NALSAR Law Review

Volume 3 **Number 1** **2006-2007**

Articles

Book Review

Note to Contributors: Manuscripts, Editorial correspondence and Style-sheet requisitions should be addressed to the Editor, NALSAR Law Review, NALSAR University of Law, 3-4-761, Barkatpura, Hyderabad – 500 027, Andhra Pradesh, India.

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

Mode of Citation: I *NLR* 2004-2005

NALSAR Law Review

Volume 3 **2006 - 2007** **Number 1**

Contents

MESSAGE FROM THE PATRON

On the occasion of the publication of the third issue of the Nalsar law Review, I congratulate all the contributors of the Journal for rising upto the expectations. I wish them all a grand success.

Publications of a university are an important corner stone to disseminate the research undertaken Documentation of the view points and advocacy through a journal reaches a wider audience. In the age of internet, net publications have taken the driver's seat. Yet the print material is irreplaceable.

There is a need for original and path breaking legal research to create new legal knowledge and which in turn would create a new generation of legal professionals.

A journal has a wider audience. It is in this context that NALSAR Law Review would serve as a platform for serious and thought provoking ideas.

We look forward to your valuable feedback and contributions

Prof. Veer Singh
Vice-Chancellor

EDITORIAL

The inaugural issue of NALSAR Law Review intended to forge an interactive relationship with its readers. This enthusiastic response had encouraged us to come out with the second issue of the journal.

The third issue has been put together with a view to inculcate a collective culture testifying to the existence of professional and academic solidarity. An endeavour is made through this journal.

We hope that the readers respond to the contributions and make suggestions in the "write back" which will be included from the next issue of the journal

Editorial Committee.

GENETIC PRIVACY AND LEGISLATIVE RESPONSE - A CRITICAL ANALYSIS

Prof P.S. Jaswal.** Stellina Jolly*

"The right to be left alone -- the most comprehensive of rights, and the right most valued by a free society"[1]

Part I

Introduction

"Perhaps from the perspective of history, the most important scientific breakthrough of this century may be seen in time, to be neither nuclear fission, nor interplanetary flight, nor even informatics, but the fundamental building and basal molecular biology which permits the human species to look into itself and find, at last, the basic building blocks of human and other life."[2] Two decades of tremendous investment and venture capital financing have begun to harness genetic technologies to advance our understanding of human physiology, accelerate drug development and medical diagnosis, and more effectively tailor pharmaceuticals to individual genotypes. The exchange of both onymous and personally identifiable health information has greatly contributed to these advances. These information and its application in genetics raise fundamental human right concerns about the privacy of our genetic secrets – the unique signatures left behind in the shedding of skin cells, saliva and blood.[3]

What safeguards are in place to protect the genetic records of millions of human beings now widely available to insurers, medical researchers, health care providers, and law enforcement agents? This Article documents the evolving political and legal response to the challenges of genetic privacy in the world. It provides an overview of relevant U.N and Regional conventions as well as key legislations and judicial interventions of various countries that affect public and private access to genetic information with a special emphasis to India. The Article also outlines relevant aspects of genetic privacy, including the characteristics according to which genetic privacy is traditionally defined and

** Chairman, Department of Laws, Punjab University, Chandigarh.

* perfectstellina@yahoo.co.in Lecturer, University Institute of Legal Studies, Punjab University.

1. The above observation is by Justice Louis Brandies, in *Olmstead v. U.S.* 277 U.S. 438 *It* is a 1928 United States Supreme Court case, in which the Court reviewed whether wiretapped private telephone obtained by federal agent as without judicial approval and subsequently used evidence, constituted a violation of the defendant's rights provided by the Fourth and Fifth Amendments.
2. M.D Kirby, "Man's Freedom and the Human Genome" in the Human Genome Project: Legal Aspects", Vol 1, Foundation BV. 2.265 (1994).
3. Jan, A. Withkowski, "The Human Genome Programme: Origins, Goals; Current Achievements and Societal Implications", in MG.K Menon and others, *Human Genome Research, Emerging Ethical, Legal Social and Economic Issues,* p 17 (2003).

the contexts within which risks to genetic privacy most often arise.

Part II

"Who am I?" has always been a basic philosophical and spiritual question that perplexed experts for centuries and may require decades of reflection to answer. With the advent of DNA analysis, there is a growing public impression that the answer may be found in our genes.[4] This' basic building block', is a substance called deoxyribonucleic acid, or as it is more commonly known, DNA, which was discovered in 1953, by Watson and Crick.[5] DNA provides the 'code' for the structures and properties of proteins that exist within human cells. Within the human body there are 23 pairs of chromosomes, which are each composed of DNA. DNA is a hereditary material and 'genes' are segments of the 'chemical steps' along the DNA.[6] Genetic material of any organism is the substance that carries the information determining the properties of that organism. All the genetic information of an organism is collectively referred to as its genome[7]. The genetic material in all organisms, apart from viruses, is a form of nucleic acid called DNA (short for deoxyribonucleic acid). Thus, the complete genetic material of an organism is called its genomic DNA.[8]

The current estimate is that humans have between 32,000 and 35,000 genes. About 99.9 percent of the genome is the same in all humans. The arrangement of the remaining components is unique to most individuals. Only identical twins (or triplets, etc.) have identical DNA.[9] Variations in DNA influence how individuals respond to disease, environmental factors such as bacteria, viruses, toxins, chemicals, and to drugs and other therapies.[10] The interaction between genes and environmental factors is not well understood at this time and is the subject of intensive research.[11]

In 1990, the Human Genome Project (HGP) was started with a view to identify the form and content of the human genome.[12] It was expected that a

