bottle Exchange and Trade Protection Society v Booth* (1887) 36 Ch.D.465 and *Kores Manufacturing Co. Ltd. v Kolok Manufacturing Co. Ltd.* (1959) Ch.108. These two cases however were between employers.

31 Some support for this view was derived from observations made in *Boulting v Association of Cinematograph, Television and Allied Technicians* (1963) 2 W.L.R. 529; See also notes by R.W. Ride out: *Trade Union Membership, The 1890 Style*: M.L.R. vol.26 p. 436. This principle does not conflict

The rules of the foot ball associations were also considered as agreement between employers, but they were considered to affect the employees' freedom of employment as if an agreement between employer and employee.³² The restraint of trade doctrine did apply to the 'retain and transfer system' operated by football clubs in relation to professional players and it was in unreasonable restraint of trade.³³ A similar decision was reached in *Greg v. Insole* and it was held that the cricket authorities had sufficient interest in the organisation of the game at test and county level to justify the imposition of reasonable restraints on the players.³⁴ The Common Law courts have held invalid a rule of the Jockey Club preventing a woman from holding a trainer's license.³⁵ A rule of the pharmaceutical society restricting the types of goods in which the members might deal was also held invalid.³⁶

Every professional body has its own ethical code which seeks, *inter alia*, to promote its welfare, interests and status. The rules or principles which aim at achieving these objectives very often involve restraint of trade. Can an ethical rule which is arbitrary and capricious be challenged on the ground that the doctrine of restraint of trade apply to professional bodies.³⁷ But it is questionable the basis upon which a person who is not a member of the relevant professional body and a party to the restrictive agreement can challenge it.³⁸ To what extent should the doctrine of restraint of trade be extended to professions which are not engaged in trade for example legal profession or medical professions? Restraint of trade doctrine would apply to all the rules and principles of professional bodies but, these restraints are justified either by preventing undesirable operations by the members or to protect them in their livelihood, and to prevent the public with whom they have to

with such cases as *Mogul S.S.Co.Vs Mc Gregor, Gow & Co.* (1892) A.C.25, which would at most prevent the plaintiff from recovering damages for conspiracy

32 *Eastham Vs New Castle United Foot Ball Club Ltd.* (1964) Ch. 413.

33 *Eastham Vs New Castle United Football Club Ltd.* (1964) Ch. 413 at P. 432.

34 *Greig v Insole* (1978) IWL R 302. At the same time it was also held that the restraint in question – a test and county ban on any player playing for the Parker organisation – was far too wide to be justified.

35 *Nagle v Fielden* (1966) 2 Q.B. 633

36 *Pharmaceutical Society of Great Britain v Dickson* (1970) AC 403. The doctrine may even apply to the rules of professional bodies where the members do not technically engage in trade.

37 *Pharmaceutical Society of Great Britain v Dickson* [1967] Ch. 708. The Court of Appeal dismissed this decision. The Court of first instance declared that such a rule would operate as an unjustified restraint of trade. The Courts have declared that they have jurisdiction to declare a rule invalid if it is arbitrary and capricious. It is valid if it is reasonable in the interests of the profession and also reasonable in the interests of the public; but it is invalid if it is unreasonable. per Lord Denning M.R.

38 *R. v Disciplinary Committee of the Jockey Club*, ex parte *Agar Khan* (1993) I.W.L.R. 909.

deal being deprived of efficient and honourable service.³⁹ Where there is unlawful discrimination or the restriction seeks to prevent those subject to the rules from dealing with a non-party, there may be a remedy.⁴⁰

Restrictive agreements relating to the supply of services are subject to the doctrine of restraint of trade on the same principles as are restrictive agreements relating to the supply of goods.⁴¹ Hence, in England service ‘cartels’ like those relating to goods must be registered and are subjected to scrutiny by the Restrictive Practices Court to determine whether or not they are in the public interest. The rules of professional bodies in principle also fall within the scope of the Restrictive Trade Practice Act although certain professional services, such as those of lawyers, doctors, surveyors and architects are expressly exempted. The common law doctrine of restraint of trade extends to cover the rules of professional bodies though in this area the field has largely been left to modern legislation for promoting competition or prohibiting certain forms of discrimination. The doctrine may even apply to the rules of professional bodies where the members of those bodies do not technically engage in trade.⁴²

However, a profession enjoys certain monopoly rights of practice in the designated field and the body administering the profession enjoys considerable autonomy in its administration. These monopoly rights and autonomy should be used for regulating quality of the profession, the standard of entry and discipline and accepted norms of performance. They should not be used to limit competition. Professions should not be denied normal opportunities of associations and promotion to preclude opportunities for growth and development. Professional bodies should not utilize their rights of autonomy to counter the normal challenges of global integration.

Generally, Trade unions are, to a large extent, protected from the doctrine of restraint of trade. A rule of a union is enforceable though it is in restraint of trade.⁴³ Where rules of a union impose unjustifiable

39 *Dickson v Pharmaceutical Society of Great Britain* [1967] 2 W.L.R. 718 at p. 734 per Danckwerts L.J.

40 *Cutsforth v Mansfield Inns Ltd.* (1986) 1 W.L.R. 558.

41 *Collins v Locke* (1879) 4 App. Cas. 674.

42 Anson’s Law of Contract 27th edn. at pp. 380,381

43 *Farnaus v Film Artists’ Association* (1964) AC 925. the House of Lords held that the agreement constituted by the rules of the association was one which related or was directed to the purposes of the union. Hence, it could not be challenged on the ground that it was in unreasonable restraint of trade and

restraints on members and others as to the payment to members superannuation benefits, have been held also to be unenforceable.⁴⁴ But where such rules of a union imposed no restrictive obligations on the members and a rule which provided for the payment on strike and those who took part in an authorised strike was held to be enforceable at common law as it was no more than an insurance of the members against the consequences of a strike.⁴⁵ An agreement among traders to regulate the wages and hours of employment of their workers for one year in accordance with the decision of the majority has been held to be against public policy and unenforceable at common law.⁴⁶ A rule of a trade protection society that no member should employ an employee who had left the service of another member without the consent in writing of his previous employer till after the expiration of two years was held invalid at common law.⁴⁷

Indian Experience

In India, before enacting M.R.T.P. Act, 1969, the only legislation worth mentioning to curb the evil effects of monopolies and restrictive trade practices was the Indian Contract Act, 1872. Section 23 of the Act provides, *inter alia*, that the consideration or object of an agreement is unlawful if the court regards it to be opposed to public policy and is void and section 27 provides subject to the specific exception provided therein, every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

the appellant's exclusion was upheld. See also *Edwards v Society of Graphic and Allied Traders* (1971) Ch. 365; *Associated News Paper Group Ltd. v Wade* (1979) 1 WLR 697, 710.

44 *Miller v Amalgamated Engineering Union* (1938) Ch. 669.

45 *Gozney v Bristol trade and provident Society* (1909) 1 K.B. 901

46 *Hilton v Eckersley* (1856) 6 El & Bl. 47.

47 *Mineral Water Bottle Exchange and Trade protection Society v Booth* (1887) 36 Ch. D. 465; *Davies Vs Thomas* (1920) 2 Ch. 189 at p.195; Trade protection agreement is an agreement by which a number of firms and companies in a particular trade or industry, sometimes the whole of those firms and companies, agree to act together for the protection of their mutual trading interests. These trade protection agreements are in practice very complicated documents. The members of the association by virtue of an agreement are bound by the agreement to observe those terms and conditions and in consequence other people are unable to deal with members except on those terms and conditions. Again some of these agreements establish what is known as a pool and quota system under which each trader is given a quota based on his turnover for the previous year or a previous period of years. If in the ensuing period his output exceeds his quota he must put his profits or a proportion of them into a pool for the compensation of other members who have been less fortunate. On the other hand if his output is less than his quota he is entitled to draw compensation from the pool. There is another type of agreement called redundancy scheme. It should be noticed that these schemes though arise out of the agreement between the members themselves; they do affect members of the public in their operation. RA East wood: Trade protection and Monopoly: Current Legal Problems 1950 at p.100

Relying on those provisions the courts in India have almost consistently held that agreements having their object for the creation of monopolies are void as opposed to public policy.⁴⁸ But, such a general provision would not be adequate in any sense to protect the society at large from the devastating effects of such ‘pernicious monopolies’ practiced by the trade and business in general. Very rarely such cases get the attention of the judicial tribunals and even in such cases where they come before them, the public interests are not represented as such. Hence, the courts in India have begun to take a flexible view of this concept.⁴⁹

As regards restrictive trade practices adopted by trade combinations, the attitude of the courts is still more uncertain and unhappy from the point of public interest.⁵⁰ Such trade agreements in the view of the courts so far seemed to be that they need not be against public interest. It was difficult in those days to predict with any certainty what attitude the courts would take in respect of each of such trade agreements, possibly because there was no specific legislative or judicial definition of what ‘public policy’ or ‘public interest’ meant.⁵¹ In India, with only a fragmentary code of Contract law the principles of English law in these areas are followed.⁵² Nonetheless, although the sanctity of contract has very much been eroded since then, and does not occupy such an exalted position as it was, it is still a factor which considerable weight would always be given by the common law of contract while talking problems of monopolies and restrictive trade agreements.

In India whatever restrictions are sought to be imposed on the citizen’s right to do business or profession they will have to stand the test of reasonableness and of the interest of general public. After all, the

48 See *Somu Pillai v. Municipal Council, Mayavaram*, (1905) 28 Mad .520; *Mahadhiraja v Yasin Khan* (1937) 17 Pat.255; *Dt Board Jhelum v Hari Chand*, AIR (1934) Lah 474:

49 *Niranjan Shankar Golikari v Country Spg. & Mfg.Co.*, AIR (1967) S.C. 1098;

50 *Bholanath Shankar Das v Lachmi Narain*, (1930) 53 All.316 it was held that a combination among traders in a particular place which brought profits for them and indirectly damaged their trade rivals was not bad in law. So also it had been held that an agreement in the nature of a trade combination for mutual benefit and for the purpose of avoiding competition is not necessarily unlawful even if it may damage others. *Daulat Ram v Dharma Chand* AIR (1934) Lah.110 Likewise when the scheme of the agreement was to limit competition and keep up prices that does not necessarily bring them within the terms of either section 27 or make them against public policy under section 23 of the Contract Act. *Fraser & Co. v the Bombay Ice Mfg. Co. Ltd.*, (1904) 29 Bom.107; Followed in *Kuber Nath VMahil Ram* (1912) 34 All.587

51 *Khemchand Manekchand v. Dayaldas Bassarmal*, AIR (1942) Sind 114; *Pallipati Ramalingaih v Nagulagunta Subbarami* AIR (1951) Mad.390

52 *Irrawady Flotilla Co. v Bugwandas*, (1891)18 I.A. 121(P.C)

public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage. He, like the rest would suffer, if the needs for protecting the interest of the country as a whole are not ranked as a prior obligation.⁵³

Cartels are common and they fall into two main categories; those concerned with the regulation of terms of employment, and those concerned with the regulation of trading terms and conditions. In both the cases the law relating to such combinations is closely associated with that relating to conspiracy. Combinations of the former type were to a greater or lesser extent made the individual free to contract as to the terms of his employment and establishing his right to associate for the purpose. Not only that, the concept of 'collective bargaining' has become the order of the day in labour management relationship and significantly the restrictive practices in this field have reached immense proportions.⁵⁴

The Allahabad High Court laid down the following propositions:⁵⁵

- (1) Every person has a right to a free course of trade and to conduct his business upon his own lines even though it results in an interference with the business of another person to his detriment.
- (2) If a person or a combination of persons unlawfully procures a breach of contract, the matter is actionable, provided that damage accrues there from.
- (3) Malice in the sense of spite or ill feeling is not the gist of the action. An action that is legal in itself does not become illegal because it prompted by an indirect or sinister motive.
- (4) Even though the dominating motive in a certain course of action may be the furtherance of one's business or of one's interest, one is not entitled to interfere with another man's method of earning his living by illegal means. Illegal means may either by means that are illegal in themselves or that may become illegal because

53 *Cooverjee v Excise Commissioner* AIR (1954) S.C.220: *K.K. Narula v State of Jammu & Kashmir*, AIR (1967) 3 S.C. 1368

54 Report of the Indian Monopolies Inquiry Commission.1965, p.2.However, the MRTP Act 1969 has not attempted to deal with the restrictive trade practices of organised labour as agreements and combinations of the above types do not appear to be common in India. Pollock & Mulla. "The Indian Contract & Specific Relief Acts" 9th Ed. (1972) p.289.

55 *Bholanath Shankar Das v Lachmi Narain* AIR (1930) All.83 at p.89.

of conspiracy where they would not have been illegal if done by a single individual.

- (5) An unlawful interference with the business of another person with intent to hurt that person is actionable, provided that damage results from the interference. A lawful interference by unlawful methods with the same object and producing similar results is equally actionable. However, a significant part of the judgment emphasizes that even acts which are lawful if done by individuals, might become unlawful if done by a combination.

The makers of the Indian Constitution being aware of the potential dangers of Concentration of Economic power, laid down certain principles in Article 39 (b) and (c) of the Constitution, to impress upon the governments of the Country about the need of fighting this danger. It says: "The State shall in particular direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."

It can be said that what is directed to be guarded against is, not concentration of economic power *per se*, but concentration to the common detriment; this in substance is the philosophy of the MRTP Act. The ways and means of the trade and industry are many and are liable to vary from time to time. The Act seeks to prevent all concentration of economic power injurious to public interest by giving very wide powers to the Central Government to control all future substantial expansions or amalgamations of already established undertakings of the above categories, the establishment of any new undertakings by them, and also the power to compel the division of any such undertakings wherever found necessary. As a general observation it might be said that there is nothing new about monopolies and restrictive trade practices.⁵⁶

Due to new liberalized policy it was felt that MRTP Act 1969 has

56 They are as old as trade itself. And as a matter of fact even legislation against them prevailed from time immemorial. Dated back from some centuries before Christ, recording regulations to prohibit merchants and producers from making collective agreements to influence the natural market prices of goods by withholding them from trade were prevalent in India and the experience of the past shown that the key to the problem lies in the wise regulation of monopolistic and restrictive trade practices rather than in their absolute prevention.

become obsolete in some respects in the light of International economic developments, more particularly relating to competition laws. Shifting of focus from curbing monopolies to promoting competition has become necessity in the globalised and liberalized Indian economy which is witnessing cut throat competition. In the pursuit of globalization India has opened up its economy by removing controls and resorting to liberalisation. Hence, Indian market has to face competition from within and outside the Country. To provide institutional support to healthy and fair competition and to take care of the needs of the trading, industry and business associations there is requirement of better regulatory and adjudicatory mechanism.⁵⁷

In that direction comprehensive and effective legislation has come up in recent years in almost every country for regulating these practices so far as they become a depictable menace to society at large and India has also fallen in line with them. Recently, it also enacted Competition Act, 2002, to fulfill the country's obligations under the World Trade Organisation Agreements. It is the country's first comprehensive law dealing with unfair competition or anti-trust issues. The Act's clearly-stated objective is not only to prevent practices which have an adverse effect on competition, but also 'to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade'. The Govt. of India amended the Act in 2007 and also in 2009 to bring full operation of the Act to achieve the objectives of the Act. Draft competition policy 2011 is also circulated through website to elicit the views of the public. It is intended to promote competition in the liberalized economy.

Under sec. 2(c) of the Indian Competition Act 2002 the term cartel is defined as including "an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services." So cartel is regarded as the most pernicious violation of competition law and is subject to the severest penalties.

57 The necessity of enacting Competition law was aptly stressed by the then Finance Minister Chidambaram who said "A world class legal system is absolutely essential to support an economy that aims to be world class. India needs to take a hard look at its commercial laws and the system of dispensing justice in commercial matters."

In general cartels are agreements which are formed in secrecy between firms in direct competition with one another in the relevant market which result in profits due to an unreasonable increase of prices by the cartel at the cost of exploitation of the customers. These create an unfavourable effect on the market and are against the ethos of free and fair competition. Under sec. 3 of the Act cartels are treated as anti-competitive agreements. Sec. 3 (1) says “no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.” Any agreement contravening that provision shall be void.

A wide range of agreements will be presumed to have an appreciable adverse affect on competition. Under sec. 3 (3) of the Act these are defined as “any agreement entered into between enterprises or association of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) share the market or source of production or provision of services by way of allocation of geographical area of market or type of goods or services or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding.”

Three essential factors have been identified to establish the existence of a cartel, namely agreement by way of concerted action suggesting conspiracy; the fixing prices and the intent to gain a monopoly or restrict or eliminate competition.⁵⁸ Parities of prices coupled with a meeting of minds has to be established to prove cartel. The test for concerted practice is that the parties have co-operated to avoid the risks of competition and this has culminated in a situation which does not correspond with the normal conditions of the market. Such collusion is illegal by law and however, there is very thin line of distinction between legitimate co-operation and illegitimate collusion. The existence of

58 *ITC Ltd. v MRTP Commission* (1996) 46 Comp Cas 619)

cartels depends on the peculiarities of the dynamics of each market.

Some of the notable features of the market that favour collusive behavior are: inelastic demand of the goods, small numbers of players in the market; higher barriers to entry; stable demand. The most crucial ingredient of cartelization behavior is collusive manipulation of prices by the competitors. Sometimes manufacturers raise their prices to match the leading players. Such a practice cannot be termed as cartelization. If a given competitor is placed in a price leadership position, then, if the price leader alters the price of its goods or services for reasons such as an increase in the cost of production or changes in the demand and supply position most of the other competitors may follow suit. This cannot be said to be illegal because the behavior of market participants is not based on any prior discussion or understanding. In India more evidence is required to support a cartel prosecution. Determination of the existence of a cartel by direct evidence is a Herculean task for the competition authorities.

In India cartels have been alleged in various sectors namely cement, steel, tyres, trucking, family planning device (copper T) etc. India is also believed to be victim of overseas cartel in soda ash, bulk vitamins, petrol etc. All these tend to raise the price or reduce the choice of consumers. The business houses are affected most by cartels as the cost of procuring inputs is enhanced or choice is restricted making them uncompetitive, unviable or be satisfied with less profits. It is in this backdrop that cartels are considered as most serious competition infringements and supreme evil of anti-trust and the most egregious violations of competition law.