4. *Patricia A. Roche, and GHeorge J. Annas* "DNA Testing, banking, and Genetic Privacy," *The New England Journal of Medicine.* Volume 355, Number 6, p545(2006).
5. J.Gaulding "Race, Sex, and Genetic Discrimination in Insurance: What's Fair?" *80 Cornell Law Review* 1646-1694 at 1664, (1995).
6. Matt Ridley, *Genome, p7(2000).*
7. Inc v Kirin-Amgen *(1998) AIPC 91-429, observation by justice Heerey.*
8. L.C Dunn, *A short History of Genetics,* p 58 (1965).
9. Electronic Privacy Information center, available at <http:*//epic.org/privacy/genetic/*>, (last visited on 2-03-2009).
10. *Sabyasachi Sarker* "Human Genome The Book of Life", *Science,* Volume 3, No. 5, September-November p23 (2000).
11. Michael A.Palladino, *Understanding the Human Genome Project,* Pearson Education, 2nd edition, P 28 (2001).
12. Robert Mullan Cook-Deegan, "Origins of the Human Genome Project", *FASEB Journal* **5:** p 8-11 (1991).

complete map of human genome will allow interested parties eventually to be able to discover whether or not an individual has a predisposition to one disease or another.[13] Along with the multitude of positive results, HGP has raised a floodligh of legal and ethical questions HGP is a human right topic because the information that will be available once the Genome is finally mapped and sequenced will relate to human beings. The legal concerns of genetic privacy and genetic discrimination makes the results of HGP issues for human rights.[14]

One of the early expectations of human genome research was to generate knowledge that could assist in developing more accurate and efficient diagnostic tests through genetic testing. This brings forth the question of Genetic testing and its importance and implications. There are mainly three types of genetic test, which reveal three differing categories of individuals, Genetic testing can identify individuals with three types of genetic conditions: individuals who currently have, or are certain to develop a genetic disease directly attributable to a specific chromosome or gene defect;

(i) individuals who do not possess a genetic disease but, nonetheless, are carriers of the disease; and

(ii) individuals with a genetic predisposition to disease in the future".[15]

Hence, there are disease such as Huntingdon's disease or cystic fibrosis, whereby the presence of the impugned gene in the body indicates that the individual either presently has the disease or is certain to develop the disease in the future. Thus, the vast bulk of genetic information is in the form of probabilities of future events and future developments, a point which is vital, yet often overlooked in considering how to approach the notion of genetic information[16]. – In making predications about the future, genetic testing information often only tells us about the chances that something will occur - it does not tell us that it certainly will".[17] Basically genetic testing provides or yield relevant genetic information about an individual.

---

13. Murphy, Timothy, and Marc A. Lappe "Justice and the Human Genome Project", (1994). Available at *<http://ark.cdlib.org/ark:/13030/ft8x0nb630/>* (last visited on 3-03-2009).
14. *Supra* note 11, See Robert.
15. Borwn ME, "Insurers and Genetic Testing: Shopping For That Perfect Pair of Genes", *40 Drake Law Review,* 121-148 at 123 (1991).
16. Mathew Stoic, "Genetic Non-Discrimination, Privacy and Property Rights", *Murdoch University Electronic Journal of Law* -Volume 7, Number 2 (June 2000) available at *www.murdoch.edu.au/elaw/issues/v7n2/stulic72_text.html*(lat visited on 12-03-2009).
17. *Sharon Van der Laan,* "Privacy and Genetic Information", *Journal of the Consumers Health Forum of Australia,* Issue 1, April (2008).
    Leslie Roberts, "Controversial From the Start", *Science* 16 February, Vol. 291, No. 5507, p1182 – 1188, (2001).

Genetic testing can have both positive and negative consequences. On the positive side, testing can help people make more informed decisions about their future. Another advantage of testing is that it provides an opportunity to seek genetic counseling so that the risk of passing on a disease gene is reduced. On the other hand, anxiety runs high when individuals are confronted with a positive test result confirming a genetic condition. Are people prepared to deal with such news?[18] Further genetic testing generally is in the form of probabilities. A positive result does not guarantee and a negative result cannot completely rule out the possibility that a person will become ill or be affected by the condition. Environment and other factors play a role. Another problem is that physicians may misinterpret the results of genetic tests now available. If positive test results are not kept private, the individual risks the possibility of losing health insurance and employment for herself, the children, and other family members.[19]

Upon considering the scientific background of DNA and geneticism, it is now imperative to clearly outline what it is about 'genetic information' that distinguishes it from other forms of heath or personal information. How can this information results in violation of right to privacy and what are the possible areas of such violation. For the purposes of the arguments presented in this paper, it is worth noting some of the distinctive characteristics of genetic information. Firstly, genetic information is unique in the sense that: "a person shares part of his or her genetic make up with genetic relatives, so genetic testing information about the person can also yield information about more than one person...[20] further there is an element of unchangeability about genetic characteristics and traits.

Genetic data and information poses considerable privacy issues basically due to its capacity to acts an identifier and the ability to reveal sensitive personal information about the individual and his or her genetic family. As genetic science develops, genetic information provides a growing amount of information about diseases, traits, and predispositions. At the same time, smaller and smaller tissue samples are required for testing. In certain instances tests can be undertaken even with a small article like root of a single hair or saliva left on a glass. The capacity to acquire more and detailed information from measure materials creates added privacy challenges. Because in such cases genetic information can be taken and talked out even from material that all humans leave behind unconsciously, such as cells left on computer keys or saliva left on a drinking glass.

18. Sharon Davis, "The Human Genome Project: Examining the Arc's Concerns Regarding the Project's Ethical, Legal, and Social Implications" presentations at the DOE Human Genome Program Contractor – Grantee Workshop VI, (1997)
19. *Ibid.*
20. Brant Pridmore, "Genetic Testing: The Privacy Issues", *Privacy Law and Policy reporter* p 88, (1996).

The ability of genetic information to provide both identification and sensitive information related to health and other predisposition has led to a lively debate about appropriate privacy protections. Proponents of "genetic exceptionalism" claim that genetic information deserves explicitly and stricter protection under the law. They base their argument on the special qualities of genetic material:[21]

- Ubiquity, i.e., the ability to derive genetic profiles from small physical traces and the longevity of material from which genetic profiles can be derived.
- Ability to reveal information not just about the individual but also about the individual's family.
- Predictive nature that can point to someone's future health and traits[22]

Opponents of "genetic exceptionalism" take the stand that genetic information is just like other medical and health information and does not needs separate protection. They claim that the term genetic information is difficult to define since it covers normal medical history collected and used by health care practitioner's long back much before sequencing of genome. They point out that in such scenario the context in which information has been gathered gains importance. For example, if genetic information is obtained as part of health care research or treatment, it should be subject to the same privacy protections as all other health information.

Genetic Privacy: Conceptual Dimensions

The English words "private" and "privacy" come from the Latin *privatus*, meaning "withdrawn from public life, deprived of office, peculiar to oneself", and the generally negative sense is continued into the early understand of the English word "private" whose first recorded appearance goes back to 1450,[23] By the end of the 19th century, "privacy" had become related to legal and political rights, associated with modernity and advanced civilization, and attributed relatively or very high value.[24] The notion of a right to be left alone is deeply embedded in popular and political culture. Outside intrusion into private spaces, whether or informational through technology or other media can result in dire

21. Sonia. M. Suter, "The Allure and Peril of Genetic Exceptionalism: Do We Need Special Genetics Legislation", *Washington University Law Quarterly,* Vol. 79, No. 3, (2001), p12 Available atSSRN: http://ssrn.com/abstract=276975 last visited on 10-02-2009.
22. *Supra* note 4
23. "Privacy - Rights of Privacy In National And International Law "<*http://science.jrank.org/pages/10849/Privacy-Rights-Privacy-in-National-International-Law.html*> Visited *On 15-01-2008).*
24. *lbid.*

medical arena; these concerns are heightened by the intimacy and sensitivity of personal health records, numerous reports of social harm resulting from medical disclosure, and the rapid progress of technologies that facilitate exchange of medical data.[25]

Genetic technology give rise to a unique form of genetic privacy, defined as the inappropriate or involuntary disclosure of the information coded in an individual's genome.[26] As the availability and affordability of genetic tests increases, as the number of social institutions using genetic surveillance increases, as the volume of genetic information stored in electronic databases increases and as more individuals learn about their unique genetic profile through genetic tests, the risk to genetic privacy intensifies.[27]

With this intensification comes the need for greater protection of genetic privacy rights. Without privacy protection, an individual's right to know, their right not to know, and their right to make autonomous decisions about the disclosure of highly sensitive and consequential information is at risk.[28] The risk of violation of privacy may be reflected in various field, questions like whether an information regarding a member of family should be shared with other members, questions of qualification regarding social benefits and who will have access to information, whether government should be allowed to keep DNA of convicts' the questions are not exhaustive.[29]

Genetic Privacy Violations : *Areas of Concern*

Health Care Sector

To effectively deliver health services, doctors and other providers depend on access to medical records. Patient information regarding health conditions, drug sensitivities, past medical procedures, and other matters must be carefully maintained and exchanged when necessary to ensure appropriate care. Likewise, in the public health setting, specialists depend on aggregated personal medical data to monitor and analyze the health of populations. The computerization ion of health files and the creation of medical databases have greatly enhanced these capacities. However, by increasing the circulation of genetic and other health information, these technologies also increase the potential for unwarranted invasions of privacy.[30]

---

25. *lbid.*
26. Merryn Ekberg, "Governing the Risks Emerging From the Non-Medical Uses of Genetic Testing", *Australian Journal of Emerging Technologies and Society* Vol. 3, No. 1, p1-16 (2005).
27. *ld., p4.*
28. *lbid.*
29. G. Anass, "Genetic Privacy, There Ought to be a Law", *Tex.Rev.L.Pol* p 9, (1999).
30. *lbid.*

Medical Research: Every year in the world over, tens of thousands of people participate as subjects in genetics research can derive health benefits and new knowledge from such involvement, they also put themselves at risk of third-party access to their sensitive and confidential medical information.[31] In this arena, privacy concerns focus on standards of informed consent, the physical security and anonymity of information, standards of non-disclosure, and the maintenance and use of stored tissue samples.[32]

Law Enforcement: DNA evidence positively aid crime investigations. Forensic scientists analyze the DNA samples to identify, confirm or eliminate a suspect in a criminal investigation[33]. The success of this analysis has motivated the collection of DNA samples and even establishment of DNA Data banks from increasing numbers of violent and nonviolent criminals, suspects and whole communities, As DNA collection and data banking expand, many are concerned by the intrusions into privacy involved in these law enforcement practices.[34].

Work Place: Employers have a long history of interest in their employees' health status, driven by both legitimate and illegitimate motivations. Surveys indicate that 77% percent of medium-to-large firms conduct medical examinations on either employees or new hires. Employers may screen employees for the purpose of monitoring job-related injuries, gauging physical and mental fitness characteristics related to job performance, or protecting other employees from communicable diseases. While genetic information can be put to beneficial se in safeguarding the health and safety of the workplace, it can also be used to stigmatize and discriminate against current and prospective employees.[35]

Insurance: Many insurance providers, particularly those that rely on individual underwriting, select and classify individuals in terms of risk to determine insurance eligibility and premiums. Personal health information, including records of medical diagnoses, tests and operations, drug prescriptions and family health histories are routinely gathered by health, life, and disability and long-term care insurers. The increasing exchange of health information, through such avenues as the Medical Information Bureau, may improve the quality of insurance underwriting but also places many at risk of losing insurance coverage and

31. D C Anderson "Elements of Informed Consent for Pharmacogenetic Research; Perspective of the Pharmacogenetics Working Group", *The Pharmocogenous Law Journal,* Volume 2, Number 5, p 284 (2002).
32. Sheila Mclean, *Old Law, New Medicine, Medical and Human Rights,* p 9 (1999).
33. *Mr. Justice R.K.Abichandani,* "New Biology & Criminal Investigation", available at *<http://gujarathighcourt.nic.in/Articles/NBCI.pdf.(last Visited on 3-02-2009).*
34. *lbid.*
35. Louise Slaughter." The Genetic Nondiscrimination in Health Insurance and employment Act: H.R. 602", 18 *N.Y.L. Sch. J.Hum. Rts.* P12 (1999).

having sensitive records in the public domain[36].