It is increasingly recognized more than ever before that competition in markets promotes efficiency, encourages innovation, improves quality, boosts choice, reduces costs, leads to lower prices of goods and services. It also ensures availability of goods and services in abundance of acceptable quality at affordable price. It is also a driving force for building up the competitiveness of the domestic industry; businesses that do not face competition at home are less likely to be globally competitive. Competition ensures freedom of trade and prevents abuse of economic power and thereby promotes economic democracy. Thus competition in markets is benign for consumers, business houses and economy as a whole. So many countries either enacted competition

laws of their own or modernized the existing competition law and revamped the competition authorities. There are sectoral regulators created by law and their powers may be in conflict with competition commission and these bound to hurt consumers. Therefore a formal mechanism for coordination between the Competition Commission and the sectoral regulators is of key importance and should be made mandatory through suitable provision in the Competition Act and sectoral laws.

In India the Competition commission is more of regulatory in nature than adjudicatory, but the adjudicatory functions have to be manned by persons trained in law. The Supreme Court suggested that there may be two bodies; one with expertise i.e., advisory and regulatory and the other adjudicatory. There may be an Appellate body and the Supreme Court's jurisdiction always remain high; but the jurisdiction of High Courts under Article 226 to review the Appellate body's decision still a question to be decided. However, Competition Appellate Authority has been created for making appeals over the decisions of Competition Commission but still writ jurisdiction lies with High Courts and Supreme Court.

Conclusion

Competition Law is also known as restraint of trade doctrine, anti-trust law, anti-competitive law, Law of Monopolies, and Trade combinations law and restrictive trade practices law etc., Cartel agreements are also within the scope of Competition Law. The original intention of anti-trust laws is economic efficiency, pursuit of consumer welfare, through protection of competition rather than competitors. Public interest was considered paramount importance in matters of anti-competitive contracts and present competition policy promotes consumer welfare concept. Trade combination agreements are in most cases freely negotiated and they are entered into for the purpose of avoiding undue competitions and carrying on trade without excessive fluctuations or uncertainty. The position adopted by the common law has been to regard some cartels at least as being not injurious to the public and in some cases even as positively beneficial. In Cartel agreements the parties can be regarded as the best judges of what is reasonable between them. Generally, the court will always protect the public from the creation of monopoly by a combination of buyers or sellers.

The scope of a Competition Law extends to labour and services associations' agreements also. Employers may attempt to regulate labour by imposing mutual restrictions upon re-employment of former employees. It is contrary to the public interest as public policy cannot allow third parties to restrict by contract a person's freedom to work to whom he wish. The rules, bylaws and regulations of associations and of professional bodies are considered as agreements between employers and affect the freedom of employee's employment and the courts have jurisdiction to declare a rule invalid if it is arbitrary and capricious. The rules of trade protection societies are in practice very complicated documents; the members of the associations by virtue of an agreement are bound by the agreement to observe those terms and conditions and in consequence other people are unable to deal with members except on those terms and conditions; they do affect members of the public in their operation.

The attitude of the courts in India is still more uncertain and unhappy from the point of public interest as a combination among traders in a particular place which brought profits for them and indirectly damaged their trade rivals was not bad in law. Whatever restrictions are sought to be imposed on the citizen's right to do business or profession will have to stand the test of reasonableness and of the interest of general public. Detriment to the public interest' is the common denominator. The concept of 'collective bargaining' has also become the order of the day in labour management relationship and significantly has reached immense proportions. Hard core cartel behaviour between competitors is the most serious form of anti-competitive behaviour.

India enacted Competition Act, 2002 and it is the country's first comprehensive law dealing with unfair competition or anti-trust issues and it should deal with anti-competitive practices particularly cartelization, price-fixing and other abuses of market power and should regulate mergers. The objective of the Competition Act is not only to prevent practices which have an adverse effect on competition, but also 'to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade'. Competition Act is truly reflective of the changing economic conditions. Competition commission should act as a watch-dog for the introduction and maintenance of competition policy. It should promote the introduction of the required changes in the policy environment and should perform a pro-active

advocacy function for competition.

Agreements that contribute to the improvement of production and distribution and promote technical and economic progress while allowing consumers a fair share of the benefits should be dealt with leniently. The relevant market should be clearly identified in the context of horizontal agreements. Blatant price, quantity bid and territory sharing agreements and cartels should be presumed to be illegal. Predatory pricing will be treated as an abuse only if it is indulged in by a dominant undertaking. Exclusionary practices which create a barrier to new entrants or force existing competitors out of the market will attract the competition law

The State monopolies, government procurement and foreign companies should be subject to the Competition Law. The Law should cover all consumers who purchase goods or services regardless of the purpose for which the purchase is made. Bodies administering the various professions should use their autonomy and privileges for regulating the standard and quality of the profession and not to limit competition.

The competition law should be designed and implemented in terms of competition policy of the State which is dynamic. This Act is a step in right direction to harmonise the Competition policy with International trade and policy and hope that Cartels which hamper economic growth will be controlled with the introduction of this new legislation.

UNIVERSITIES, INTELLECTUAL PROPERTY RIGHTS AND SPINOFFS: A CRITICAL EVALUATION

*Pinaki Nandan Pattnaik**

Introduction

The efforts in protecting the intangible property of the intellectual mind in its any form, be it patent or copyright or trademark or designs is at its peak in contemporary times. In this particular context, it is pertinent to understand the role of universities as major contributors of scientific research leading to invention and innovation in the world. Universities not only prepare the labor force in fact they create the much needed skilled human resource. As a matter of fact, it is universities that explore new areas, push the frontiers of knowledge into the future and more often than not lay the foundation for new industries. Therefore, it is important to understand the linkage between Universities and the production of knowledge not only historically but also in contemporary times. This paper aims to look into the university research system in relation with intellectual property rights. We would also make an attempt to explore the technology commercialization of university research in Canada, Japan and India and try to understand the meaning and role of Technology Transfer/Licensing Office in this regard. Though universities can adopt several methods of commercializing developed technologies, our focus is on creation of university spinoffs through the commercialization of research in these three countries. Hence, the paper also aims to look into the various models of spinoff creation in universities, analyze them and understand the nuances that they consist of.

Universities and Knowledge Production: Historical Backdrop

Since ancient times, India has had a very robust tradition of higher education. This is evident from the centers of learning which existed in the 7th century BC in the form of the Buddhist monasteries and in the 3rd century AD at Nalanda. With students and scholars from Korea, Japan, China, Tibet, Indonesia, Persia and Turkey, the major areas of learning at Nalanda were Buddhist studies, fine arts, medicine,

* Assistant Professor of Management, National Law University, Odisha

mathematics, astronomy, politics and the art of war.¹ In the European context, the first so called university originated in the form of a medical school at Salerno, Italy in the 9th Century. In the true sense though, the first university originated at Bologna. The first university to be established in northern Europe was the University of Paris, established sometime between 1150 – 1170 A.D. The University of Oxford, founded in the 12th Century was the most reputed in England. Major part of the curriculum consisted of the seven liberal arts namely; grammar, logic, rhetoric, geometry, arithmetic, astronomy and music. The universities in the 12th till 14th Century were although controlled by the state, they drew their powers from the church.² Their autonomy from local government control, in other words, depended upon their subordination to the community of God. In keeping with the Christian order of truth, knowledge was constructed as eternal and scholarship as a matter of interpretation, imitation, and cultivation. During the Reformation, in the 16th century, many universities were freed from the direct control of the Church and came under secular state supervision. In the process, they lost their monopoly over knowledge and science.³

As authority was vested in individual genius and the scientific method, “true knowledge” moved from the academy to scientific societies. The academy still had the power to license professionals, but it could no longer claim to license “knowledge” in the sense of “that which is worth knowing”.⁴ Although till most of the 17th Century, both Protestants and Catholic universities staunchly defended religious doctrines and were averse to the rapidly increasing influence of science which was gaining ground in Europe, the first modern university of

-
- 1 Nalanda was established in the 5th century AD in Bihar, India. Founded in 427 in northeastern India, not far from what is today the southern border of Nepal, it survived until 1197. Nalanda's main importance comes from its Buddhist roots as a center of learning. Hsuan Tsang, the famous pilgrim from China came here and studied and taught for 5 years in the 7th Century A.D. Nalanda University at that time had over 10,000 students and 3,000 teachers. For some 700 years, between the 5th and 12th Centuries, Nalanda was the center of scholarship and Buddhist studies in the ancient world. A great fire wiped out the library of over 9 million manuscripts and at the beginning of the 12th Century, the Muslim invader Bakhtiyar Khalji sacked the university. It was in the 1860's that the great archeologist Alexander Cunningham identified the site as the Nalanda University and in 1915-1916 the Archeological Survey of India began excavations of the site.
 - 2 Marlon B. Ross: Authority and authenticity: Scribbling authors and the genius of print in eighteenth century England, in Woodmansee and Jaszi, (eds.), *The universities of Europe, 1100–1914*, Associated University Presses, London, 1994, pg. 235
 - 3 Hilde de Ridder-Symoens: *A History of the University in Europe*, Vol. 2: *Universities in Modern Europe*, Cambridge University Press, Cambridge, 1996, pg. 246
 - 4 Marlon B. Ross: Authority and authenticity: Scribbling authors and the genius of print in eighteenth century England, in Woodmansee and Jaszi, (eds.), *The universities of Europe, 1100–1914*, Associated University Presses, London, 1994, pg. 236

Halle, was founded by Lutherans in 1694. Its modernity was evident as it was the first university to challenge the age old belief system and encouraged reason and inquiry based education.⁵

According to Bruno Latour, the task of the seventeenth century was “the conjoined invention of scientific facts and citizens”.⁶ Two hundred years later the reproduction of this conjoined invention became the task of the modern research university. Between 1830 and 1920 the university would be thoroughly enlisted in the central modernist project: the scientific construction of, to borrow from Sheldon Rothblatt, a “character who [could] transcend himself,” meaning a sovereign subject who could abstract himself from particular circumstance through the use of disinterested reason.⁷ During this period, a new proposition of the meaning of university was forwarded by Immanuel Kant. He positioned the university as the embodiment of “thought as action toward an ideal”—the ideal being the production of a national culture and a reasoning subject to serve as its vehicle. He also argued that universities should examine and guide the “inmost thoughts,” the “secret intentions,” the conduct, and the health of the citizenry through pure disinterested reason. Reason, Kant proposed, was self-justifying; and no one had to confirm it. The principle of reason, in turn, could be deployed to produce men trained in a *method* of knowledge production (the scientific method) rather than a specific body of knowledge. Readings argued that “educated properly, the subject learns the rules of thought . . . so that thought and knowledge acquisition becomes a freely autonomous activity, part of the subject”.⁸ Its autonomy was founded instead upon reason, the faculty that justifies itself. Only reason can critique reason, so no outside body, including the state, could possibly judge the university. “It is absolutely essential that the learned community contain a faculty that . . . having no commands to give, is free to evaluate everything”.⁹ Kant, citing the medieval guild rights of the university masters, noted

5 Harold Perkin: History of universities in: Forest, James and Altbach, P. (eds) International Handbook of Higher Education, Springer, Dordrecht, Netherlands, 2006, pp. 176

6 Bruno Latour: We Have Never Been Modern, translated by Catherine Porter, Harvard University Press, 1993, pg. 33

7 Sheldon Rothblatt and Bjorn Wittrock: The European and American university since 1800: Historical and sociological essays, Cambridge University Press, Cambridge, 1993, pg. 30

8 Bill Readings: The University in Ruins, Harvard University Press, Cambridge, Massachuset, 1996, pg. 67

9 Immanuel Kant: The Conflict of the Faculties (1794), Translated by Mary J. Gregor, Abaris Books, New York, reprinted in 1979, pg. 27

that only the university had the right to “create doctors,” that is, to certify scholarship and none else.

Thus reconceived, the university was uniquely positioned as the home for, and producer of, “basic” research ostensibly shielded from the operations of power.¹⁰ With this it became possible to say that “the concept of being scientific . . . [gave] the university its internal intellectual coherence,” moreover, the university could at last take its place as the central institution of the public domain.¹¹ It was not the only such institution, of course, since intellectual and cultural resources were not confined to the university sphere. However, the university was a space where the public domain was supposed to be actively and continuously produced. Art, music, and literature, by contrast, transformed common resources into privately owned expression, moving signs and symbols from the public to the private and, once terms of protection had expired, back again to the public domain. University research was similarly engaged in transformation of the common (nature) into the specific (facts about nature), but academic expression was figured as permanently public by definition. If that expression was to claim the status of fact it could not be anything else.¹²

Yet the university was located in a rather peculiar position with respect to the public/private divide. The philosophy faculty, Kant argued, had to be free from government control with regard to its content if it was to be a space where reason was “authorized to speak out publicly”.¹³ Endowed with academic freedom and corporate liberty, the university was a kind of corporate person with specific rights as against the state. Philosophers also had to be free from the private sphere, for pure rational knowledge could not be limited to the realm of self-interest. The university founded on reason was thus conceptually autonomous from both state and capital. At the same time, the university was the servant of

10 Jacques Derrida: *The Principle of Reason: The University in the Eyes of its Pupils*, Diacritics, The John Hopkins University Press, Vol. 13, 1983, pg. 11

11 Wilhelm Schmidt-Biggeman: *New Structures of Knowledge* in *Supra* note 3 at pg. 489

12 Biagioli, M: *The Instability of Authorship: Credit and Responsibility in Contemporary Biomedicine*, *The Journal of the Federation of American Societies for Experimental Biology*, Harvard University Press, Vol. 12, 1998, pg. 6

13 Immanuel Kant: *The Conflict of the Faculties (1794)*, Translated by Mary J. Gregor, Abaris Books, New York, reprinted in 1979, pg. 29

the state, earning its protection by encouraging “the rule of reason in public life”.¹⁴

Further, the university was the servant of capital, legitimating the commodification of knowledge through the construction of the uncommodifiable. Indeed, the status that the university gained from its position in the public domain was precisely what would ultimately make it useful to capital. A permanent space of non-property was created, a “knowledge commons” that could legitimate private property in expression and invention—remembering that the (re)creation of a private domain of intangibles was and is justified by the existence of a public domain— and provide new exploitable resources.¹⁵

Today research has become an important function of the university system although its roots can be traced back to the beginning of the 19th century in Germany where the University of Berlin came into existence with scientific research at its core.¹⁶ In the following centuries till date, research is of ultimate importance for all universities as the status of universities is based on the research quality and productivity. Many authors have defined research in many ways as regards to the discipline and form in question. Research is primarily defined in different ways by various disciplines and can take many forms. A broad definition of research is given by Martin Shuttleworth, who wrote that “in the broadest sense of the word, the definition of research includes any gathering of data, information and facts for the advancement of knowledge.”¹⁷ Another definition of research is given by Creswell, who stated that “research is a process of steps used to collect and analyze information to increase our understanding of a topic or issue”. It consists of three steps: pose a question, collect data to answer the question, and present an answer to the question.¹⁸

14 Bill Readings: *The University in Ruins*, Harvard University Press, Cambridge, Massachuset, 1996, pg. 58

15 Biagioli, M: *The Instability of Authorship: Credit and Responsibility in Contemporary Biomedicine*, *The Journal of the Federation of American Societies for Experimental Biology*, Harvard University Press, Vol. 12, 1998, pg. 8

16 Joseph Ben-David and Zloczower Awraham: *Universities and Academic Systems in Modern Societies*, *European Journal of Sociology*, Cambridge University Press, Vol. 3, 1962, pg. 63

17 Martyn Shuttleworth: *Definition of Research*, Experiment Resources, Experiment-Research.com. <http://www.experiment-resources.com/definition-of-research.html> 2008, Retrieved 15th July 2012.

18 John W. Creswell: *Educational Research: Planning, Conducting, and Evaluating Quantitative and Qualitative Research*, Pearson Merrill Prentice Hall, Upper Saddle River, New Jersey, 4th edition, 2011, pg. 132

Research universities are at the zenith of the university system. They serve only the crème of the students and are very few in number.¹⁹ The aim of these universities is to bring research to the core of the university system and apply that research to national economic development. It all started in the later part of the 19th century with the onset of the American Land Grant universities which included direct service to society mainly in agriculture and industry to the objectives of research universities. This brought universities to the limelight and since then universities have been contributing to the society more directly through research and development in almost all countries worldwide.²⁰

The University Research System

Over a period of time, universities world over have developed indigenous science and technology system. The science and technology system comprises of resources available to the university like finance, governance or administrative, human, intellectual, and physical capital that acts as inputs to the productivity through research, education, training, and socialization generating intellectual and human outputs. As discussed, the system comprises of²¹:

- i. **Human Capital:** Faculty, Researchers, Students, Administrators, Technicians etc;
- ii. **Governance Capital:** Rules, Norms, Policies;
- iii. **Physical Capital:** Land, Facilities and Equipment;
- iv. **Intellectual Capital:** Knowledge, Information, and Ideas; and
- v. **Financial Capital:** Research Grant, Funding etc.

Each of these resources is integral to the system. It is interesting to note that the combination in which these resources are put together and the derived behavior of that combination differs from university to university. The elements of this system, combined within a university structure, together act as valuable inputs in reaching the desired goals of universities like facilitation of research, dissemination of knowledge

19 Burton R Clark: Places of Inquiry: Research and Advanced Education in Modern Universities, University of California Press, Berkeley, California, 1995, pg. 159 & Philip G. Altbach, and Jorge Balán: World Class Worldwide: Transforming Research Universities in Asia and Latin America, Johns Hopkins University Press, Baltimore, Maryland, 2007, pg. 18

20 Philip G Altbach: The Complex Roles of Universities in the Period of Globalization, in Higher Education: New Challenges and Emerging Roles for Human and Social Development, Higher Education in the World, Vol. 3, Palgrave Macmillan, 2008, pg. 6

21 Brett M. Frischmann: The Pull of Patents, The Berkeley Electronic Press, Berkeley, 2005, pg. 8

through education, imparting training and acting for the betterment of the society at large.