In all contexts, privacy protections require attaining a balance between individual rights and other contending ethics such as public health and safety, law enforcement, and national security. Although privacy has irrefutable importance and one of the prime right for the realization of major social goals and a life of dignity, excessive restrictions or control on the flow of information can be detrimental. Policymakers through out globe continue to fight to build up laws that safeguard privacy without compromising other collective goods. This is indeed a difficult task when the interests of patients and researchers, suspects and prosecutors, and labor and management come into conflict.[37] While scientific and political trends have drawn attention to genetic privacy, the scope and boundaries of the concept remain poorly defined.[38]

While there is a general consensus on the need to protect genetic privacy, designing effective and equitable policies for the protection of genetic privacy is exceptionally difficult to achieve because there are many situations where one persons right to genetic privacy conflicts with another's equal and opposite right to genetic information. Indeed there are many situations in which the right to genetic privacy is not absolute. In the context of insurance, fund managers have a responsibility to other policyholders and thus, genetic privacy may be violated to ensure the viability of an insurance fund and to maintain actuarial fairness. In the context of education, a child's right to privacy may be violated by parents if a learning problem is suspected and a remedial program is available to assist the child. The genetic privacy of immigrants may be violated to protect public health, maintain the fiscal integrity of the health system and to avoid fraudulent claims of consanguinity and finally, in forensic investigations, the right of victims to justice and retribution and the collective right of society to safety and security trumps the privacy rights of suspects and criminals Whilst acknowledging that genetic privacy is not an absolute and inalienable right, protecting genetic privacy is an important goal for genetic policy. It is important for upholding the intrinsic value of preserving the integrity, dignity and autonomy of individuals and because it provides one of the most effective mechanisms for protecting against genetic discrimination.[39]

36. Mary Crossly, "Discrimination Against The Unhealthy In Health Insurance", *54, U.Kan. L. Rev.,* p73 (2001).
37. George Annas, "Mapping the Human Genome and the Meaning of Monster Mythology", *39 Emory Law J,* p 629-664, (1990).
38. Kristie A. Deyerle, Comment, and Genetic Testing in the Workplace: Employer Dream, Employee Nightmare Legislative Regulation in the United States and the Federal Republic of Germany, 18 *COMP.LAB. L.J.* p 554, (1997).
39. A.P. Joshua, *Introducing Human Rights,* South Asia Human Rights Documentation Centre, p123 (2000).

Part III

Right to Privacy : International Legal Framework

The preamble to the Universal Declaration of Human Rights commences with a difference to the inherent dignity of all members of the human family and provides more specifically that all human beings are brown free and equal in dignity and rights.[40] While the concept of human dignity forms part of any discussion of human rights, it is important to note that international human rights law has grown to ensure the promotion and protection of distinct legal rights (i.e., rights to privacy, equality, and nondiscrimination).

These rights have evolved over the years by various conventions to enable an encompassing approach to various issues.[41]

In the late 1960s The United Nations awakened to the dangers posed to Human Rights by recent advances in Technology. The International Conference on Human Rights, held in Tehran 1968 was the first to address these issues. The proclamation of Tehran stated that while recent scientific discoveries and technological advances have opened vast prospects for economic, social and cultural progress, such development may nevertheless endanger the rights and freedoms of individuals and will require continuing attention,[42] Once the United Nations began to interest itself in this field, it went on to concern itself with a varied range of the threats from new technology.

The international community recognized the need to regulate the use of genetic information, specifically to protect the rights to privacy. In 1997, the United Nations Educational, Scientific and Cultural Organization (UNESCO) passed the Universal Declaration on the Human Genome and Human Rights (UNESCO Declaration)[43], the chief principle of Human Genome Declaration,

40. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Gaor, 3d Sess.
41. Right to privacy has been accepted as human right in various conventions For instance Under UDHR Article 12 provides "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference of attacks." Further under Incarnation Covenant on Economic Social and culture Rights (ICESCR), Art. 17 lays down "no "arbitrary or unlawful interference" with "privacy, family, home, or correspondence" For regional instruments, see the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8 of the Convention provides a right to respect for one's "private and family life, his home and his correspondence", subject to certain restrictions that are" in accordance with law" and necessary in a democratic society". These provisions clearly shows how the right to privacy has been elaborated by various conventions.
42. Proclamation of Teheran (International Conference on Human Rights at Teheran on 13 May 1968) U.N. Doc. A/CONF. 32/41 at 3 (1968). available at *http://www.unhchr.ch/html/menu3/b/b_tehern.htm*(Last visited on 28-22-2008)
43. Universal Declaration on the Human Genome and Human Rights G.ARes. 152, UN.GAOR, 53rd Sess., U.N.Doc.A/53/625/Add.2(1998).

which is affirmed in several of its articles, is that of human dignity, a dignity that is inherent to all members of the Human family.[44] The declaration does not specifically lays down right to privacy but many of the provisions of the declaration more than once underlies the same. For instance Article 5 (b) provides "In all cases, the prior, free and informed consent of the person concerned shall be obtained. If the latter is not in a position to consent, consent or authorization shall be obtained in the manner prescribed by law, guided by the person's best interest. Further clause (c) of the same section provides that the right of each individual to decide whether or not to be informed of the results genetic examination and the resulting consequences should be respected.[45] Further article 7 provides of research or any other purpose must be held confidential in the conditions set by law.[46]. Article 9 provides "In order to protect human rights and fundamental freedoms, limitations to the principles of consent and confidentiality may only be prescribed by law, for compelling reasons within the bound of public international law and the international law of human rights."[47] These principles no doubt lays down important safeguards and respect for individual privacy.

At the regional level, the most important instrument is the European Convention on Human Rights and Biomedicine (EU Convention), passed in 1997 by the Council of Europe to legislatively proscribe genetic discrimination. Article 10 of the EU Convention specifically upholds human dignity and respect for privacy.[48]

The British House of Lords rejected the claim that retention of DNA samples and profiles violates the European Convention on Human Rights in cases where an individual is later acquitted or charges are dropped. The decision in the case of Regina v. Chief Constable of South Yorkshire Police notes that samples are retained only for the purpose of investigating and fighting crime, and that the benefit to society from a much larger law enforcement DNA databank outweighs the individual's right to privacy.[49] In US v.Kincaid[50] the court decided

44. *id.,* Art 1.
45. *ld.,* Art 5
46. *id.,* Art 7.
47. *ld.,* Art 9
48. European Convention on Human Rights and Biomedicine, Apr. 4,, 1997, CETS No. 164, available at <*http://conventions.coe.int/treaty/en/treaties/html/164.html*> (last visited 12-02-2009) Thirty two countries are signatories to the convention. Article 10 to the Convention provides Private life and right to information Everyone has the right to respect for private life in relation to information about his or her health. Everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed. In exceptional cases, restrictions may be placed by law on the exercise of the rights of privacy in the interests of the patient.
49 2004] UKHL 39, available at<*http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040722/york-1.htm*> (visited on 28-02-2009).

that requiring for parolees and inmates to provide DNA samples under the DNA Analysis Backlog Elimination Act of 2000, is unconstitutional.[51]. The court ruled that the requirement to provide DNA without probable cause violated the Fourth Amendment protections against unreasonable searches and seizures.