University science and technology research systems, like any other system, are invaluable to the society because of the economic activity they generate in addition to the knowledge base that they create for the society. In fact the contributions of the research systems are in the value that is imbibed in final output.²² The research results produced by these systems mostly contribute to industrial and social needs by facilitating the production of various private or public goods. The results derived from research not only various in specifications but also in terms of its use and application to reach desired outcomes towards the benefit of the society.²³

Allocation of the infrastructural capital of the universities is not a conscious decision to exploit the market potential of research results.²⁴ Therefore, the majority of the research and development activities resulting in results have not been towards market oriented research. Of course, this is not to say that university research systems have not contributed by way of conducting commercial research or that research results have never been used commercially but rather that this area has not been an area of priority to the universities.²⁵ Historically speaking, as regards to the industry or its need in terms of industry orientation, universities have not allocated enough resources. But the trends are changing with changing times.

In the same way, for a good part of the last century public funding for research in universities have not been towards finding solutions for specific problems of the commercial segment of the

22 Brett M. Frischmann: An Economic Theory of Infrastructure and Commons Management, *Minnesota Law Review*, University of Minnesota, Vol. 89, 2005, pg. 935

23 J. H. Reichman & Paul F. Uhlir: A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment, *Law & Contemporary Problems*, Duke University, Vol. 66, 2003, pg. 327

24 Philip E Auerswald, & Lewis M. Branscomb: Start-ups and Spin-offs: Collective Entrepreneurship between Invention and Innovation, in *The Emergence of Entrepreneurship Policy: Governance, Start-Ups, and Growth in the Knowledge Economy*, David Hart, ed., Cambridge University Press, Cambridge, 2003, pg. 79-80.

25 Rebecca Henderson, Adam B. Jaffe, and Manuel Trajtenberg: Universities as a Source of Commercial Technology: A Detailed Analysis of University Patenting, 1965-1988, *Review of Economics and Statistics*, MIT Press, Vol. 80, 1996, pg. 119

society.²⁶ Again, this is not to say that public funding has not produced any commercially applicable results but as the historical developments of the Bayh-Dole Act reflects;²⁷ not only research in this area was insufficient but was also underutilized.²⁸ Lack of genuine interest of the universities in commercial research outputs and the industry demand for university generated research has been areas demanding a relook at intellectual property. To solve the problems of insufficient research and underutilization of research results by the industry, a re-look at the age old concept of production and utilization of intellectual property was required.²⁹

Justifications of Intellectual Property Rights in Universities

It is beyond doubt that universities play a very important role in producing and disseminating new knowledge not only at the regional but also at the national and the global level. This is the reason why many believe that proper mechanisms should be set up to facilitate the transfer of knowledge from universities to the economy effectively and to that extent appropriate policies should be developed. These new developments providing for a more extended use of knowledge or intellectual property developed in universities also provide new justifications than the ones before which was primarily to provide incentives to generate private investments for production of intellectual property.³⁰

Firstly, it is commonly held that along with a strong system to protect intellectual property comes strong incentives' influencing the disclosure of new knowledge and ideas through publications, patents, copyrights etc. Especially patents can be a source of technological

26 Donna Fossum, Lawrence S. Painter, Elisa Eiseman, Emile Etedgui and David M. Adamson: *Vital Assets: Federal Investment In Research And Development at the Nation's Universities and Colleges*, published by Rand, Santa Monica, California, Issue 1824, 2004, pg. 2

27 David C. Mowery, Richard R. Nelson, Bhaven N. Sampat and Arvids A. Ziedonis: *Ivory Tower and Industrial Innovation: University-Industry Technology Transfer Before and After the Bayh-Dole Act*, Stanford Business Books, Palo Alto, 2004, pg. 39

28 Rebecca S. Eisenberg: *Technology Transfer and the Genome Project: Problems with Patenting Research Tools*, *RISK: Health, Safety & Environment*, United States, Vol. 5, 1994, pg. 163

29 Kieff, F. Scott: *Property Rights and Property Rules for Commercializing Inventions*, *Minnesota Law Review*, University of Minnesota, Vol. 85, 2001, pg. 697

30 Partha Dasgupta and Paul A. David: *Toward a New Economics of Science*, *Research Policy*, Vol. 23, 1994, pg. 496 & Paul A. David and Trond E. Olsen: *Technology Adoption, Learning Spillovers, and the Optimal Duration of Patent-Based Monopolies*, *International Journal of Industrial Organization*, Vol. 10, 1992, pg. 527

knowledge which many can adopt to their own in order to create or facilitate further knowledge. That knowledge of course cannot be used commercially. This possibility of this produced knowledge not being able to be used commercially by another provides an incentive to the inventor and induces them in disclosing that knowledge rather than keeping it secret.³¹

Secondly, since intellectual properties rights include the right to exclusion they provide the creator or the inventor control of their invention. This right also provides the inventors with an incentive to trade their inventions and innovations as they have the potential to create increasing returns to scale and therefore are much sought after. As the market for these inventions or innovations expand, it automatically results in increasing profits for the inventors.³² This expansion of the market eventually leads to the proliferation of the produced knowledge, which probably would not have happened in the absence of a proper intellectual property protection system. Similarly, this trade creates a positive impact for the economy via the information spillover effect which are externalities of economic activity or processes that affect those who are not directly involved.³³

Thirdly, arguments have been put forward that universities might proactively pursue commercializing their intellectual property and contributing to the overall economic growth if they can generate income from it which is pivotal at this time of gradually decreasing public funding for research and development activities at the universities. An enhanced system of protecting intellectual property rights coupled with the reasons mentioned above encourage universities to create intellectual products that are more applied in nature and are suited towards the industry or even spinoffs from universities to either develop or create solutions for the market.³⁴

31 Birgitte Andersen: *If Intellectual Property Rights is the Answer, What is the Question?* Economics of Innovation and New Technology, Routledge, part of the Taylor & Francis Group, Vol. 13, 2004, pg. 427

32 Luis A. Rivera-Batiz and Paul M. Romer: *Economic Integration and Endogenous Growth*, The Quarterly Journal of Economics, Harvard University, Vol. 106, 1991, 542

33 Supra note 30 at 537

34 Rebecca Eisenberg: *Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research*, Virginia Law Review, University of Virginia, Vol. 82, 1996, pg. 1689 & Elizabeth Popp Berman: *Why did Universities Start Patenting? Institution-Building and the Road to the Bayh-Dole Act*, Social Studies of Science, Sage Publications, Vol. 38, 2008, pg. 860.

Primarily, the above mentioned reasons are responsible for the policy formulations that aim to direct and strengthen the transfer of university created intellectual properties to the industry.³⁵ The first such policies that became an Act of the legislature was The Bayh-Dole Act of the United States of America which came into existence in 1980 and provided American universities with the desired control over the intellectual properties produced by them by using federal funds and in addition to that it also promoted using the formal protection mechanism for those inventions or innovations by way of patents.³⁶ As of today, the Bayh Dole Act is known to provide the best economic incentive for companies to pursue further development and commercialization of government sponsored research and development.³⁷

It is also true that patents facilitate inventors to allocate necessary resources in research and development activities that result in more innovations.³⁸ These patents also help the owner or the licensee to utilize such technologies which otherwise would have been hidden away to produce the best results or solutions for the market. These licenses make possible standardization and compatibility among technologies³⁹ as they can be incremental or even subsidiary to the central technology in use. They also establish business relations and help them develop by patent exchanges resulting in knowledge spillovers.⁴⁰ The impact that patents have on competition is also pertinent as they can provide competitive advantage to the holder or help the holder in producing new or differentiated products.⁴¹

35 David C. Mowery and Bhaven N. Sampat: The Baye-Dole Act of 1980 and University-Industry Technology Transfer: A Model for other OECD Governments?, *The Journal of Technology Transfer*, Springer, Vol. 30, 2005, pg. 121

36 Birgitte Andersen and Federica Rossi: Beyond Bayh - Dole: Universities and the use of Proprietary and Non-Proprietary Intellectual Property (IP) marketplaces, *Dynamics of Institutions and Markets in Europe*, Working Paper No. 90, 2010, pg. 4

37 Wendy H. Schacht: The Bayh-Dole Act: Selected Issues in Patent Policy and the Commercialization of Technology, Congressional Research Service, The Library of Congress, 2005, pg. 1

38 Kenneth Arrow: Economic Welfare and the Allocation of Resources for Invention, in Richard R. Nelson (ed.) *The Rate and Direction of Inventive Activity*, Princeton University Press, Princeton, New Jersey, 1962, pg. 617

39 Robert P. Mergers and Richard R. Nelson: On the complex economics of patent scope, *Columbia Law Review*, Columbia University, Vol. 90, 1990, pg. 902

40 Adam B. Jaffe, Manuel Trajtenberg and Rebecca Henderson: Geographical Localization of Knowledge Spillovers, as Evidenced by Patent Citations, *Quarterly Journal of Economics*, Harvard University, Vol. 58, 1993, pg. 583 & David J. Teece: Profiting from Technological Innovation: Implications for Integration, Collaboration, Licensing and Public Policy, *Research Policy*, Vol. 15, 1986, pg. 298

41 Roberto Mazzoleni and Richard R. Nelson: The Benefits and Costs of Strong Patent Protection: A Contribution to the Current Debate (1998), *Research Policy*, Vol. 27, 1998, pg. 275

Today the commercial value of research is increasingly understood by universities involved in research and development. This has given rise to means and methods of intellectual property commercialization to enable the technologies developed through research to reach the market. This creates a win-win situation for the university as well as the inventor.

The argument that universities must have a direct role in the national economy by producing knowledge that acts as the raw material that fuels innovation and national progress leads to the bigger picture of the role of universities in fueling knowledge-oriented economic development. By the latter part of the 1980s, thinkers were already postulating possibilities of economic development by enhancing the existing knowledge in the human resource of nations and the resultant effect on their productivity which had a big impact on higher per capita output and income.⁴² One such theory is the endogenous growth theory⁴³ which emphasizes that although knowledge is a non-excludable and non-rivalrous factor of production, it has the capacity to generate increasing returns to scale and can thus lead to higher economic growth by significantly increasing output.⁴⁴

This ever important role of universities in producing knowledge and contributing to the overall economy was further solidified by its inclusion in the features of the knowledge economy wherein a lot of importance was given to those industries which had a faster rate of growth than other industries and essentially traded in knowledge based products or services.⁴⁵ With the view that knowledge aids in economic growth and universities aid production of that knowledge, a third mission of directly transferring the produced knowledge to the economy has

42 Robert E. Lucas: On the Mechanics of Economic Development, *Journal of Monetary Economics*, North Holland, Vol. 22, 1988, pg. 27

43 The initial research was based on the work of Kenneth Arrow (1962), Hirofumi Uzawa (1965), and Miguel Sidrauski (1967) In Endogenous growth theory investment in human capital, innovation and knowledge are significant contributors to economic growth. The theory also focuses on positive externalities and spillover effects of knowledge based economy which will lead to development of economies. The endogenous growth theory also holds that policy measures can have an impact on the long-run growth rate of an economy.

44 Paul M. Romer: Endogenous Technological Change, *Journal of Political Economy*, University of Chicago, Vol. 98, 1990, pg. S82

45 Danny Quah: A Weightless Economy, United Nations Educational, Scientific and Cultural Organization Courier, United Nations, December 1998, pg. 19

recently gained ground along with the traditionally conceptualized missions of teaching and research for the universities.⁴⁶

Commercialization, Intellectual Property Rights and Universities

Over the years, with time and scientific revolutions, universities have taken on another role, becoming central players in regional and national economic development through application of the knowledge created within the university. They also play an equally important role in creating economic value by way of inventions that can be transformed into commercial and feasible products in the market. The idea proposed by the economist Robert Solow that scientific and technological innovation drives economic growth got him the Nobel Prize in 1987.⁴⁷ Now, there is a general consensus that universities act as tools for economic growth via commercialization of research outputs.⁴⁸ It is today common sense that technological innovation is one of the key drivers of socio-economic development. It occurs mainly when new products or processes are created through research and development (R&D).⁴⁹ Universities contribute by way of creating the human resource of nations, who, down the line help create, adapt and absorb new and existing technologies.⁵⁰

In this day and age of competition and changing needs of the market, the industry's needs have also changed. Be it any industry, the Software industry or the Information Technology industry or the Communications industry or even Automobiles, Aeronautics or the Pharmaceuticals industry, universities are the only suppliers of both knowledge and the knowledge workers.⁵¹ Some of these industries do produce that knowledge which is required by them themselves but usually all industries depend on universities to create and transfer

46 Smith, H. Lawton: *Universities, Innovation and Territorial Development: A Review of the Evidence, Environment and Planning, Government and Policy*, Vol. 25, 2007, pg. 108

47 Nathan Rosenberg: *Innovation and Economic Growth*, Organization for Economic Growth and Development, 2004, p.1-6, available at www.oecd.org/dataoecd/55/49/3426/7902.pdf

48 Philip H. Phan, and Donald S. Siegel: *The Effectiveness of University Technology Transfer: Lessons Learned from Qualitative and Quantitative Research in the US And UK*, *Foundations and Trends in Entrepreneurship*, Hanover, Massachuset, Vol. 2, 2006, pg. 87

49 Sidney S. Winter: *On Coase, Competence, and the Corporation*, *The Journal of Law, Economics & Organization*, Yale University, Vol.4, 1988, pg. 169

50 R.S.M Lau: *Strategic Flexibility: A New Reality for World-Class Manufacturing*, *S.A.M. Advanced Management Journal*, Vol. 661, 1996, pg. 8

51 David Lim: *Quality Assurance in Higher Education in Developing Countries*, *Assessment & Evaluation in Higher Education*, Routledge, part of the Taylor & Francis Group, Vol. 24, 1999, pg. 383

knowledge to them.⁵² Universities constantly define and redefine the boundaries of science through cutting edge research, and whenever possible transfer the technologies to the industry and society by ways of⁵³;

- Making available skilled human resources to the industry
- Publishing and presenting research results at national and international conferences and seminars
- Conducting contract research from the government or the industry
- Consulting work done by academicians for the industry
- Academicians training human resources in the industry
- Developing equipments that are used by the industry
- Conducting collaborative research
- Establishing industry focused or sponsored training programs
- Supporting spinoffs and licensing university technology to industry

It is no secret that knowledge from universities has found its way outside to the industry and has generated value for the economy at large. Previously it was only in the form of students, research result publications or faculties who trained people in the industry. Even now, these are the most valued outputs from the universities that are highly regarded and valued by the industry.⁵⁴ Only very recently universities and individual researchers are engaging in formal commercialization of the research results or technologies through patents, licensing those patents or at times creating start ups also called university spinoffs.

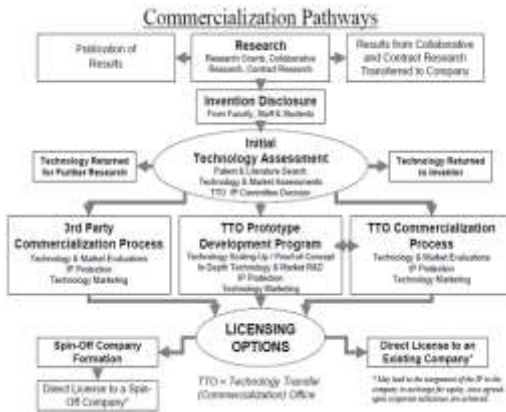
However, there is no single system of technology commercialization. Different universities have adopted different methods to achieve the same desired results. It is important to look at the process of technology commercialization used in Canada, Japan and India to understand the system and how it works. In case of Canada, the technology commercialization model of University of British Columbia is used as an example. In case of Japan, we will focus at Tohoku University and finally for India, the National Chemical Laboratory.

52 Jorge Niosi: Strategy and Performance Factors Behind Rapid Growth in Canadian Biotechnology Firms, in John de la Mothe and Jorge Niosi (Eds), *The Economic and Social Dynamics of Biotechnology*, Dordrecht, Boston and Kluwer Academic, London Vol. 21, 2000, pg. 102

53 *Supra* note 47

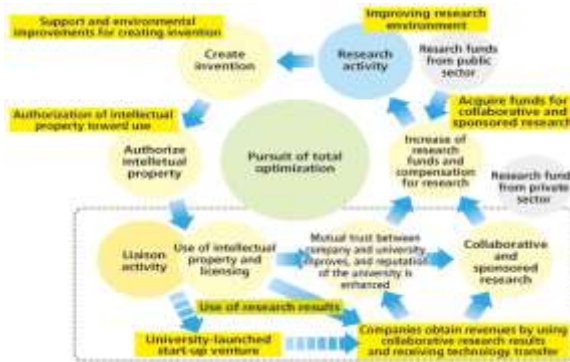
54 Wesley Cohen, Richard Nelson and John Walsh: Links and Impacts: The Influence of Public Research on Industrial R&D, *Management Science*, Vol. 48, 2002, pg. 15

Figure I: Technology Transfer Process at University of British Columbia, Canada:



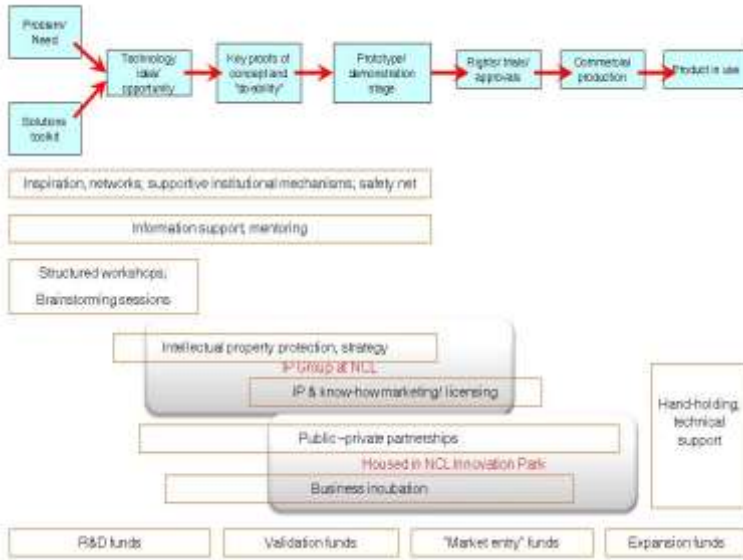
(Source: Technology Transfer Office, University of British Columbia www.ubc.ca)

Figure II: Technology Transfer Process at Tohoku University, Japan



(Source: <http://www.rpip.tohoku.ac.jp/english/policy/index.html>)

Figure III: Technology Transfer Process at National Chemical Laboratory, Pune, India



(Source: http://www.nclinnovations.org/aboutUs.php#Technology_commercialization)

It is interesting to note that in order to fulfill the need for intellectual creation, in all the three cases, “research activities” comes first. For this, it is necessary to “improve and enhance the research environment.” The next step in the process is “creation of a technology” resulting from research. Next is the “disclosure” of the technology to the technology transfer office leading to “evaluation and protection” of the technology or the intellectual property. The last step in the process is “licensing” of the technology to existing companies or “spinoff creation”. It is possible today with facilitation done by the Technology Transfer/Licensing Offices that have been set up by many universities and in many cases funded by the government that technologies developed in the universities find their way to the logical end in order to provide solutions to the society at large.