At present there is no specific protection for DNA information at the federal level in the United States, although several existing laws may provide protection under specific circumstances. For example, protection of medical information under the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA[52]) provides protection for genetic information that falls within the HIPAA definition of "protected health information."[53] Further Genetic Confidentiality and Non-Discrimination Act 1997, contains some provisions for the protection of Privacy[54]

Section.8 of the Genetic Non-Discrimination and Privacy Act states:

"(1) A person may disclose genetic information in a genetic record characterized from the DNA sample of an individual only if.

(a) the individual has authorized the disclosure; or

(b) the disclosure is required or authorized by or under law; or

(c) the person believes on reasonable grounds that disclosure is necessary to prevent or lessen a serious or imminent threat to the life or health of an individual or of another person.

---

50. 379 F. 3d 813 (Cir9 2004)
51. H.R. 4640 DNA Analysis Backlog Elimination Act of 2000. The Act proposes grants to States for carrying out DNA analysis for use in the Combined DNA Index System of the Federal Bureau of Investigation, Further it provides for the collection and analysis of DNA samples from certain violent and sexual offenders for use in such system.
52. The Health Insurance Portability and Accountability Act, 1996 (HIPAA) was enacted by the U.S. Congress in 1996. It addresses the security and privacy of health data. The standards are meant to improve the efficiency and effectiveness of the nation's health care system by encouraging the widespread use of electronic data interchange in the US health care system section.
53. *id* SEC. 1171 (4). provides that the erm 'health information' means any information, whether oral or recorded in any form or medium, that ---
"(A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and "(B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or
future payment for the provision of health care to an individual.
54. The Genetic Information Nondiscrimination Act [H.R. 493, S. 358] is an Act that prohibits discrimination on the basis of genetic information with respect to health insurance and employment. It was introduced to establish basic legal protections that will enable and encourage individuals to take advantage of genetic screening, counselling, testing, and new therapies that will result from the scientific advances in the field of genetics. available at <*http:// www.geneticalliance.org/ws_display.asp?filter= plicy.leg.nondiscrim* > (visited on 29-08-2008).

(2) The person to whom genetic information has been disclosed may redisclose the information only to the extent reasonable in the exercise of judgement for professional medical consultation for the direct benefit of a patient or with the written authorization of the individual."[55]

If we shift our attention to India We are indeed achieved great strides in the areas of biotechnology, which has opened up new avenues and possibilities. On the other side of the spectrum there is the very real risk of personal genetic information being abused in terms of employment or eligibility for health insurance. Relatively speaking, In India we do not have specific laws to deal with genetic privacy. The existing rights of individuals to privacy from the actions private-sector entities and individuals derive primarily from statutory and common-law principles. Despite the lack of an explicit right to privacy recognized in the Constitution, the Courts has ruled that the Right to life under article 21 is wide enough to cover constitutionally protected privacy interests[56]". Other decisions have noted that infringements on privacy and personal autonomy must be justified by a compelling interest.[57] If an issue of violations of genetic privacy or genetic information arises one will have to possibly fall back upon Constitutional Provisions dealing with privacy which is undoubtedly inadequate. The major drawback of protecting privacy right under Article 21.

Consistent with Declaration of Helsinki adopted by the World Medical Assembly in 1964, and amended in October 2000 and the Universal Declaration on the Human Genome and Human Rights (UNESCO, 1997), Indian Council Of Medical Research (ICMR) have laid down the legal, ethical, scientific and technical norms regarding research on genetic research.[58] The guidelines clearly incorporate the basic premise of right to privacy. The concept of autonomy and privacy is given a place in the guidelines. The basic privacy principles that should be followed in genetic research and services are:

1 **Autonomy:** Choice of participation is autonomous, voluntary and based on informed consent; persons or groups with diminished autonomy should be given protection.

55. *Id., Section 8*
56. *Kharak Sing v. Union of India,* AIR *12963 SC 1295 Rajagopal v. State of Tamil Nadu,* 1994) 6 SCC 632.
57. In India, the Supreme Court has held that disclosure of confidential medical information may be justified in some circumstances When the right to health is weighed against the right to privacy, the right to health will override because privacy interest must be placed in the context of other rights and values in *Mr. X v. Hospital Z,* 1998, 8 SCC 296.
58. "Ethical Guidelines for Bio Medical Research on Human Participants" India Council of Medical Research 2006 available at <*http://www.icmr.nic.in/ethical_guidelines.pdf*> (Visited on 27-09-2008)

1 **Privacy:** Identifiable information (clinical, genetic, etc.) of individuals or groups is confidential and should be protected.[59]

Through this regulation the principle of medical confidentiality first recognized in the Hippocratic Oath has been codified. It is submitted that the present position is clearly inadequate. We need to seriously think of enacting legislation If India need to reap the potential economic and health benefits of advances in the field of Human genome research.[60]

CONCLUSION

Despite over two decade of legislative actions, the world continues to lack comprehensive accepted criteria of protection for genetic privacy. As a consequence, individuals and groups must depend on a combination of statutes and professional guidelines that standardize access to genetic and other medical information by various entities - such as hospitals, employers, and forensic laboratories, insurers and newborn screening. Most experts consider that these piecemeal safeguards are clearly limited and under-enforced. Rectifying this crisis will involve a strong policy response and political will. At present, major resistance for policy framing and implementation comes from various stakeholders especially within the medical care system that rely on access to genetic information. The outcomes, genetic and medical records of patients, research suspects, criminals, insurance sector and various others continue to undergo routine exchange and revelation with negligible safeguards if any without comprehensive safeguards for generic privacy, in the midst the growing surveillance of our genes and genomes, fears of various human right violations including discrimination, eugenics are likely to continue, inhibiting the full realization of promising scientific advances.