Technology Transfer/Licensing Office

The management of the transfer of technology from the university to the industry is generally performed by the Technology Transfer Office. According to OECD, a "TTO", as it is commonly referred to by technology transfer professionals, is *"this organization or*

*parts of an organization which help the staff at Public Research Institutions to identify and manage the organization's intellectual assets, including protecting intellectual property and transferring or licensing rights to other parties to enhance prospects for further development."*⁵⁵ According to European Commission on technology transfer from science to enterprises, a Technology Transfer Office is "*a dedicated entity which provides, continuously and systematically, services to publicly funded or co-funded Research Organizations in order to commercialize their research results and capacities*".⁵⁶

The rationale for the establishment of Technology Transfer Offices in universities is primarily information and coordination. The scientific and knowledge market is characterized by uncertainties since firms do not have perfect information about the commercial potential of inventions made within the universities. A Technology Transfer Office plays a filtering role thereby making the university more transparent to the outside world, whilst it invests in the creation of a reputable label or brand based on its ability to select those inventions which have the greatest commercial potential. A Technology Transfer Office is an interface that coordinates and seeks to translate the language and objectives of the scientific community for the benefit of the business world and vice-versa. It seeks to alert the scientists to the requirements of the commercialization process while, at the same time, making industrial partners aware of the potential and limitations of the technology developed within the university.⁵⁷

It is therefore important that the Technology Transfer Office must bring together the interests of the various stakeholders namely university researcher/scientist, the technology transfer office and the external firms and provide appropriate incentives to all of them in order

55 OECD: Turning Science into Business – Patenting and Licensing at Public Research Organisations, OECD Publications, Paris, 2003, pg. 39, available at <http://213.253.134.29/oecd/pdfs/browseit/9203021E.PDF>

56 European Commission, DG Enterprise, Improving Institutions for the Transfer of Technology from Science to Enterprise – Expert Group Report, Conclusions and Recommendations, 2004 http://europa.eu.int/comm/enterprise/enterprise_policy/competitiveness/doc/itte_expertgroupeport.pdf

57 See generally Laura Abramovsky, Rupert Harrison and Helen Simpson: Increasing innovative Activity in the UK? Where now for Government Support for Innovation and Technology Transfer?, Institute for Fiscal Studies, United Kingdom, Briefing Note no. 53, 2004, pg. 4

to achieve its goals.⁵⁸ A snapshot of the stakeholders, their responsibilities, motives and culture is provided below:

Figure IV: Nature and Objective of the Technology Transfer Stakeholders

Stakeholders	Responsibility	Primary motives	Secondary motives	Culture
University scientists	Discovery of new knowledge	Recognition within the scientific community	<ul style="list-style-type: none"> - Financial gain and desire to secure additional research funding - Reputation and recognition outside the scientific community 	Scientific
TTO	Works with faculty and firms to structure deals	Protect and market intellectual property	<ul style="list-style-type: none"> - Facilitate technology diffusion - Secure additional research funding 	Bureaucratic
Firm/entrepreneur	Commercialise new technology	Financial gain associated with the acquisition of new knowledge	<ul style="list-style-type: none"> - Access to new technology and qualified personnel - Skill/knowledge enhancement of its scientific workforce (absorption capacity) - Maintain control of proprietary technology 	Entrepreneurial

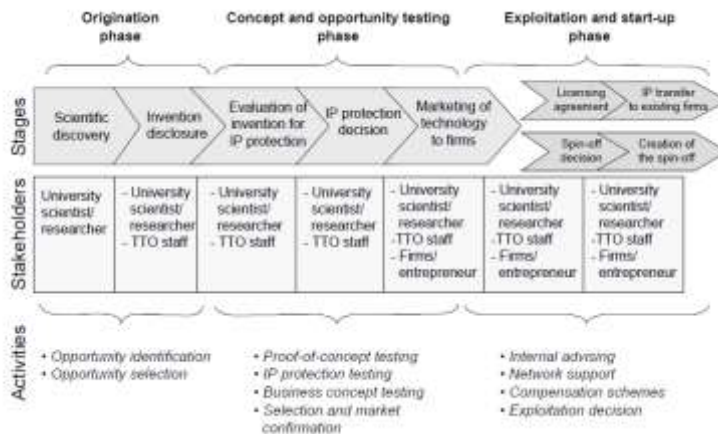
(Source: Siegel D., Waldman D. and Link A., "Assessing the Impact of Organizational Practices on the Productivity of University Technology Transfer Offices: An Exploratory Study", 2003)

The technology transfer process leading to a licensing agreement being made with a firm or a business or the creation of a spinout is facilitated by the technology transfer office. It comprises of three major phases namely the origination phase; the concept and opportunity testing phase and finally the exploitation and start-up phase. The origination phase covers the genesis of the licensing and/or of the spin-off process. The second stage concerns the concept testing stage during which the scientific opportunity is tested and partially validated from a technical, an intellectual property and a business point of view. This phase ends up when there is a confirmation of an existing business opportunity. Finally in the last phase, the exploitation of the scientific discovery starts either

58 Donald S. Siegel, David Waldman and Albert Link: Assessing the Impact of Organizational Practices on the Productivity of University Technology Transfer Offices: An Exploratory Study, Research Policy, Vol. 32, 2003, pg. 36

through a licensing agreement or a spin-off decision.⁵⁹ It is well expressed in the process map given below followed by a detailed discussion on each of the stages:

Figure V: Technology Transfer Office Process Map



(Source: University of Michigan, Tech Transfer Office, <http://www.techtransfer.umich.edu>)

The technology transfer process is interplay among various stakeholders guarding varied interests during the genesis to end use of a technology. During the ‘Origination Phase’, the technology is invented referred to as scientific discovery and the disclosure of the same take place. The stakeholders involved are the University Researcher and the Technology Transfer Office and the major activities undertaken at this phase are opportunity identification and selection for the technology.

The next phase, the technology passes through is called the ‘concept and opportunity testing phase’. During this phase, the evaluation of the technology for intellectual property protection is conducted, decision is taken and the technology is marketed to firms or businesses; established or spinoffs. The stakeholders involved are the university researcher, the Technology Transfer Office and since it also involves marketing the technology to the industry, it also involves the

⁵⁹ Jean-Jacques Degro of and Edward B. Roberts: Overcoming Weak Entrepreneurial Infrastructures for Academic Spin-off Venture, Journal of Technology Transfer, Springer, Vol. 29, 2004, pg. 339

entrepreneur as a stakeholder. The major activities undertaken at this phase are proof of concept testing to verify the underlying principle of the technology and to check if it has the potential to be used, Intellectual Property protection testing to check the strength of the Intellectual Property in the technology, business concept testing to check the viability of the business idea and finally selection and market confirmation to ensure selection of a proper market to sell the end product developed using the technology.

The third and final phase of the process is referred to as the 'Exploitation and Start-up phase'. In this final phase that the technology passes through the important stages like either licensing the technology to existing firms or creating a university spinoff occur. The stakeholders involved are the University Researcher, the Technology Transfer Office and the Entrepreneur and the activities like internal advising regarding commercial and legal aspects of the technology and business is provided by the technology transfer office. The technology transfer office also provides network support like developing business contacts, arranging finance and in some cases it also provides incubation facilities for spinoffs through business incubators, provides assistance in developing compensation schemes like revenue or equity sharing between the stakeholders and helps in the technology exploitation decision of licensing the technology to existing firms or to create spinoffs.

Origin of University Spin offs & Legislative Activity

The modern university has its roots in Germany in the 19th century and therefore it is not surprising that the earliest examples of University Spinoffs are also found in 19th Century German universities. For instance, Gusten identifies several chemistry professors in 19th Century Germany who founded companies on the basis of their technological developments and knowledge. He explains that one of the most famous of these efforts was that of Professor Johann Pickel, who produced salts, potash, and acetic acid on the basis of his scientific discoveries, and that another well-known effort was a company founded by Justus von Liebig to manufacture chemical fertilizers.⁶⁰ Many countries, in the following years, modeled their university system on the same bases established in Germany. However, early efforts to

60 Bernard Henry Gusten: *The Emergence of the German Chemical Profession, 1790–1867*, University of Chicago. 1975, pg. 34

commercialize university technologies were rather limited, both because of the relatively limited level of technology production at universities at this time and because of the relatively small size of universities prior to the 20th century.⁶¹

Morrill Act

One of the unique features of the modern day university systems was developed in the American university system. In the 19th century, the Americans enacted the Morrill Act of 1862 which granted States, land for the establishment of colleges and universities and was instrumental in the establishment of land grant universities. Section 1, Chapter CXXX, named An Act donating public lands to the States and Territories which may provide colleges for the Benefits of Agriculture and Mechanics Arts read

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That there be granted to the several States, for the purposes hereinafter mentioned, an amount of Public Land, to be apportioned to each State a quantity equal to thirty thousand acres for each Senator and Representative in Congress to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty.

The Hatch Act

The Hatch Act of 1887 followed the Morrill Act with additional federal grant funds for each state by establishing an agricultural experiment station in association with the land-grant universities. SEC. 2., 7 U.S.C. 361b, read,

It is further the policy of the Congress to promote the efficient production, marketing, distribution, and utilization of products of the farm as essential to the health and welfare of our peoples and to promote a sound and prosperous agriculture and rural life as indispensable to

61 Scott Andrew Shane: Academic Entrepreneurship – University Spinoffs and Wealth Creation, Edward Elgar Publishing Limited, 2004, pg. 40

the maintenance of maximum employment and national prosperity and security. It is also the intent of Congress to assure agriculture a position in research equal to that of industry, which will aid in maintaining an equitable balance between agriculture and other segments of our economy. It shall be the object and duty of the State agricultural experiment stations through the expenditure of the appropriations hereinafter authorized to conduct original and other researches, investigations, and experiments bearing directly on and contributing to the establishment and maintenance of a permanent and effective agricultural industry of the United States, including researches basic to the problems of agriculture in its broadest aspects, and such investigations as have for their purpose the development and improvement of the rural home and rural life and the maximum contribution by agriculture to the welfare of the consumer, as may be deemed advisable, having due regard to the varying conditions and needs of the respective States.

This Act called on universities to develop and disseminate knowledge that resulted from academic research for the development of both Industry and Agriculture.⁶² Furthermore, the purpose of the Hatch Act was the promotion of efficient production, distribution, marketing, and use of products and or methods that promoted a prosperous agriculture industry and resulted in national prosperity. Several entrepreneurial efforts were undertaken by academics in the late 19th and early 20th century as a way to take university knowledge and use it to help farmers and manufacturers through extension services.

While university technology commercialization efforts in the developed world were relatively small in the 19th Century, they began to grow at the beginning of the 20th century.⁶³ However, at the turn of the 20th century, many academics and university administrators took a negative view of efforts by faculty members to patent and license their

62 Nathan Rosenberg and Richard R. Nelson: American Universities and Technical Advances in Industry', Research Policy, Vol. 23, 1994, pg. 329

63 David Mowery and Bhaven Sampat: University Patents and Patent Policy Debates in the USA, 1925–1980, Industrial and Corporate Change, Oxford Journals, Oxford University Press, Vol. 10, 2001, pg. 790

inventions. As a result of this largely negative view of technology commercialization from the beginning of the 20th century to the early 1970s, universities' efforts to support technology commercialization and spinoff activity were more indirect than direct.⁶⁴ In general, during this period, most university researchers did not involve their institutions formally in their efforts to commercialize their inventions through the formation of new companies.⁶⁵

University patenting and technology commercialization activity increased after World War I, a fact that can be attributed, at least in part, to the acceleration of technological development in the 1920s, as well as to the increased involvement of industry in university research.⁶⁶ However, the volume of the commercialization effort in the first part of the 20th century was still relatively low. During this period, universities produced much less technology for commercial purposes than they do today, in both absolute and relative terms. This time period also saw no appreciable change of formation of new companies to exploit intellectual property created at universities, which remained relatively low in volume and was conducted by academicians largely independently of the academic institutions that employed them. However the leading public research institutions, by this time began to institute policies and systems to manage and commercialize university generated intellectual property.⁶⁷

As early as 1930 due to the severe financial squeeze, the great depression and the resounding success of pioneering institutions like the universities in generating income from technology licensing, there was growth in formalized university technology commercialization.⁶⁸

The 1970s was the decade of profound change in university technology commercialization and spinoff activity. Beginning in 1970,

64 David Mowery: Trends in patenting, licensing, and the role of equity at selected U.S. universities', presentation to the National Academies Board on Science, Technology, and Economic Policy Committee on Intellectual Property Rights in the Knowledge-Based Economy, Washington DC, 2001

65 Nathan Rosenberg and Richard R. Nelson: American Universities and Technical Advances in Industry', *Research Policy*, Vol. 23, 1994, pg. 333

66 David Mowery and Bhaven Sampat: University Patents and Patent Policy Debates in the USA, 1925–1980, *Industrial and Corporate Change*, Oxford Journals, Oxford University Press, Vol. 10, 2001, pg. 792

67 David Mowery and Bhaven Sampat: Patenting and licensing university inventions: Lessons from the History of the Research Corporation', *Industrial and Corporate Change*, Oxford Journals, Oxford University Press, Vol. 10, 2001, pg. 323

68 *Supra* note 66 at pg. 799

university patenting began to accelerate, initiating the rise in university patenting activity that continues to this day.⁶⁹ This increase in university patenting activity is significantly higher than the increase in the academic share of research and development, which means that, since the 1970s, universities have seen a large increase in their patent productivity.⁷⁰

New concept of University Spinoff

University Spinoffs have been defined in many ways by many authors. “University spinoff” is defined as a new company founded to exploit a piece of intellectual property created in an academic institution.⁷¹ Spinoff, also known as ‘start ups’ and ‘spinout’ also means leaving “the parent organization, taking along a technology that serves as the entry ticket for the new company in a high-technology industry”.⁷² Locket and Wright defined university spin-outs as “new ventures that are dependent upon licensing or assignment of the institution’s intellectual property for initiation.”⁷³ The above definition does not include the companies which are not based on technology assigned/ licensed from the universities i.e. the companies which are not directly associated to intellectual assets created from research and funded by the government or the industry.

In order to commercialize, technology is moved to a separate, new venture and this development is known as spinning’ off.⁷⁴ “An entrepreneurial spin-off arises when an entrepreneur leaves an organization to start a firm of his/her own. Hence, university spin-out is a

69 David Mowery: Trends in patenting, licensing, and the role of equity at selected U.S. universities’, presentation to the National Academies Board on Science, Technology, and Economic Policy Committee on Intellectual Property Rights in the Knowledge-Based Economy, Washington DC, 2001

70 Supra note 69

71 Scott Andrew Shane: Academic Entrepreneurship – University Spinoffs and Wealth Creation, Edward Elgar Publishing Limited, 2004, pg. 4

72 Elias G. Carayannisa, Everett M. Rogersb, Kazuo Kuriharac and Marcel M. Allbrittond (1998) “High-Technology Spin-Offs from Government R&D Laboratories and Research Universities”, *Technovation*, Elsevier, Vol. 18, 1998, pg. 3

73 Andy Locket and Mike Wright: Resources, Capabilities, Risk Capital and the Creation of University Spin-Out Companies, *Research Policy*, Vol. 34, 2005, pg. 1044

74 Stefan Görling: Methods for Assessing Technology Transfer – An Overview, Pink Machine Paper, Royal Institute of Technology, Department of Industrial Economics and Management, Sweden, Working Paper Series No. 31, 2006, pg. 4

separate venture and involves a specially formed team of people”⁷⁵ i.e. a faculty member, staff member or a student.⁷⁶

To give one universal definition for spin-off one can take definition of spinoff which is as follow: “Spinouts involves transfer of a core technology from an academic institution into a new company and the founding member(s) may include the inventor academic(s) who may or may not be currently affiliated with the academic institution”.⁷⁷

Companies established by current or former members of a university, which do not commercialize intellectual property created in academic institutions, are not included in the definition of a spinoff employed here. Thus university spinoffs are a subset of all start-up companies created by the students and employees of academic institutions. Some others have defined spinoffs as companies founded by anyone who has studied or worked at a university.⁷⁸ Several other researchers view spinoffs as companies where academic scientists serve on scientific advisory boards in return for equity compensation.⁷⁹

Why Spinoffs?

While university spinoffs are rare entities, they are, nonetheless, quite important. University spinoffs are valuable because of the following reasons: they enhance local economic development; they are useful for commercializing university technologies; and they help universities with their major missions of research and teaching. A detailed discussion on each of these would further clarify the justification of university spinoffs.

75 Désirée van Gorp and Pieter Klaas Jagersma: Spin-Out Business Model: A Strategic Tool for Innovative Growth, Entrepreneurship and Flexibility in the Service Sector, In *Managing Business in a Volatile Environment : Balancing Local and Global Challenges*. The 8th International conference on global business and economic development, Guadalajara, Mexico 7-10 January 2004

76 Raymond W. Smilor, David V. Gibson and Glann B. Dietrich: University spin-out companies: Technology Start-ups from UT Austin, *Journal Business Venturing*, Elsevier, Vol. 5, 1990, pg. 63-76.

77 Nicos Nicolaou and Sue Birley: Academic Networks in a Trichotomous Categorisation of University Spinouts, *Journal of Business Venturing*, Elsevier, Vol. 18, 2003, pg. 340

78 Edward B. Roberts: *Entrepreneurs in High Technology*, Oxford University Press, New York, 1991, pg. 161

79 Supra note 61 at pg. 5

Spinoffs and Economic Development

University spinoffs are important entities for encouraging local economic development. There are at least four ways in which spinoffs encourage local economic activity. First, they generate significant economic value by producing innovative products that satisfy customer wants and needs. Second, they generate jobs, particularly for highly educated people. Third, they induce investment in the development of university technology, furthering the advance of that technology and finally, they have highly localized economic impact.

It is estimated that the economic impact of academic spinoffs, measured by the amount of financial value added they generate, is relatively large.⁸⁰ University spinoffs are beneficial entities because they are very effective generators of novel products and services, creating more new innovative products and services than other technology start-ups.⁸¹ Because firms that develop more innovative products and services satisfy important and new customer wants and needs, university spinoffs can be seen as useful entities in finding high technology solutions to unsatisfied customer demand.

Although comprehensive data on the level of investment in the development of university technology belonging to spinoff companies are not available, Golub suggests that university spinoffs are effective at encouraging investment in university technology development.⁸² Another measure of the value of university spinoffs in generating investment in technology development lies in their tendency to invest in research and development. Studies have shown that university spinoffs are much more research and development (R&D)-intensive than the typical start-up company, with R&D intensity exceeding 20 percent of sales in many cases.⁸³

University spinoffs are also valuable entities because they are important contributors to the economic development of the locality to

80 Warren Cohen: Taking Care of Business, ASEE Prism Online, Chicago, 2000, pg. 3

81 Desmond M. Blair and David M. W. N. Hitchens: Campus Companies – UK and Ireland, Ashgate Publication Ltd, Aldershot, United Kingdom, 1998, pg. 167

82 E Golub: Generating Spin-offs from University-Based Research: The Potential of Technology Transfer, PhD Dissertation, Columbia University, 2003

83 Philippe Mustar: Spin-Off Enterprises. How French Academics Create High-Tech Companies: Conditions for Success or Failure, Science and Public Policy, Paris, Vol. 24, 1997, pg. 40

which they belong. Firstly, they create business opportunities by translating research results into workable technologies leading to market solutions. Secondly, these spinoffs conduct most of their basic activities like their hiring, sourcing of supply, production, and so on locally and thus have significant multiplier effects on local economic activity. Spinoffs frequently serve as catalysts for the formation of geographic clusters of new firms in particular technologies.⁸⁴ The best evidence for the geographic localization of university spinoffs is that provided by Roberts. He observed that spinoffs not only tend to be founded in the same city and state as the university from which they emerged, but are often established in locations geographically very proximate to the laboratories in which they were born.⁸⁵

In addition to the direct effect of spinoffs on local economic development, there is also an indirect effect. Because founders of spinoffs often want to retain employment at their universities while establishing their companies, the creation of university spinoffs also encourages venture capitalists and other supporting institutions to locate in geographical areas where universities are found. As a result, university spinoffs serve as magnets for the creation of an infrastructure to support the creation of new technology companies in general.

Spinoffs and Commercialization of University Technologies

University spinoffs are valuable entities because they commercialize those university technologies that would otherwise go undeveloped. Researchers have identified two ways that spinoffs enhance the development of technology. First, they provide a mechanism for firms to commercialize such inventions in which uncertainty is very high resulting in a lack of interest of other larger establishments. Second, they provide a way to ensure inventor involvement in the subsequent development of university technologies, which is crucial when technologies are based on tacit knowledge. Thursby and Thursby conducted a survey of licensees of university technologies and found that one of the most important reasons why established companies do not license university technology is the early stage of development of the

84 Robert Alan Lowe: *Invention, Innovation and Entrepreneurship: The Commercialization of University Research by Inventor-Founded Firms*, University of California at Berkeley, 2002, pg. 202

85 *Supra* note 77 at pg. 176

invention.⁸⁶ Matkin found that the most common reason for university researchers founding their spinoff companies was that existing firms would not license and develop their inventions, and they wanted their technologies to be commercialized.⁸⁷

University spinoffs also provide effective mechanisms for involving the inventor of the technology in the process of commercialization which is a necessary condition for the development of products or services from university technology. University inventions often require additional development to be commercialized, with the knowledge necessary to undertake this additional development being tacit. Because the inventor is often the only party who has the knowledge necessary to develop the technology further, inventor involvement is a necessary condition of technology commercialization.⁸⁸ University spinoffs achieve inventor involvement because many scientists perceive that spinoffs are better places to work at because start-up companies undertake more interesting and more challenging projects than established firms, and tend to have smarter employees.⁸⁹ As a result, inventors are more inclined to work with new companies seeking to commercialize their university inventions than they are to work with established companies seeking to commercialize their inventions.

Also, start-up firms focus more of their attention on technology development as opposed to other aspects of business, and university researchers are more interested in technology development than in other aspects of business. Consequently, university inventors generally believe that they fit in better with spinoff companies and can contribute more to their development of technologies than they can to the development of technologies by established firms. And finally, equity is a more effective tool to ensure inventor involvement in spinoffs than other forms of compensation.⁹⁰ Spinoffs can provide inventors with equity holdings more easily than established firms because the distribution of equity at

86 Jerry G. Thursby and Marie C. Thursby: Industry Perspectives on Licensing University Technologies: Sources and Problems, *Journal of the Association of University Technology Managers*, United States of America, Vol. 12, 2000, pg. 13

87 Gary Matkin: *Technology Transfer and the University*, Macmillan, New York, 1990, pg. 78

88 Richard Jensen and Marie C. Thursby: Proofs and Prototypes for Sale: The Tale of University Licensing, *American Economic Review*, Chicago, Vol. 91, 2001, pg. 249

89 Martin Kenney: *Biotechnology: The University-Industrial Complex*, Yale University Press, New Haven, 1986, pg. 121

90 Richard Jensen and Marie C. Thursby: Proofs and Prototypes for Sale: The Tale of University Licensing, *American Economic Review*, Chicago, Vol. 91, 2001, pg. 251

the time of firm founding does not involve the transfer of equity from someone who has it to someone else, as is the case when equity is distributed after founding.

University Spinoffs and the Mission of Research and Teaching

Spinoffs are useful to universities because they help to attract and retain productive science and engineering faculty. By allowing faculty to supplement their salaries with equity in their own companies, universities provide a financial mechanism to retain and recruit faculty, particularly in the biomedical areas, that is similar to the use of practice plans common with clinical faculty in medical schools.⁹¹ At least in the biological sciences, researchers have observed that allowing faculty to found spinoffs has been an effective mechanism to deter faculty from taking higher paying industry jobs.⁹²

Spinoffs also benefit universities through the contribution that they provide to the education and training of students. Interaction with university spinoffs provides faculty with knowledge about starting companies that is useful in educating students for a world in which entrepreneurial activity is increasingly common among scientifically trained people.⁹³ In fact, McQueen and Wallmark propose that spinoff companies help faculty to learn about commercial uses for new technology, rather than just scholarly uses for academic inventions.⁹⁴ The incidence of university graduates working in the industry is much higher as compared to those who have an inclination towards research and might become academic researchers. This makes it very important to make them aware of the commercial uses for new technology so that they can also identify the practical value of research.⁹⁵ University spinoffs, thus, help universities achieve their primary missions of scholarly research and teaching.

91 Gary Matkin: *Technology Transfer and the University*, Macmillan, New York, 1990, pg. 85

92 Walter W. Powell and Jason Owen-Smith: *Universities and the Market for Intellectual Property in the Life Sciences*, *Journal of Policy Analysis and Management*, Wiley & Sons, Vol. 17, pg. 1998, pg. 359

93 Maurice N. Richter: *University Scientists as Entrepreneurs*, *Society, Social Science and Public Policy*, Springerlink, Vol. 23, 1986, pg. 80

94 Alistair Brett, David V. Gibson and Raymond W. Smilor: *University Spin-off Companies*, Rowman and Littlefield Publishers, Savage, Maryland, 1991, pg. 109

95 Henry Etzkowitz: *Research Groups and "Quasi-Firms": The Invention of the Entrepreneurial University*, *Research Policy*, Vol. 32, 2003, pg. 116

Establishment of University Spinoffs

The creation of the technology used by a university spinoff is a multi-stage process. Funding from the governments, industry and foundations are used to support scholarly research in science and engineering. Some of this research, results in the creation of new technology, some of which is disclosed to the university. The university technology-licensing office then decides whether or not to seek intellectual property protection for the inventions, after which efforts are made to find licensees for them. In most cases, established companies are the licensees of university inventions, but in some cases newly formed companies are the licensees. Beginning with the initial research phase, the process of university technology development involves significant amounts of hard work, with only some efforts leading to outcomes that mark progression to the next stage.

The researcher will now discuss some of the models for creation of University Spinoffs that are widely used. The first model is proposed by Shane Scott. Next the researcher shall discuss the model devised by Vohora. And finally the researcher shall elaborate the third model as formulated by Ndonzuau.

Shane's Process of University Technology Development

Figure VI: The Process of University Technology Development



(Source: Scott, Shane, Academic Entrepreneurship – University Spinoffs and Wealth Creation, 2004)

The University Spin-Off (USO) creation process consists of several steps, stages or phases. Shane describes this process in five phases.⁹⁶ The first, second and fourth phases are considered as stages in the spin-off creation process and the third and fifth phases are decision making moments. All steps will be discussed below:

96 Supra note 61 at pg. 97

University Research: The first phase in the decision to create university spinoffs is research. Research at universities is production of new knowledge and more often than not uses funding from companies, foundations and government agencies to obtain human and physical resources required. Most of the research funding is used to pursue typical academic goals, like producing knowledge that can be published in academic journals, paper presentations at conferences, seminars etc. Sometimes, though, this research leads to technological knowledge that has the potential to facilitate new products and services. When a potential technology that has such kind of utility has been identified, the next step of creation and disclosure of the invention happens.

Creation and Disclosure of Invention: Upon identification of potential, researchers then conduct extensive research to derive results and create the technology. When a researcher believes that his or her new technology is an invention that can be commercialized, the individual is expected to disclose it to the university technology-licensing office. Before making that decision, two conditions must be met. First, the researcher must believe that the invention is something that is novel, non-obvious and valuable, rather than having produced a research result. Second, depending on the university's policy, if it so requires that the inventors must disclose their invention to the university. This is also dependent on the nature of the technology and the nature of intellectual property protection.

Decision to seek IP Protection: Provided that the research led to creation of a technology that fulfils the conditions of a patent i.e the technology is novel, non-obvious and valuable, the inventor can seek the protection of that intellectual property. If the inventor wants to seek IP protection, he or she must believe that these conditions are met. Moreover, the technology must be embodied in some form that can be patented. Tacit knowledge that only the inventor knows is difficult to protect through a patent. The next step is to market the technology.

Marketing the Technology: Only when the technology has legal protection, (by virtue of its novelty, non-obviousness and value) the inventor or the technology transfer office will try to market the technology. Licensing to established companies is by far the most used form. Approximately 86 percent of licenses go to companies that already

exist.⁹⁷ But it is not always easy to find an established company willing to invest in an often very early stage invention as the uncertainty of these investments is very high or in other words, the risk is very high. In fact, Shane suggests that a technology is likely to be exploited by a USO if the technology is:

- **Radical:** There is little doubt that incremental inventions would better complement an existing company, because of their advantage on market experience and market knowledge and hence radical technologies are often rejected by established firms because they could negatively affect their balance sheet and their existing products or services. These kinds of technologies undermine the existing organizational competencies and hence established firms often reject radical technology. This makes such kind of technologies, of whose capabilities; established companies are unaware of, available to the university spinoff companies and to exploit them to their true potential.
- **Early Stage Technology:** These technologies are usually at the 'proof of concept' stage. At this stage large established companies do not want to take the risk as the true potential of the technology is unproven and uncertain, the focus of established firms is on existing operations and finally the lack of expertise in conducting radical product development using these technologies in established firms. For this reason, many university spinoffs find it alluring to indulge in these technologies as the full potential can be unlocked by the inventors in order to compete in the market.
- **Tacit:** If a technology is tacit, it is difficult for anyone other than the inventor to see how an invention could be further developed into a technology that can be commercialized.
- **General-purpose:** USOs tend to exploit technologies that are general-purpose, which offer multiple markets and are difficult for established companies to identify.

In addition to the above, Shane also suggests that a technology is likely to be exploited by a USO if the technology has:

- **Significant customer value:** USOs start from scratch and need to assemble the assets needed for the technology. This requires identification and use of a more valuable opportunity. The

97 Lori Pressman: AUTM Licensing Survey: FY 2001, Association of University Technology Managers, Northbrook, Illinois, 2002

technology will most likely to be exploited by a USO if it feels that the technology has the potential to provide significant customer value. It is value that is important to the customer and brings in the revenues required for the existence of the company.

- **Significant technical advance:** Existing companies usually conduct incremental advancements in technology as they need to be doubly sure that there is demand for their product and that the customer is informed and ready to accept the product. But as is clear now, university research might lead to novel technologies. These technologies are significantly advanced as otherwise they would not be protected under the Intellectual Property rights law. These significantly advanced technologies are the ones that university spinoffs use.
- **Strong IP protection:** Starting USO companies have the only competitive advantage of having an intellectual property that can be further used to create end products and services. Any loophole in this competitive advantage might result in heavy loss of investments and thus spin-offs are more likely to be founded with a technology that has strong intellectual property protection so that it is safe from being tampered with by existing larger companies to their own advantage.
After analyzing the market for the technology, the licensing decision has to be made.
- **Licensing Decision:** If a technology has not been licensed to an established company and the inventor believes in its success, the technology can be licensed to a newly established company. This is when a spin-off occurs. As stated above, approximately 86 percent of technologies are licensed to existing companies, which means that only 14 percent are licensed to USO companies. This number might be relatively low due to the fact that mostly academics try to license a technology to an established company instead of exploiting it through a USO as the risk bearing capacities for a USO is far limited when compared to an existing company.

Analysis

The model proposed by Shane begins with utilization of funds available for research at universities. In the process of conducting

research at times technologies are created which have the potential to facilitate the development of new products and services as research funding is primarily used to pursue academic goals. The model seems to miss out on information regarding identification and exploitation of resources prior to research i.e. the ground work before the research that can lead the research to its logical end. In the next phase of the model, the onus of creation and disclosure of research results and the resultant technology is based on belief of the researcher. It seems that this stage again is not based on analysis that is supposed to be conducted on the research results to verify its potential rather it is based on a hunch of the researcher. In the next stage, while deciding whether or not to seek IP protection, again it depends on the belief of the researcher if the research has led to a technology that is novel, non-obvious and valuable.

Shane also mentions that licensing the technology to large existing companies is the most preferred use of the research result or the technology and it is only if, for reasons discussed in the model, the technology cannot be licensed to these large firms then the inventor might start a university spinoff. Again, it seems that there is a serious lack of planning and implementation of a plan in the creation of a technology that will lead to the creation of a university spinoff. In fact, the model overlooks certain important factors that must be considered.

Beginning with a lack of opportunity identification prior to conducting research, the model also does not pay any heed to the entrepreneurial capabilities of researchers. In a way, the model also does not take into account acceptability of the technology or the products and services that the technology might facilitate by the market at large. Without possible market acceptance, production would be catastrophic.

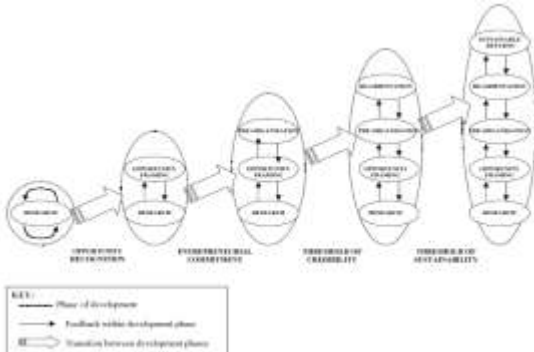
In the end, it seems that the model is more chance based rather than being choice based. Some of the very basics like understanding the phenomenon of demand and supply, market needs, market acceptance of potential solutions, competition etc. seem to have been left out.

Vohora's Model of Phases and Critical Junctures

Vohora et al. offer an evolutionary perspective on USO development. The model comprising of five phases shows that before a USO can extend itself from being a concept to reality, a specific group of

activities as well as strategic focus must be accomplished. He also discusses certain hurdles/obstacles that have to be crossed after each phase. These ‘obstacles’ are the critical junctures.

Figure VII: The Phases and Critical Junctures in the Development of University Spin-offs



(Source: Vohora, A., Wright, M., Lockett, A.: *Critical Junctures in the Development of University High-tech Spinout Companies*, 2004)

Research phase: Just as in the model proposed by Shane, as discussed above, the first phase of this process too is the research phase. This phase is essentially aimed at producing academic knowledge. This phase spans from researching a new technology, to the point that intellectual property is created. It can take a long time sometimes even years.

Vohora et al. claim that before the opportunity of commercializing is recognized, the main focus of the academic involved is to perfect the research and publish the research and the results thereof in the specific area. The transition from academic research to opportunity passes through a critical juncture of being able to recognize that opportunity.