One of the prominent authorities of Bio ethics law Annals believes that countries should come up with a privacy protection, such legislation which should guarantee the individual's right to: determine who may collect and analyze DNA; determine the purposes for which a DNA sample can be analyzed; know what information can reasonably be expected to be derived from the genetic analysis; order the destruction of DNA samples; delegate authority to another individual to order the destruction of the DNA sample after death; refuse to permit the use of the DNA sample for research or commercial activities; and inspect and obtain copies of records containing information derived from genetic analysis of the DNA sample.[61]

59. *Ibid.*

60. Suman Sahai, "Does India have a role to play in Human Genome Project?", available at<*http://www.genecampaign.org/Publication/biotechnology/PROMISE% 20OF%20HUMAN%20GENOME.pdf*> (last visited on 28-12-2008).

61. Beatrice Godard "Data Storage and DNA Banking for Biomedical Research: Informed Consent, Confidentiality, Quality Issues, Ownership, Return of Benefits. A Professional Perspective", *European Journal of Human Genetics, p 11,* (2003).

"ACQUIESCENCE" OF PROPRIETOR OF A TRADE MARK IN THE USE OF HIS TRADE MARK BY THE OTHER : "MEANING" AND "CONSEQUENCE" UNDER THE TRADE MARKS LAW IN INDIA

Dr. Meenu Paul[1]

> *"If a trader allows another person who is acting in good faith to build up a reputation under a trade name or mark to which he has rights, he may lose his right to complain, and may even by debarred from himself using such name or mark"*[2]

If the proprietor of trade mark even being aware of the use of his trade mark by another does not take any action, rather lets him to invest in popularising his trade mark and expand his business over a period of time, then the proprietor of the trade mark may become disentitled to the remedy of injection against the other user of his trade mark by which otherwise he could restrain the other user from the use of his trade mark. As under the trade marks law such conduct of the proprietor indicates an *"acquiescence"* i.e., the *implied consent* on his part in the use of his trade mark by the other.

Although *"acquiescence"* has been held to be as a complete defence for the other user of the trade mark against the proprietor of the trade mark yet until the enactment of Trade Marks Act, 1999 the defence of *"acquiescence"* was not clearly laid down under the Trade Mark Law in India. In the absence of clearly defined defence of *"acquiescence"* under the Trade Marks Law until the enactment of Trade Marks Act, 1999, judiciary in India played pivotal role in giving the meaning to *"acquiescence"* as the defence for the other user of the trade mark against the exclusive right of the proprietor over his trade mark. While explaining the meaning of *acquiescence"*, the Judicial opinion has laid down certain essentials of the defence of *"acquiescence"* under the Trade Mark Law. This paper analyses the meaning as well as legal consequence of *"acquiescence"* on the part of a proprietor of trade mark in the use of his trade mark by the other in the light of judicial interpretation of the statutory provisions that referred to the defence of *"acquiescence"* under the Trade Mark Law applicable in India prior to the enactment of Trade Marks Acts, 1999.

---

1. Reader in Law, Deptt. of Laws, Punjab University, Chandigarh.

2. *Halsbury's Laws of England, Second edition, Vol.32, page 656, Paragraph 966*

"ACQUIESCENCE": PRIOR TO THE TRADE MARKS ACT, 1999

Although prior to the Trade Marks Act 1999 defence of "acquiescence" was not clearly laid down under the Trade and Marks Act, 1958 or under Trade Marks Act 1940 yet the other user the trade mark took it as a defence against the proprietor of the trade mark under the relevant provision that referred to "acquiescence" on the part of the proprietor of the trade mark under the Trade Marks Law that was applicable at the time. For example judicial opinion permitted the other user of the trade mark to take the defence plea of "acquiescence" within the expression "special circumstances" in section 10(2) of the Trade Marks Act, 1940 which read as follows:

Sec.10 (2) In case of honest concurrent use or of other **special circumstances** which, in the opinion of the register, make it proper so to do he may permit the registration by more than one proprietor of trade mark which are identical or nearly resemble each other in respect of the same goods or description of goods subject to such conditions and limitations, if any, as the registrar may think fit to impose.

Later when Trade Marks Act, 1940 was repealed and Trade and Merchandise Marks Act, 1958 came into force the other user took the defence plea of "acquiescence" against the proprietor of the trade mark within the expression "special circumstances" under Clause (1) of subsection (b) of Section 30 of the Trade and Merchandise Marks Act, 1958 which read as follows;

Sec.30. Acts not constituting infringement :- (1) Notwithstanding anything contained in this Act, the following acts do not constitute an infringement of the right to use of a registered trade mark - (b) the use by a person of a trade mark in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark if, as to those goods or bulk of which they form part, the registered proprietor or the registered user conforming to the permitted use has applied the trade mark and has not subsequently removed or obliterated it, **or has at any time expressly or impliedly consented** to the use of the trade mark.

Trade and Merchandise Marks Act, 1958 has been repealed by the Trade Marks Act, 1999. Trade Marks Act 1999 that came into force in 2003 has made a clear provision for the defence of "acquiescence" for the other user of the trade mark against the proprietor of the trade mark under sec.33 of it.

Sec.33 of the Trade Marks Act, 1999 providing for the defence of "acquiescence" to the other user of the trade mark against the proprietor of the trade is an improvement upon the earlier reference to the acquiescence within the statutory provision under the Trade and Merchandise Marks Act, 1958 and

Trade Marks Act,1940. As sec.33 of the Trade Marks Act, 1999 lays down the defence of "acquiescence" to the user of the trade mark against registered proprietor of the trade mark with much clarity.