Opportunity Recognition (Critical Juncture 1): When a USO company is at the end of the research phase, the problems that arise from moving to the opportunity framing phase are defined by the critical juncture ‘opportunity recognition’. Opportunity recognition is the solution that

satisfies the need of an unfulfilled market.⁹⁸ The ability to connect the specific knowledge and a commercial opportunity requires a set of skills, aptitudes, insights and circumstances that are neither uniformly nor widely distributed.⁹⁹ It is pertinent to note here that academicians or researchers working in universities who have created the technology know the nuances of it too but they lack the ability to link that research result to the varying needs of the market. Added to that, they at times over assess the profitability potential of the technology that they create. Therefore it is clear that the ability to develop or acquire the necessary skills in order to create a market oriented and feasible offering keeping in mind the identified unfulfilled market need is the foundation upon which USOs are built. When a USO is able to link the opportunity to a specific market, it moves to the next phase, the opportunity framing phase.

Opportunity Framing phase: Here the academic and others involved will examine if the recognized opportunity has enough underlying value to proceed with the commercialization. This process involves evaluation of the opportunity and being ensured from the results arrived at that the technology is workable and has the required potential in terms of application in a commercial environment. If the opportunity can be applied in a commercial environment, the next step is to evaluate it to find out the commercial opportunity it fits into. That is, to identify the markets for the opportunity and what application of the opportunity are to be developed for those markets. Also, an assessment of customers in parlance to the innovation is critical. This not only requires entrepreneurial skills but also a strong commitment to the purpose. This becomes another critical juncture.

Entrepreneurial Commitment (Critical juncture 2): At the interface of the opportunity framing phase and the pre-organization phase lays the critical juncture entrepreneurial commitment. “Entrepreneurial commitment is necessary for a potential venture to be taken forward from a vision that the academic has created mentally, to the formation of a business that is operational and engaged in business transactions”.¹⁰⁰

98 Mahesh P. Bhawe: A Process Model of Entrepreneurial Venture Creation. Journal of Business Venturing, Elsevier, Vol. 9, 1994, pg. 235

99 Sankaran Venkataraman: The Distinctive Domain of Entrepreneurship Research. Advances in Entrepreneurship, Firm Emergence and Growth (1997), in J. Katz, ed., Foundations Of Entrepreneurship, Scott Andrew Shane, ed., Edward Elgar Press, Vol. 3, 2002, pg. 123

100 Ajay Vohora, Mike Wright and Andy Lockett: Critical Junctures in the Development of University High-Tech Spinout Companies, Research Policy, Vol. 33, 2004, pg. 160

Entrepreneurial commitments are the acts which bind the entrepreneur to a certain course of events. In their research, Vohora et al. suggest that the commitment to the enterprise is critical because there is a serious need for the entrepreneur to have high commitment towards making the USO company a success but then finding such an individual with the requisite technological and entrepreneurial skills is difficult.¹⁰¹ He also provided four reasons for this. The first reason is the difficulty in finding good role models in the area of academic entrepreneurship, from whom future such entrepreneurs can learn about the basics like the value of commitment and thinking out of the box or perceiving things differently than others. This results in reluctance on the part of academic entrepreneurs. The base of such reluctance is because they do not know how to commit, where to commit and how much to commit. Commitment leads to not only exploration of potential but also the direction of that exploration and the lack of it restricts this exploration of the potential locked in the commercialized technology. This happens because of the values that academicians imbibe and the system in which they perform. Scientist can feel uncomfortable commercializing the opportunity by themselves, and the social connections of most academics in general are restricted to the academic linkages within academia alone and not to the commercial world or the market per se. Secondly, entrepreneurs of USOs lack prior business experience for obvious reasons coupled with a genuine concern of moving from academic to market competition. At times mistrust in one's own abilities to successfully compete in the market is also a problem. This leads to a feeling of insufficiency which can display itself in poor framing of the opportunity. The poor framing of the opportunity can result in uncertain and complex decisions which can later impede smooth functioning of the USO. The third reason is an insight related to the lack of self-awareness of personal limitations and sometimes a lack of humility on the part of some academics as a result of which many USOs face difficulties in delegation or sharing of their roles, responsibilities and powers while commercializing their intellectual property. This happens so because of the years of training in academic areas where intellect is important but almost no training in areas of commercial or business skills. The fourth reason is that a USO can find it difficult to identify and acquire another entrepreneur who is apt at business and its intricacies. This is so because of limited connections, inadequate financial offers and other benefits and

101 Supra note 100 at pg. 163

the inability of the inventor to relinquish control of their company to anybody else. When the opportunity is framed within its commercial potential and the company has found, internally or externally, a committed entrepreneur, the USO moves to the next phase of development.

Pre-organization phase: Once the opportunity is framed, the development and implementation of the strategic plans can take shape. The decisions made in this phase are found to have major and unforeseeable impact upon the USO. The path that the firm will take is charted and any mistakes made in this phase can prove fatal in the future and affect the mission and strategies set. Time is of great value in technology oriented products and a small mistake can result in loss of time and revenue. The natures of the problems are such that not only experience and other human resources but knowledge of where to draw solutions from is also of great value. This phase is the one where maximum learning happens for the inventor or the entrepreneur if they lacked business knowledge regarding how the industry functions and what it values. At this stage, the credibility of the entrepreneur can take the USO a long way. Thus credibility becomes the next critical juncture.

Credibility (Critical juncture 3): Credibility is the ability of the entrepreneur to gain access to and acquire an initial stock of resources required for the business to begin to function. The lack of it critically directly impacts access to important resources like finances and human resource among others for the entrepreneur.¹⁰² A cumulative of insufficient resources, lack of proper business links and also absence of business skills can dampen the scope of the USO. Financial investors not only desire proof of market and the proof of concepts but also a reality check on the credentials of the entrepreneur. It is not easy though as more often than not the only thing that they have to show is the intangible knowledge or the technology that they have as resources and an academic curriculum vitae consisting of publications as credentials. Also the connection with the university can be a problem at this stage. In fact, stakeholders, both internal and external value a distinct image of the company in order to have faith in the project and as long as it remains connected with the university, an identity cannot be created for the USO. The path dependency of USOs may present specific challenges like non

102 Supra note 100 at pg. 164

acceptability of the products and services offered by the USO and more commonly investors and customers may negatively view the influence of the non-commercial cultures from the university. When the USO has acquired the necessary resources, it will move to the re-orientation phase.

Re-orientation phase: After the pre-organization phase, the USO has sufficient resources and credibility to start-up the business. The USO would then focus on generating revenues. This is possible by offering value that is acceptable in the market. Now the management faces the challenge of identification and acquisition of required resources, configuring them and if needed, repeating the process several times till it produces the desired results.¹⁰³ In fact, lack of capital and managerial skills in start-up companies are factors that result in continuous re-configuration. In addition to these, information and interaction with stakeholders concerned causes a great deal of change. For example, if results in a certain category of customers are disappointing, the strategy will be realigned to target a new category of customers. The success of progressing from this phase to the next depends to a large extent on the preparatory work done during the previous phases so that actions and resource allocation and utilization of those resources are sustainable. Thus sustainability becomes critical.

Sustainable Returns (Critical juncture 4): After exploiting its technological assets commercially, the USO faces the challenge of creating sustainable return. Sustainable returns can be in the form of steady profits from revenues or promise of investment from investors. With the knowledge generated from the information gathered from concerned stakeholders, optimum utilization of available resources, honed skills and linkages developed, the management of the USO would be in a position to conduct a re-configuration, if required. At this point, weaknesses can be converted to strengths and new opportunities should be identified and explored in order to create desired results facilitating creation and delivery of value to the identified customer base. All said and done, improper identification and allocation of resources, lack of managerial skills and weak human resource that might have been carried forward from the previous phases will be tough to handle but need to be

103 David J. Teece, Gary Pisano and Amy Shuen: Dynamic Capabilities and Strategic Management, Strategic Management Journal, John Wiley & Sons, Vol. 18, 1997, pg. 515

addressed.¹⁰⁴ If the company has succeeded to overcome all the critical junctures, it moves to the sustainable returns phase.

Sustainable returns phase: If the USO manages to arrive in this phase, it has addressed many of the uncertainties. Typically in this phase, the company moves from the university campus to a commercial environment.

Analysis

The model proposed by Vohora provides a systematic approach for the development of university spinoffs. The model recognizes that opportunity analysis and identification is critical to research as research conducted without an understanding the opportunity will most probably result in non – commercialization of the same. It is a tricky situation as connecting academic research to a market opportunity is not an easy task and requires in addition to the scientific knowledge, sound business knowledge also. This opportunity in a way provides a broad end result of the research. But then once the opportunity is identified, the end has not been achieved. It has to be scrutinized for value in parlance to the market that it is supposed to serve. Vohora very skillfully draws the relation of opportunity to research to value to market till the second stage.

Again, he identified that the thread that ties things together is the commitment of the entrepreneur. It is commitment that is the most difficult of all the ingredients for a successful enterprise and it is that much more important for an enterprise like university spinoffs. Entrepreneurs of university spinoffs are inventors and are apt at research. Vohora identified that running a company requires capabilities in which researchers might not be comfortable owing to the lack of prior business experience. Very craftily Vohora mentions that any lack of commitment on the part of the entrepreneur might have serious impacts on the spinoff as it will impact the vision, mission and strategy of the spinoff.

The model also takes care of the most important element in business called decision making. A right decision can mean success and a wrong one may mean closure. Decision making is extremely important in case of university spinoffs as entrepreneurs here not only lack

104 Supra note 100 at pg. 167

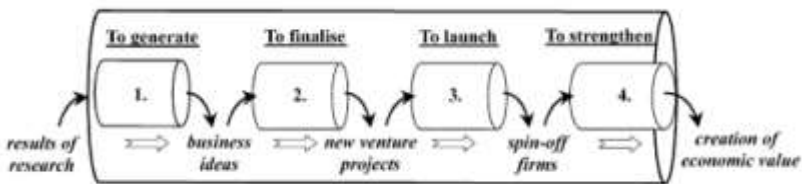
experience of conducting business but also do not have access to networks of expertise and understanding the consumer. The model rightly identified that the credibility or the goodwill of the entrepreneur is also pivotal in securing finances for the functioning of the company among other things.

There is no doubt that the market is in continuous transformation. This is so because of the changing competitive environment, changing tastes and preferences of the consumers, flow of information, changing legalities etc. The model takes this too into consideration. And finally keeping the modern business practices in mind the model bring the process to a logical end of sustainability. This is a rather wholesome process.

Ndonzuau’s Academic Spin-Off Creation Process

Ndonzuau et al. identify four stages in the development process of USOs. The four stages identified are from a public and academic authority’s point of view. This is done by benchmarking international spin-off support programmes. The four stages of the model are not wholly independent from each-other; decisions made in an earlier stage can have an impact on the later stages. Ndonzuau et al. identify “obstacles, impediments, hindrances and other sources of resistance” that need to be overcome in each phase. These are called ‘issues’ in their research.

Figure VIII: The Academic Spin-off Creation Process



(Source: Ndonzuau, F. N., Pirnay, F., Surlemont, B. *A stage model of academic spin-off creation*, 2002)

Generating Business Ideas (Stage 1): The first stage in this process deals with the generation of a viable business idea. This can be difficult

because of the academic culture and the problem of identifying business ideas.

- **Academic culture:** The academic culture plays a very important role in this regard. The usual culture of ‘publish or perish’ in a way influences researchers to keep working on new areas and publishing results whereas the researcher pays little heed to the application of the research in finding new solutions for the public at large. It is no secret that the relationship of researchers to money has at best remained platonic. In the academic culture, researchers consider money as a means of scientific progress. In the business sphere however, other liabilities such as financial results and project delays have to be taken into account. The disinterested nature of academic research is also an important factor of why the academic culture can be problematic in creating business ideas.
- **Identification of business ideas:** Another very important factor in the first stage is the identification and assessment of ideas. A technology with has to be identified and a business idea has to be conceived accordingly requires sensitive contacts, development of mutual trust, and organization of an efficient system of internal diffusion of information.¹⁰⁵ After an idea has been identified, it should be assessed on its technological, commercial and personal aspects. Technological evaluation requires the ability to assess the extent to which research results are stable and/or sufficiently developed to lead to industrial exploitation by identifying their possible applications, assessing their technical feasibility, and, in some circumstances, suggesting further research and development. This can be done by internal partners (i.e. professors) or external partners (i.e. consulting firms). After the technological evaluation, the market potential must be assessed and compared with the entrepreneurial ability of the inventor. Only after proper evaluation of the technological, market potential & entrepreneurial ability, a transition to the next stage is possible.
- **Finalizing New Venture Projects (Stage 2):** After stage 1, ideas are generally ill-structured with many grey areas to be clarified, while their potential to make money is not yet precisely known.

105 Frédéric Nlemvo Ndonzuau, Fabrice Pirnay and Bernard Surlemont: A Stage Model of Academic Spin-Off Creation. *Technovation*, Elsevier, Vol. 22, 2002, pg. 284

In the second stage, the idea must be transformed into a business project. This process requires major investments and consists of the protection and development of the idea.

- **Protection of ideas:** First, it must be clear who the owner of the idea is. This is often far from clear because of multiplicity of funding sources, the diversity of conventions established between funding organizations and teams of researchers, the collaboration between different research centers (public or private), the various status of people carrying out research activities (professors, contractual researchers, doctoral students, and so forth), and, finally, the intangible character of most results. All these elements contribute to complicating the task of protecting intellectual rights and require an in-depth analysis to determine who the owner of the idea is.

The next step is to efficiently protect an idea. High technological level and barriers of imitation can protect an idea naturally for a considerable period of time. Most academic results do not have high barriers, so they must be protected through artificial protection such as patents and copyrights. This requires specialists who understand how to formulate a patent. The protection of intellectual right can be costly and hence a cost-benefit analysis must be conducted on the usefulness of such legal protection.

- **The development of business ideas:** At this stage, the decision must be made on how to best exploit the idea. If the decision is made to exploit the idea through a spin-off, a transformation of the idea into a business project is required. This involves technical and commercial development along with arrangement of financing.

The purpose of technological development is to verify the possibilities of industrial exploitation.¹⁰⁶ This is done by conducting a prototype which can determine whether production can be extended to a larger industrial scale and also to demonstrate to potential customers and partners what the technology can achieve. This requires material issues like the availability of technical facilities that may be necessary to build up a prototype and non-material issues like the time of development.

106 Supra note 105 at pg. 285

After technological development, the commercial development occurs in order to determine whether the idea is a business opportunity and if so, then in which way this opportunity can be exploited. This requires a solid business plan as it helps to design a coherent strategy and to estimate more accurately key elements such as investments, turnover, operating costs, or treasury forecasts and also gives a concrete form to a selling document for bankers and investors by giving them a structured and coherent image of the ways in which the results are intended to be exploited.¹⁰⁷

Problematic in the technological and commercial development process is to finance this stage. Legal protection is often supported through the university, but for technological and commercial development, it is difficult to find funding. Public funding is dedicated to fundamental research, and very few private financial bankers invest in such early stage idea, in an unpredictable and instable high-tech market, conducted by researchers with often low entrepreneurial capabilities. This is called the 'financing gap' and is undoubtedly the key problem to overcome in order to finalize these projects.¹⁰⁸ Once, these issues are taken care of, the process moves on to the next phase.

Launching Spin-off Firms (Stage 3): This stage deals with the creation of a new firm to exploit an opportunity managed by a professional team and supported by available resources.¹⁰⁹ At this stage, the process of commercialization takes place, moving from specific academic contingencies towards business considerations. This brings two important problems: the availability of resources and the relationship that should be established between the spin-off company and the university. Dependent on their policy toward spin-offs, some universities can help overcome these problems to find solutions for these issues such as raising venture capital funding.

- ***Access to resources:*** Both tangible and intangible resources are needed to realize entrepreneurial projects. The management and creation of a spin-off is very different compared to the research activities that academics normally perform at the universities.

107 Supra note 105 at pg. 286

108 Bjornar Reitan: Fostering Technical Entrepreneurship In Research Communities: Granting Scholarship to Would-Be Entrepreneurs. *Technovation*, Elsevier, Vol. 17, 1993, pg. 288

109 Supra note 108 at pg. 292

They will have competitive pressure and they will have to be surrounded by competent people to avoid mistakes. The main reason of failure is often not the poor business idea but the poor quality of the management. The development of a business requires management expertise and good social networks. The problems that arise from this are how to identify key people and how to involve them in the spin-off company.

- ***Relationship with university of origin:*** Eventually, all USOs will leave their academic environment, but most of the USOs retain some relationship with their original university. This can be through an institutional level such as equity shares (financial resources), patent technology ownership by university (intangible resources) and access to university facilities (material resources). But it can also be through a personal relationship between the university and the researchers. This could be through incidentally benefiting from effective research infrastructure accessed at a lower cost than available in the market, or universities that unintentionally subsidize some activities of the spin-offs with a view to create economic value from the venture.

Strengthen the Creation of Economic Value (Stage 4): All endeavors academic or commercial must in one way or the other create economic value to be important to its local, national or global environment. As a matter of fact, this phase is the most important stage for the USO. This is where the technology reaches its logical end of contributing value to the customers, employees, investors, and all other stakeholders (both internal and external). This stage on the creation of economic value from a USO is from a public perspective and does not consider the development process of a USO itself.

Analysis

The model proposed by Ndonzuau is more oriented towards business. It starts with the generation of a business idea but is careful in keeping the academic culture and other problems of identifying a business idea in mind. In fact the model goes a step further and discusses the importance of cementing the idea and turning it into a viable business project by looking at the protection that the idea or the technology has. This model also suggests a prototype test of the technology and then balancing the business idea accordingly to satisfy the consumers and

other stakeholders like the financiers. The model realizes that finance is the backbone of any enterprise and duly appreciates it.

Then the model goes on to include the launching of the spinoff but even at this stage pays importance to the availability of resources and additional funding. Finally, the model focuses on the creation of economic value from the activities of the spinoff taking the process to its logical end.

A compact and methodical model, Ndonzuau values the realities of business in this model and displays a very resourceful insight into the formation, development and sustenance of university spinoffs.

Conclusion

Most of our knowledge has been produced in Universities across the world not only in the early or the medieval period only but also today. Universities are one of the major contributors to technological invention and innovation. As a result of their research activities, new areas are explored, the frontiers of knowledge are pushed forward and sometimes even the foundations of new industries are laid. They also train the human resource and create human capital.