MEANING OF "ACQUIESCENCE": JUDICIAL OPINION

As prior to the provision of "acquiescence" under sec.33 of the Trade Marks Act, 1999 the essentials of the defence of "acquiescence" were not clearly laid down under the Trade Marks Act, 1940, or under the Trade and Merchandise Marks Act 1958, the meaning and scope of the term "acquiescence" as a defence to the other user of the trade mark under the Trade Mark Law depended largely upon the judicial opinion. The judiciary in its turn has made considerable contribution in giving meaning to the defence of "acquiescence: so far as its place in the trade marks law is concerned. In its attempt to give meaning to the defence of "acquiescence" the judiciary has specified the essentials of the defence of acquiescence whenever the proprietor of such trade mark sought the injunction by filing suit against the unauthorized use of his trade mark by the other and the other user resisted it on the ground of "*acquiescence*" i.e., the implied consent of the registered proprietor in the use of his trade mark. Significance of the judicial opinion in the context of the defence of "*acquiescence*" in the matter of unauthorized use of the trade mark by the person other than the proprietor lies in the fact that provision of "*acquiescence*: under sec.33 of the Trade Marks Act, 1999 reflects all the essential of the "*acquiescence*" which the judicial opinion has established over the years in its successive judgments as a complete defence for the other user against the proprietor of the trade mark.

"ACQUIESCENCE: "DELAY" COUPLED WITH "IMPLIED CONSENT"

Tracing down judgments of the Courts in Indian from the beginning i.e., even prior to the Trace Marks Law was enacted in India, one finds that judicial opinion in India had firmly established that simple delay by the proprietor of a trade mark in filing the suit against the unauthorized use of his trade mark by the other does not indicate proprietor's acquiescene in the use of his trade mark by the other. For the defence of acquiescene against the proprietor of trade mark the other user of the trade mark must prove that the proprietor of the trade mark not only delayed in taking action against the unauthorized use of his trade mark by the other user but also encouraged him to use his trade mark by his conduct.

Judicial opinion prior to the Trade Marks Law in India:- Prior to the Trade Marks Act, 1940, as there was no trade mark law in India the Courts in India followed the judicial opinion of Courts of England and relied on the

Report of the patent cases (RPC) and of Chancery Division (Ch.D) of England i this matter and accordingly held that, "acquiescence" can not be inferred merely by reason of the fact that the proprietor has not taken any action against the infringement of his trade mark by the other. The Courts in India consistently held that for the defence of "acquiescence" delay in filing the suit must be accompanied by the knowledge of the proprietor about the unauthorized use of his trade mark by the other and encouraging the other user by allowing him to use his trade mark without any objection. So even before the trade mark law came into existence in India it had become an established principle of law in India that, to support a plea of "acquiescence" in trade mark case it must be shown that the proprietor has not only stood by for a substantial period but has also encouraged that other user to expend money in building up a business associated with the trade mark that belonged to the proprietor of the trade mark.

It was as early as in 1930 i.e., much before the Trade Mark Act, 1940, came into force in India that the Calcutta High Court[3] had an opportunity to decide a case in which the defence of "acquiescence" was pleaded against the proprietor of the trade mark by the other user of the trade mark against the action for passing off taken against him by the proprietor of the trade mark under the common law. Calcutta High Court in this case explained the meaning of the "acquiescence" as a defence plea by the other user of the trade mark against the proprietor of the trade mark. This was the case of *Moolji Sicca & Co. v. Ramjan Ali*[4] which was about colourable imitation of the labels attached to the bundles of 'biris' (an inferior substitute for cigarette). In this case the plaintiff alleged that the defendant's labels on the bundles of his 'biris' are the colourable imitations of the labels attached on the bundles of his 'biris'. The defendants on the other hand on the plea of acquiescence contended for the claim of concurrent right with the plaintiff to use that trade mark. The defendant pleaded that though the trade mark belonged to the plaintiff yet the defendant had been using the same trade mark for a long time for his 'biris' without any objection from the plaintiff. Plaintiff on the other hand proved that as soon as they received by information that the defendant was violating their rights in connection with their trade mark they sent the letter of objection to the defendant through their attorney but the defendant continued using the trade mark despite the objection by the plaintiff. As the element of implied consent of the proprietor of the trade mark an essential element of acquiescence was missing in this case the plaintiff was not held disabled in any way by way of acquiescence or

3. *Moolji Sikka & Co.v. Ramjan Ali,* AIAR 1930 Cal 678
4. *Id.*

delay from pursuing their legal rights, and they were entitled to an injection and to an account of profits against the defendant.

Thus in *Moolji Sicca & Co. v. Ramjan Ali*[5] Calcutta High Court laid down the principle that, to set up the defence of "acquiescence" against the proprietor of the trade mark the other user must prove that the proprietor of the trade mark was not only aware of the use of his trade mark by the other but also encouraged the other user by not objecting to the use of his trade mark by him. In *Moolji Sicca & Co. v. Ramjan Ali*[6] Calcutta High Court in its judgment quoted the observation made by Lord Justice Cotton in Proctor v. Bennis 36 Ch. Div.760 in the context of the defence of "acquiescence" which reads as follows:

> "It is necessary that the person who alleges this laying by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title"

Similarly in *Gasper & Co. v. Leong Chey & Co.,*[7] a case decided in 1934, the defence of "acquiescence" was taken by defendant who used the trade mark which was the colorable imitation of the trade mark of the plaintiff. In *Gasper & Co. v. Leong Chey & Co.*[8] the plaintiff used the trade mark of "Steamer Brand" with the picture of steamer on the labels that were attached on the bottles of whiskey that they had been importing in Rangoon for more than twelve years. The defendant also started using the trade mark of steamer on the labels that were attached to their bottles of whiskey. The plaintiff charged the defendant with having adopted their trade mark in the hope and expectation of stealing part of their trade. They accordingly sought injunction restraining the defendants, their servants and agents from selling their whiskey with the labels containing the picture of steamer which was the colorable imitation of the labels used by the plaintiff. In this case "acquiescence" was taken as a defence by the defendant. As the defendants contended that the plaintiff had allowed other firms to use the picture of sailing ship on the labels attached to their bottles of whiskey. Therefore they contended that even if the plaintiff had acquired a right to the exclusive use of the steamer mark they had lost it by reason of their "acquiescence" in another firm using the picture of battleship on its label. In *Gasper's case*[9] the Court observed that, "of course where the owner of a trade mark stands by and allows a number of different people to copy his mark

5. *Id.*
6. *Id.*
7. AIR 1934 Rangoon 297
8. *Id.*
9. *Id.*

he loses his mark he loses his right in it by reason of the fact that he mark has become common to the trade". But the plaintiff in this case proved that the other firms who used the picture of a sailing ship or a cruiser used these marks for not more than one year and their use was never brought to the notice of the plaintiffs. As the Court in this case[10] found that plaintiff did not lose their right to their trade mark by reason of their "acquiescence" the defendants were restrained from the use of the trade mark by injection. Thus knowledge and no objection by the proprietor on the use of his trade mark by the other has been held to be the essential constituents of the term "acquiescence" as a defence available to the other user of the trade mark against the of proprietor to he trade mark.