Research has always been an important function of the university system. Universities which conduct only research and at a very high level are known as Research universities. They form the pinnacle of the academic system, typically serving only the most able students and constituting only a modest number of institutions. These universities are not only committed to bringing research to the centre of the academic enterprise but also aim to link research to real time applications and thereby foster and national development. To facilitate cutting edge research and first class training to the society, universities world over have developed indigenous Science and Technology system. This system is an intricate mix of complementary university resources comprising of financial, governance, human, intellectual, and physical capital resources that together create productive processes including research, education, training, and socialization that generate a wide range of socially valuable research outputs intellectual and human capital.

Since the Second World War, a new practice developed as regards to universities. In the developed countries universities were expected to play a more express role in nurturing economic growth and national competitiveness. This resulted in the developments of an economic thinking that justified the interpretation of universities as crucial in sustaining national competitiveness. It was clear that a push for an increase in the number of higher education students would be essential for the knowledge economy. But it was not enough and this changed the relationship between universities and Intellectual Property. The emphasis on the economic role of the university producing knowledge as the raw material that fuels innovation and national progress builds upon the broader economic debate of knowledge-driven economic growth.

Today the commercial value of research is increasingly understood by universities involved in research and development. This has given rise to means and methods of intellectual property commercialization to enable the technologies developed through research in order for them to reach the market. This creates a win-win situation for the university as well as the inventor. It is possible today with facilitation done by the Technology Transfer/Licensing Offices that have been set up by many universities and in many cases funded by the government that technologies developed in the universities should, as far as possible, find their way to the industry in order to provide solutions to the society at large.

Our research on three different models of translation of university research results into commercializable end products through university spinoffs have shown that essentially a lot of planning has to be done in order to identify the area of research to begin with, a concerted effort to understand the need of the industry where that research can be applied and finally be able to create an environment wherein entrepreneurial ventures can take shape. In the event of any diversion from the process, it is difficult to derive the end result of being able to commercialize university research results leading to greater economic prosperity.

LEGAL AID IN INDIA AND THE JUDICIAL CONTRIBUTION

*Dr. G. Mallikarjun**

The concept of seeking justice cannot be equated with the value of dollars. Money plays no role in seeking justice.

Justice Blackmun in *Jackson v Bish*

Introduction

Legal aid to the poor and weak is necessary for the preservation of rule of law which is necessary for the existence of the orderly society. Until and unless poor illiterate man is not legally assisted, he is denied equality in the opportunity to seek justice. Therefore as a step towards making the legal service serve the poor and the deprived; the judiciary has taken active interest in providing legal aid to the needy in the recent past. The Indian Constitution provides for an independent and impartial judiciary and the courts are given power to protect the constitution and safeguard the rights of people irrespective of their financial status. Since the aim of the constitution is to provide justice to all and the directive principles are in its integral part of the constitution, the constitution dictates that judiciary has duty to protect rights of the poor as also society as a whole. The judiciary through its significant judicial interventions has compelled as well as guided the legislature to come up with the suitable legislations to bring justice to the doorsteps of the weakest sections of the society. Public Interest Litigation is one shining example of how Indian judiciary has played the role of the vanguard of the rights of Indian citizens especially the poor. It encouraged the public spirited people to seek justice for the poor. For that Supreme Court relaxed procedure substantially. Apart from Public Interest Litigation and judicial activism, there are reforms in the judicial process, where it aims to make justice cheap and easy by introducing Lok Adalat system as a one of the methods to provide free legal aid and speedy justice at the door steps of the poor. In this article the author highlights the importance of free legal aid in a constitutional democracy like India where a significant section of the population has still not seen the constitutional promises of even the very basic fundamental rights being fulfilled for them.

* Assistant Professor (Law), NALSAR University of Law, Hyderabad.

Legal Aid: The Concept

Legal Aid implies giving free legal services to the poor and needy who cannot afford the services of a lawyer for the conduct of a case or a legal proceeding in any court, tribunal or before an authority. Legal Aid is the method adopted to ensure that no one is deprived of professional advice and help because of lack of funds. Therefore, the main object is to provide equal justice is to be made available to the poor, down trodden and weaker section of society. In this regard Justice P.N. Bhagwati rightly observed that:¹

The legal aid means providing an arrangement in the society so that the missionary of administration of justice becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of its given to them by law, the poor and illiterate should be able to approach the courts and their ignorance and poverty should not be an impediment in the way of their obtaining justice from the courts. Legal aid should be available to the poor and illiterate, who don't have access to courts. One need not be a litigant to seek aid by means of legal aid.

Therefore, legal aid is to be made available to the poor and needy by providing a system of government funding for those who cannot afford the cost of litigation.

Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society. It is worthy to mention that the Constitution of India provides² that State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability. Constitution of India also makes it obligatory for the

1 Speaking through the Legal Aid Committee formed in 1971 by the State of Gujarat on Legal Aid with its Chairman, Mr. P.N. Bhagwati along with its members, Mr. J.M. Thakore, A.G., Mr. VV Mehta, Deputy Speaker, Gujarat Vidhan Sabha, Mr. Madhavsinh F. Solanki, M.L.A, Mr. Girishbhai C. Patel, Principal, New Lal College, Ahemdabad. His Lord ship answered to the question of inequality in the administration of justice between the rich and the poor.

2 Article 39A of the Indian Constitution

State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all³.

Free Legal Aid in India : The positive Contribution of Judiciary

The Supreme Court of India got a major opportunity to make an emphatic pronouncement regarding the rights of the poor and indigent in judgment of *Hussainara Khatoon*⁴ where the petitioner brought to the notice of Supreme Court that most of the under trails have already under gone the punishment much more than what they would have got had they been convicted without any delay. The delay was caused due to inability of the persons involved to engage a legal counsel to defend them in the court and the main reason behind their inability was their poverty. Thus, in this case the court pointed out that Article 39-A emphasized that free legal service was an inalienable element of 'reasonable, fair and just' procedure and that the right to free legal services was implicit in the guarantee of Article 21.

Two years later, in the case of *Khatri v. State of Bihar*⁵, the court answered the question the right to free legal aid to poor or indigent accused who are incapable of engaging lawyers. It held that the state is constitutionally bound to provide such aid not only at the stage of trial but also when they are first produced before the magistrate or remanded from time to time and that such a right cannot be denied on the ground of financial constraints or administrative inability or that the accused did not ask for it. Magistrates and Sessions Judges must inform the accused of such rights. The right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require... The State cannot avoid this obligation by pleading financial or administrative inability or that none of the aggrieved prisoners asked for any legal aid.

In *Suk Das v. Union Territory of Arunachal Pradesh*⁶, Justice P.N. Bhagwati, emphasized the need of the creating the legal awareness

3 Articles 14 and 22(1) of the Indian Constitution.

4 *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 98.

5 *Khatri v. State of Bihar*, AIR 1981 SC 262.

6 AIR 1986 SC 991.

to the poor as they do not know their rights more particularly right to free legal aid and further observed that in India most of the people are living in rural areas are illiterates and are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness they are not approaching a lawyer for consultation and advice. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant and they cannot even help themselves. That is why promotion of legal literacy has always been recognized as one of the principal items of the program of the legal aid movement in the country. I would say that even right to education would not fulfill its real objective if education about legal entitlements is not made accessible to people and our constitutional promise of bringing justice to the doorsteps of the people would remain an illusion.

Justice Krishna Iyer, who is crusader of social justice in India, had rightly said that 'if a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to the Supreme Court for want of legal assistance, there is implicit in the Court under Article 142 read with Articles 21 and 39-A of the Constitution, the power to assign counsel for such imprisoned individual 'for doing complete justice'.⁷

It is a statutorily recognized public duty of each great branch of government to obey the rule of law and uphold the trust with the constitution by making rules to effectuate legislation meant to help the poor.⁸ Though the law has been enacted to protect the poor the governments are lazy to implement the enacted law. The same was observed by Supreme Court in *State of Haryana v. Darshana Devi*⁹, that "the poor shall not be priced out of the justice market by insistence on court-fee and refusal to apply the exemptive provisions of order XXXIII, CPC. The state of Haryana, mindless of the mandate of equal justice to the indigent under the magna carta of republic, expressed in article 14 and stressed in article 39A of the constitution, has sought leave to appeal against the order of the high court which has rightly extended the 'pauper' provisions to auto-accident claims. Order XXXIII will apply to tribunals, which have the trappings of the civil court"...even court also

7 *M.H. Hoskot v. State of Maharashtra* (1978) 3 SCC 81.

8 Order 33, Rule 9A, Code Civil Procedure, 1908.

9 AIR 1972 SC 855.

expressed its poignant feeling that “no state has, as yet, framed rules to give effect to the benignant provision of legal aid to the poor in order xxxiii, rule 9A, civil procedure code, although several years have passed since the enactment. Parliament is stultified and the people are frustrated. Even after a law has been enacted for the benefit of the poor, the state does not bring it into force by willful default”.

Legal Aid in India: Statutory Recognition

Though there was a statutory procedure providing free legal aid¹⁰ by appointing the advocate for defending criminal case and by exempting court fees in civil cases, it was not really making any significant impact on the ability of the underprivileged people to get the judicial redressal for their grievances. Hence under tremendous constitutional persuasion from the Supreme Court the Legal Services Authorities Act, 1987 was passed by the parliament of India. The Act prescribes the criteria for giving legal services to the eligible persons. It makes a person eligible for assistance under the act if he is -

- (a) a member of a Scheduled Caste or Scheduled Tribe;
- (b) a victim of trafficking in human beings or begar as referred to in Article 23 of the Constitution;
- (c) a woman or a child;
- (d) a mentally ill or otherwise disabled person;
- (e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or
- (f) an industrial workman; or
- (g) in custody, including custody in a protective home or in a juvenile home
- (h) of in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987; or
- (i) A person whose annual income less than rupees fifty thousand or such other higher amount as may be prescribed by the State Government¹¹.

This limit on income can be increased by the state governments. Limitation as to the income does not apply in the case of persons

10 Section 304(1) of Code of Criminal Procedure and Order 33, Rule 17 of Code of Civil Procedure.

11 Section 12 of the Legal Services Authorities Act, 1987.

belonging to the scheduled castes, scheduled tribes, women, children, handicapped, etc. Thus by this the Indian Parliament took a step forward in making the legal aid possible in the country.

According to the Act the 'court' is a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions¹². Under the Act 'legal service' includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter¹³.

Legal Services Authorities after examining the eligibility criteria of an applicant and the existence of a prima facie case in his favour provide him counsel at State expense, pay the required Court Fee in the matter and bear all incidental expenses in connection with the case. The person to whom legal aid is provided is not called upon to spend anything on the litigation once it is supported by a Legal Services Authority.

Bodies under the Act and Their Hierarchy

A nationwide network has been envisaged under the Act for providing legal aid and assistance. National Legal Services Authority is the apex body constituted to lay down policies and principles for making legal services available under the provisions of the Act and to frame most effective and economical schemes for legal services.

In every State a State Legal Services Authority is constituted to give effect to the policies and directions of the Central Authority (NALSA) and to give legal services to the people and conduct Lok Adalats in the State. State Legal Services Authority is headed by the Chief Justice of the State High Court who is its Patron-in-Chief. A serving or retired Judge of the High Court is nominated as its Executive Chairman.

12 Section 2(1) (a) of the Legal Service Authority Act,1987.

13 Section 2(1)(c) of the Legal Service Authority Act,1987.

District Legal Services Authority is constituted in every District to implement Legal Aid Programmes and Schemes in the District. The District Judge of the District is its ex-officio Chairman.

Taluk Legal Services Committees are also constituted for each of the Taluk or Mandal or for group of Taluk or Mandals to coordinate the activities of legal services in the Taluk and to organize Lok Adalats. Every Taluk Legal Services Committee is headed by a senior Civil Judge operating within the jurisdiction of the Committee who is its ex-officio Chairman.

In order to provide free and competent legal service, the NALSA has framed the National Legal Service Authority (Free and competent Legal service) Regulations, 2010. The salient feature of Regulation is engaging senior competent lawyers on payment of regular fees in special cases like where the life and liberty of a person are in jeopardy.

Supreme Court of India has also set up Supreme Court Legal Services Committee (SCLSC) to ensure free legal aid to poor and under privileged under the Legal Services Authorities Act. It is headed by a judge of Supreme Court of India and has distinguished members nominated by Chief justice of India. The SCLSC has a panel of competent Advocates on record with certain minimum number of years of experience who handle the cases in the Supreme Court. Apart from that the SCLSC has full time Legal Consultant who provides legal advise to poor litigants either on personal visit or through the post.

Conclusion and suggestions

Legal aid is not a charity or bounty, but is an obligation of the state and right of the citizens. The prime object of the state should be “equal justice for all”. Thus, legal aid strives to ensure that the constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the downtrodden and weaker sections of the society. But in spite of the fact that free legal aid has been held to be necessary adjunct of the rule of law¹⁴, the legal aid movement has not achieved its goal. There is a wide gap between the goals set and met. The major obstacle to the legal aid movement in India is the lack of legal

14 See note 6.

awareness. People are still not aware of their basic rights due to which the legal aid movement has not achieved its goal yet. It is the absence of legal awareness which leads to exploitation and deprivation of rights and benefits of the poor.

Suggestions

- It is suggested that it is the need of the hour that the poor illiterate people should be imparted with legal knowledge and should be educated on their basic rights which should be done from the grass root level of the country. For that judiciary needs the support from state administration to conduct legal literacy programme.
- The judiciary should focus more on Legal Aid because it is essential in this present scenario where gulf between haves and have-nots is increasing day by day. And elimination of social and structural discrimination against the poor will be achieved when free Legal Aid is used as an important tool in bringing about distributive justice.
- There are number of precedents as well as legislations to up hold the right to free legal aid but they have just proven to be a myth for the masses due to their ineffective implementation. Thus the need of the hour is that one should need to focus on effective and proper implementation of the laws which are already in place instead of passing new legislations to make legal aid in the country a reality instead of just a myth in the minds of the countrymen.
- In providing Legal Aid, the Legal Aid institutions at all level should use proper ADR methods so as to speed up the process of compromise between parties to the case and with that matter will be settled without further appeal.

Free Legal Services Authorities must be provided with sufficient funds by the State because no one should be deprived of professional advice and advice due to lack of funds.

Parental Substance Misuse and Child Abuse

*Dr. Aruna B Venkat**

“Children who grow up with alcoholic parents bear emotional, behavioural and mental scars”¹.

Parental substance abuse influences the extent to which a family functions effectively. There is a greater risk of child abuse and neglect as well as violence against a partner when substance abuse is present in a family. Children with a parent who is a substance abuser have a greater risk of experiencing trouble in school as well as social isolation. Moreover, children living in these unstable environments are at a greater risk of becoming substance abusers themselves.

There is neuro-scientific evidence attesting the fact that addiction is a complex disease characterized by changes in the structure and function of the brain. In some cases, these changes are brought on by substance use and other behaviors; other times, it appears these structural and functional characteristics are pre-existing. The effects of addiction on the brain make conscious control over certain behaviors exceedingly difficult, and in most cases pharmaceutical and/or behavioral treatments are required to manage the disease.² Exposure to parental substance misuse during childhood can have dire consequences for children. Compared to children of parents who do not abuse alcohol or drugs, children of parents who do, and who also are in the child welfare system, are more likely to experience physical, intellectual, social, and emotional problems. Among the difficulties in providing services to these children is that problems affected or compounded by their parental substance abuse (PSM) might not emerge until later in their lives.³ Some of the consequences of PSM on childhood development including a disruption of the bonding process; emotional, academic and developmental problems; lack of supervision; parentification; social stigma; and adolescent substance use and delinquency.

* Associate Professor, NALSAR University of Law, Hyderabad.

1 U.S. Department of Health and Human Services, ACF report. (1999).

2 Kraemer, G. W. (1992). *A psychobiological theory of attachment: Behavioral and Brain Sciences*, 15(3), 493–511.

3 Supra fn 3.

PSM leads to disruption of the bonding process

When mothers or fathers abuse substances after delivery, their ability to bond with their child—so important during the early stages of life—may be weakened. In order for an attachment to form, it is necessary that caregivers pay attention to and notice their children's attempts to communicate. Parents who use marijuana, for example, may have difficulty picking up their babies' cues because marijuana dulls response time and alters perceptions. When parents repeatedly miss their babies' cues, the babies eventually stop providing them. The result is disengaged parents with disengaged babies.⁴ These parents and babies then have difficulty forming a healthy, appropriate relationship. Neglected Children may demonstrate a lack of confidence or social skills that could hinder them from being successful in school, work, and relationships, have difficulty understanding the emotions of others, regulating their own emotions, or forming and maintaining relationships with others, have a limited ability to feel remorse or empathy, which may mean that they could hurt others without feeling their actions were wrong, become more mistrustful of others and may be less willing to learn from adults, and also demonstrate impaired social cognition, which is awareness of oneself in relation to others as well as of others' emotions. Impaired social cognition can lead a person to view many social interactions as stressful.⁵

Emotional, Academic, and Developmental Problems

Children who experience either prenatal or postnatal drug exposure are at risk for a range of emotional, academic, and developmental problems. For example, they are more likely to: experience symptoms of depression and anxiety, suffer from psychiatric disorders, exhibit behavior problems, score lower on school achievement tests, demonstrate other difficulties in school, these children may behave in ways that are challenging for biological or foster parents to manage, which can lead to inconsistent care giving and multiple alternative care

4 Goldman, J., & Salus, M. K. (2003). *A coordinated response to child abuse and neglect: The foundation for practice* [On-line]. Available: <http://www.childwelfare.gov/pubs/usermanuals/foundation/index.cfm>;

5 Ibid, Sullivan, S. (2000). *Child neglect: Current definitions and models—A review of child neglect research, 1993– 1998*. Ottawa, Canada: National Clearinghouse on Family Violence; Perry, B. D. (1997). *Incubated in terror: Neuro developmental factors in the 'cycle of violence'* [On-line]. Available: <http://www.childtrauma.org/CTAMATERIALS/incubated.asp>; supra fn1.

placements. Positive social and emotional child development generally has been linked to nurturing family settings in which caregivers are predictable, daily routines are respected, and everyone recognizes clear boundaries for acceptable behaviors.⁶ Such circumstances often are missing in the homes of parents with substance use disorders. As a result, extra supports and interventions are needed to help children draw upon their strengths and maximize their natural potential despite their home environments. Protective factors, such as the involvement of other supportive adults (e.g., extended family members, mentors, clergy, teachers, neighbors), may help mitigate the impact of PSM.⁷

Lack of Supervision

The search for drugs or alcohol, the use of scarce resources to pay for them, the time spent in illegal activities to raise money for them, or the time spent recovering from hangovers or withdrawal symptoms can leave parents with little time or energy to care properly for their children. These children frequently do not have their basic needs met and often do not receive appropriate supervision.

Social Stigma

Adults with substance use disorders may engage in behaviors that embarrass their children and may appear disinterested in their children's activities or school performance. Children may separate themselves from their parents by not wanting to go home after school, by not bringing friends to the house, or by not asking for help with homework. These children may feel a social stigma attached to certain aspects of their parents' lives, such as unemployment, homelessness, an involvement with the criminal justice system, or substance use disorders treatment. Drug abuse by a parent will have a significant and enduring impact on the family dynamics and functioning. Families encounter great stress, conflict and anxiety as a consequence of trying to protect the family member from the dangers and harms associated with drugs, and to limit the damage arising from their behaviour towards the rest of the family. A child's basic needs - diet and nutritional intake, health and schooling -

6 Shonkoff, J., & Phillips, D. (Eds.). (2000). *From neurons to neighborhoods: The science of early childhood development*. Washington, DC: National Academy Press; Kagan, J. (1999). The role of parents in children's psychological development. *Pediatrics*, 104(1), 164-167

7 Ibid.

may become neglected if a parent is more preoccupied with drugs. A child is at risk of emotional and physical neglect as they grow. These children may periodically distance themselves from reality as a coping mechanism for the parent's drug abuse.⁸

These children also risk developing emotional and social problems later in life. A child could be the victim of violence – both physical and mental from a family member who is abusing drugs. A child may lose out on childhood to adopt adult responsibilities having to provide both practical and emotional care for their parents who abuse drugs. This includes protecting their parents from harm. A child may become the “parent” if both parents are abusing drugs and unable to fulfill parenting roles and obligations. Older siblings may be expected to look after their younger brothers and sisters – to ensure they continue to go to school, to keep the home in order. A child may be forced to lie, with family life being kept a secret to protect the parent or sibling who is abusing drugs. A child faces a mix of anger, sadness, anxiety, shame, social isolation and loss as parents, brothers and sisters struggle with drug addiction. A child may have a sense of being impotent to alter the course of the drug problem in the family. A child may develop drug problems as a result of being exposed to drug culture in the family.⁹

Children depend on their family to meet their physical, psychological and social needs and their economic security and well-being. All of these can be jeopardized by parents misusing drugs. For a substantial minority of the affected children, the effect of their parents' substance misuse continues into their adult lives. For some, the impact can be multifaceted and persist not only into adult life but even into the lives of the next generation.

Children who have parents that abuse drugs and alcohol are the victims of a number of negative effects. They experience physical effects such as fetal alcohol syndrome, failure to thrive, intrauterine growth retardation, and contraction of infectious disease, premature birth and various types of abuse. These children can also experience behavioral effects such as behavior disorders, impulsive behaviors, independence, children as the role of caretaker, attention seeking and passive behavior.

8 Drug Abuse and Its impact on Children and young people, UNICEF Malaysia, May 2007.

9 Ibid.

The social effects for children are no primary caregiver and atypical social behaviors.¹⁰ There are also emotional and mental effects on these children which consist of mistrust, guilt, confusion, fear, ambivalence, conflicts with sexuality and shame. The same effects can occur in children who do not have parents who substance abuse. After examining traumatic experiences during childhood, such as having a parent who does drugs or being sexually abused, it is clear that these things can have an apparent and noticeable effect on the child both physically and otherwise.¹¹ It seems as though these traumatic events that can occur during childhood, such as abuse, death of a parent and physical illness, are usually directly correlated with a parent or caregivers substance abuse. Poverty is also a factor in the number of negative experiences a child has to deal with.¹²

How does alcoholism affect the family? Alcoholism affects the entire family. The level of dysfunction or resiliency of the non-alcoholic spouse is a key factor in the effects of problems impacting children. Children raised in alcoholic families have different life experiences than children raised in non-alcoholic families. Children raised in other types of dysfunctional families may have similar developmental losses and stressors as do children raised in alcoholic families. Families with alcoholism have higher levels of conflict than other families. Lack of adequate parenting and poor home management and family communication skills often leave children without effective training and role modeling.¹³ Families with alcoholism often lack structure and discipline for their children; as a result, the children often are expected to take on responsibilities normally assigned to older youth or adults.¹⁴

Why should we be concerned about children of alcoholics? Alcoholism tends to run in families. Children of alcoholics (COAs) are four times more likely than non-COAs to develop alcoholism or drug problems.¹⁵ COAs are at higher risk than others for depression, anxiety

10 Supra fn 7.

11 National Institute on Alcohol Abuse & Alcoholism. *Alcohol and Health: 9th Special Report to the U.S. Congress*. Washington, DC.

12 Children of substance abusers: overview of research findings. *Pediatrics* 103(5) Supplement: 1085-1099

13 National Institute on Alcohol Abuse & Alcoholism. (2000). *Alcohol and Health: 10th Special Report to the U.S. Congress*. Washington, DC, Johnson, J.L. & Leff, M. (1999). Children of substance abusers: overview of research findings. *Pediatrics* 103(5) Supplement: 1085-1099

14 ibid

15 Grant, B.F. (2000). Estimates of U.S. children exposed to alcohol abuse and dependence in the family. *American Journal of Public Health* 90(1): 112-115, C.

disorders, problems with cognitive and verbal skills, and parental abuse or neglect. They are significantly more likely than other children to be abused or neglected by their parents or guardians and are more likely to enter foster care.¹⁶

If not prevented, the difficulties faced by COAs can place increased burdens on state and local Governments. These include increased costs for health care, mental health services, child welfare, education, police and juvenile justice, and lost economic opportunity.

How can we help prevent children of alcoholics from repeating their families' alcohol-related problems? Although they are at increased risk, many COAs do not develop alcohol or drug use disorders or other serious problems in their lives. Often, they appear to be resilient, bolstered by protective factors and the support of caring adults in their lives.¹⁷

COAs can be helped, whether or not the alcohol-abusing family members are receiving help. Prevention programs often help COAs reduce stress; deal with emotional issues; and develop self-esteem, coping skills, and social support.¹⁸ Children who cope effectively with alcoholism in their families often rely on support from a nonalcoholic parent, grandparent, teacher, or other caring adult. Support groups, faith communities, and trained professionals also are available to help.¹⁹

16 Ibid, National Institute on Alcohol Abuse & Alcoholism. (2000). *Alcohol and Health: 10th Special Report to the U.S. Congress*. Washington, DC, National Institute on Alcohol Abuse & Alcoholism. *Alcohol and Health: 9th Special Report to the U.S. Congress*. Washington, DC, U.S. General Accounting Office. (1998). *Foster Care: Agencies Face Challenges Securing Stable Homes for Children of Substance Abusers*. Washington, D

17 National Center on Addiction and Substance Abuse at Columbia University. (2004). *Criminal Neglect: Substance Abuse, Juvenile Justice and the Children Left Behind*. New York.5. U.S. General Accounting Office. (1998). *Foster Care: Agencies Face Challenges Securing Stable Homes for Children of Substance Abusers*. Washington, DC.6. National Institute on Alcohol Abuse & Alcoholism. *Alcohol and Health: 9th Special Report to the U.S. Congress*. Washington, DC. . Emsh off, J.G. & Price, A.W. (1999). Prevention and intervention strategies with children of alcoholics. *Pediatrics* 103(5) Supplement: 1112-1121 Werner, E.E. & Johnson, J.L. (2004). The role of caring adults in the lives of children of alcoholics. *Substance Use and Misuse* 39(5): 699-720. Werner, E.E. & Johnson, J.L. (2000). The role of caring adults in the lives of children of alcoholics. *Children of Alcoholics: Selected Readings, Vo 2.1*

18 Nastasi, B.K. & De Zolt, D.M. (1994). *School Interventions for Children of Alcoholics*. New York: Guild Press

19 Prevention and intervention strategies with children of alcoholics. *Pediatrics* 103(5) Supplement: 1112-1121, Werner, E.E. & Johnson, J.L. (2004). The role of caring adults in the lives of children of alcoholics. *Substance Use and Misuse* 39(5): 699-720

What can others do to help children of alcoholics avoid alcohol abuse and other serious problems? Simple acts of kindness and compassion can make a difference for COAs. By making yourself available to listen, discuss feelings, share interests, and support their efforts to make friends, you can help COAs cope with their present situations and develop the resilience and skills necessary for their futures.²⁰ Tell them they are not alone, that responsible adults are available to help them, and that millions of others have had similar experiences and have grown up to lead healthy, satisfying lives.²¹ Remind them that their families' problems are not their fault and not their responsibility to solve. Their jobs are to be children and help take good care of themselves; learn the facts about alcohol, tobacco, and drugs; recognize their risks; and learn how to avoid repeating their families' alcohol abuse patterns.²² Encourage them to ask for help. Assure them that getting help is a sign of strength. Offer your own examples and be prepared to help them connect with caring, trustworthy adults and with student assistance programs and other services designed to provide them with further skill building and support.²³

Effects of substance abuse on children in the family

Drug and alcohol abuse is a large problem for adults in our world today. But it is probably an even bigger problem for the children of today who are being raised by alcoholics or drug users. These children have to endure a family life that is often unpredictable and chaotic, which can lead to many problems later in life. To think that these children have their whole future ahead of them should cause much concern about how they are being raised today.²⁴

Family Life

Many parents that abuse drugs or alcohol will treat their families differently on different days, depending on their level of sobriety at the

20 Werner, E.E. & Johnson, J.L. (2000). The role of caring adults in the lives of children of alcoholics. *Children of Alcoholics: Selected Readings, Vol. 2*

21 Dies, R.R. & Burghardt, K. (1991). Group interventions for children of alcoholics: prevention and treatment in the schools. *Journal of Adolescent Group Therapy* 1(3): 219-234

22 Nastasi, B.K. & De Zolt, D.M. (1994). *School Interventions for Children of Alcoholics*. New York: Guild Press.

23 Nastasi, B.K. & De Zolt, D.M. (1994). *School Interventions for Children of Alcoholics*. New York: Guild Press.

24 <http://www.treatmentsolutions.com/effects-of-substance-abuse-on-children-in-the-family/>

time. Often the mood swings and changes in parenting that these parents exhibit will confuse the child or make them insecure. Inconsistent care by a parent can lead to a child that either has to grow up quickly and assume adult responsibilities, or one that rebels and gives up trying to do well in school or life. Children in these homes need to constantly be prepared for a parent that is high or drunk, one that is irrational and unable to provide the care that a child needs.²⁵

Families that suffer with substance abuse are more at risk for domestic violence, mental illness, divorce, and sexual and physical abuse than other families. These issues are very detrimental and can lead to children with depression, anxiety, and suicidal thoughts. Children in these situations may be withdrawn and have trouble bonding with others. Often they feel that the problems of the family are their fault or that it is their job to conceal the problem, and this can lead to low self-esteem, lack of desire to perform well in school, or fear of failure. It would be difficult for these children to make friends because of the fear that someone in the outside world will find out about their secret, or will witness the chaos firsthand.

If a child is living with an alcoholic or drug user, the child is likely to develop a warped sense of normal when it comes to using these substances. They may know that their parent drinks too much, or does drugs, but over time, the child may not know what other families are like, or how many drinks a regular person is expected to have in a day. Children of alcoholics are 4 times more likely to become alcoholics themselves, which leads these families into a cycle that is hard to break. Fathers drink to deal with stress in their life, and when their children get older, they have learned that the way to handle stress is to drink.

The good news is that children of alcoholics and drug abusers often develop an inner strength that helps them get through the tough times at home. With much love and encouragement from a sober parent, another relative, or even a social worker or teacher, these children can go on to live happy, successful lives. And of course, the best scenario is if the addict in the family receives treatment and overcomes the problem, and then the child can continue their life and work on a brighter future.

25 *Supra* fn 17.

Children who grow up in alcoholic homes can be deeply affected by the experience and the effects can last well beyond their childhood years. It can affect how they see themselves and how they view the world itself.

Dr. Janet listed several common characteristics shared by many children who grew up with an alcoholic parent. One of those characteristics is the feeling of having to guess what normal is, due to the fact that they never experienced a "normal" family life.²⁶

Some responses to the question, "How Do You Feel Growing up with an Alcoholic Parent Has Changed You?" were²⁷:

Didn't Learn' Correct Behavior'- I do feel I never learned 'correct' behaviors or reactions to situations, am very scared of angry people, authority or any kind of conflict, am easy for bullies to walk all over as I seem to exude a scent of 'weak' and 'victim' that they can smell a mile off. –JoJo

Never Feel Normal - I grew up not trusting my father of 25 years for the first 15 years. I had very major issues with that, and I still struggle with being accepted. I never feel normal. I always feel like all of my security will vanish at any moment. That is what it feels like to grow up with a really hardcore alcoholic. – Kathy

Having to Watch Others- No family is perfect but abusive families are soul destroying. Having to watch others to learn the right way to behave, sometimes you don't know good role models from bad. Dealing with mental health issues and the shame that comes with that. Can you ever overcome the feeling that you are not good enough, the feeling down deep inside that hurts. Does it ever go away? -- Sandie

Very, Very Withdrawn - I think because in school I was very, very withdrawn to the point of not talking in class. I think this being a very deep fear of not being normal and everyone finding this out or

26 Dr. Janet G. Woititz, "Adult Children of Alcoholics,"

27 Janet G. Woititz, "The 13 Characteristics of Adult Children," The Awareness Center. Accessed November 2010. Adult Children of Alcoholics World Service Organization, "The Laundry List – 14 Traits of an Adult Child of an Alcoholic," (Attributed to Tony A., 1978). Accessed November 2010.

worse finding out my secret. I also relate to the feeling of still being a child maybe because at times I couldn't be a child. -- Invisible

Can't Express True Feelings - I realize that I still carry that burden of not being able to express my true inner feelings. I hate to cry in front of people, like it's some kind of weakness. -- E.W.M.

Years to Begin to Know Normal- It took years of counseling for me, when I had two children, to begin to know normal. I am glad to know that it has certainly helped me to be more compassionate and understanding towards people. It has been a long and arduous journey. -- Better Now

Don't Feel Like an Adult - I never feel like I can do anything right, so I don't try. Relationships, forget it, and I am struggling as a parent. I always guess what normal is. I don't feel like an adult. – Kitten

Never Feel Comfortable - I have a hard time getting close to people and I never want a family. I am uncomfortable around families because I'm not sure what to feel or what to do. Put me in the middle of a dogfight and I might feel more at home. –Saully

All these experiences go to show that Families Are Affected. If parents are heavy drinkers and they have children, they may want to rethink how their drinking may be affecting others and try to find help to quit or cut back on the amount of alcohol that you consume. The World Health Organization defines harmful drinking as drinking to the point of causing damage to your health and hazardous drinking as a pattern of alcohol use that increases the risk of harmful occurrences.

If parents drink excessively, they are doing a grave disservice to their child. If they neglect or abuse their child because of an alcohol problem, their child is more likely to start drinking, too. This typically leads to falling grades, skipping school and general delinquent behavior. As an adult, their child is more likely to drink to excess, abusing her children as well. Therefore, Parental Substance abuse leads to child abuse. Parents can help the situation by going for RE-habilitation and DE-addiction treatment.²⁸

²⁸ “Child Maltreatment and Alcohol”, WHO 2006 Report.

Strong links between child abuse and harmful alcohol consumption offer further opportunities to reduce abuse through lowering levels of drinking in the population. Both the harmful and hazardous use of alcohol and child maltreatment has been recognized internationally as key public health issues requiring urgent attention. At both national and international levels, health organizations have a key role in advocating for policies that address the relationships between alcohol use and child maltreatment and in doing so promote prevention initiatives that will improve public health. The World Health Organization (WHO) runs comprehensive programmes on both issues to instigate and conduct research, identify effective prevention measures, and promote action by Member States to implement successful interventions and align policy towards reducing hazardous and harmful drinking and child abuse.²⁹

²⁹ Ibid.

FORM IV

Statement of ownership and other particulars about the **NALSAR Law Review**

Place of Publication	Justice City, Shaerpet, R. R. Dist., Hyderabad - 500 078
Language	English
Periodicity	Half Yearly
Printer's Name Nationality and address	Prof. (Dr.) Faizan Mustafa Vice-Chancellor NALSAR University of Law Justice City, Shameerpet, R. R. Dist., Hyderabad - 500078
publisher's Name Nationality and address	Prof. (Dr.) Faizan Mustafa Vice-Chancellor NALSAR University of Law Justice City, Shameerpet, R. R. Dist., Hyderabad - 500078
Editor's Name Nationality and address	Prof. (Dr.) Faizan Mustafa, Indian Vice-Chancellor NALSAR University of Law Justice City, Shameerpet, R. R. Dist., Hyderabad - 500078
Owner's Name	NALSAR University of Law, Hyderabad

I, Prof. (Dr.) Faizan Mustafa here by declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
Prof. (Dr.) Faizan Mustafa



for subscription enquiries write to:
The Registrar
NALSAR University of Law
Post Box No. 1, NISA Hakimpet,
Justice City, Shameerpet, R.R.Dist.,
Hyderabad - 500 078, A.P. India
Tel: +91 40 2349 8104
E-mail: registrar@nalsar.ac.in
Website: www.nalsar.ac.in

ISSN 2319 - 1988