Devi Dass and Co. Banglore v. Althur Abboyee Chetty, Madras[11] is an important case in which the other user of the trade mark successfully set up the defence of "acquiescence" against the of proprietor of the trade mark. In *Devi Dass and Co. Banglore v. Althur Abboyee Chetty, Madras* the appellant was the proprietor of the trade mark that consisted of a baby sitting on the four pieces of cloth for the cloth sold by him. The respondent also used the deceptively similar trade mark of a baby sitting on the single piece of cloth which he imported from England for its sale in India. The appellant in this case filed a suit for passing off action against the respondent. As the appellant contended that the respondent sold his cloth using a trade mark which was deceptively similar to his trade mark. On the other hand the respondent took the defence of "acquiescence" against the passing off action by the appellant. The respondent in the first instance proved that he used the trade mark of the baby sitting on the cloth in *good faith* and in entire ignorance that the appellant had already adopted the trade mark of the baby. Secondly, the respondent proved that the appellant even being aware of the use of his trade mark by the respondent took no action against the respondent between the period 1931 to 1935 during which the respondent spent Rs. 20,000/- in advertisement and in other ways in popularizing their goods as a result of which their business grew greatly year by year. On the proof of both the facts firstly, that the respondent used the trade mark of the appellant in good faith and secondly, the appellant took no action despite having the knowledge that their trade mark was being used by the respondents for a long time the Madras High Court allowed the respondent to take the defence of "acquiescence". Madras High Court in this case[12] held that, "to support a plea of acquiescence in a trade mark case it must be shown that the plaintiff has stood by for substantial period and thus encouraged the defendant to expend

10. *Id.*
11. AIR 1941 Mad 31.
12. *Id.*

money in building up a business associated with the mark."

Madras High Court in its judgement in *Devidass's case* quoted[13] an observation that was made by *Romer J.* in 1896 in *Rowland v. Michell* which reads as follows:

> "If the plaintiff really does stand by and allow a man to carry on business in the manner complained of to acquire a reputation and to expend money he can not then after a long lapse of time, turn around and say that the business ought to be stopped."

Thus even prior to the enactment of any trade mark law in India the judicial opinion in India had firmly established that for the defence of "*acquiescence*" delay in filing the suit by the proprietor against the unauthorized use of his trade mark by the other must be accompanied not only by the knowledge of the proprietor about the unauthorized use of his trade mark over a period of time by the other but also by the no objection by the proprietor despite the knowledge. As no objection by the proprietor despite his knowledge of unauthorized use of his trade mark by the other over a period of time implies a consent on the part of the proprietor of the trade mark and that constitutes the defence of "*acquiescence*".

Judicial Opinion after the Trade Marks Law in India :- It has been seen that the judicial opinion that was formed with respect to the defence of "*acquiescence*" in the context of the unauthorized use of trade mark by the other user before the Trade Marks Law was enacted in India was carried forward in the same sprite after the enactment of Trade Marks Act, 1940 in India. For example in *Amridhara Pharmacy v. Satya Deo Gupta*[14] the Supreme Court of India had an opportunity to decide upon the defence of "*acquiescence*" that was taken up by the other user against the proprietor of the trade mark under sec.10 of the Trade Marks Act, 1940. In *Amritdhara Pharmacy v. Satya Deo Gupta*[15] the respondent who was the other user of the deceptively similar trade mark "Lakshamandhara" was allowed to take the defence of "acquiescence" against the proprietor of the trade mark "Amritdhara". In *Amritdhara Pharmacy v. Satya Deo Gupta*[16] it was found that the proprietor of the trade name "Amritdhara" had been using this trade name for an ayurvedic medicine since 1903 which was also registered under Trade Marks Act, 1940. Whereas the respondent started using deceptively similar trade mark "Lakshamandhara" for the similar medicine since 1923 in a small way in Uttar Pradesh. Later the respondent used the trade

13. Id.
14. AIR 1963 SC 449
15. Ibid.
16. Ibid.

mark "Lakshamandhara" extensively and publicized their trade mark in the same journal in which the trade name Amritdhara was publicized. In this case it was established that the proprietor of Amritdhara and their agents were well aware if the advertisements if Lakshamandhara and they stood by and allowed the respondent (the proprietor of Lakshmandhara) to develop his business till he achieved annual turnover of Rs.43,000/- in 1949. As the circumstances of this case established that the other user of the deceptively similar trade mark used the trade mark Lakshamandhara with the full knowledge of the proprietor of the trade mark used the Amritdhara. Further proprietor of the trade mark Amritdhara did not object to the use of a trade name Lakshamandhara by the respondent although it was deceptively similar to their trade name Amritdhara, the Supreme Court held it to be a fit case in which the respondent who is the other user of the deceptively similar trade mark could take the plea of acquiescence under sub-sec. (2) of sec. 10 of the Trade Marks Act, 1940. Supreme Court in this case[17] not only allowed the respondent to use the trade name Lakshamandhara but also permitted him to apply for the registration of the trade mark for sale in Uttar Pradesh only.

The essentials of the defence of "acquiescence" laid down by the judicial opinion before the enactment of the Trade Mark Act, 1940 that were carried forward after the enactment of the Trade Mark Act, 1940 were duly recognized further by the Judiciary under the Trade and Merchandise Marks Act, 1958 which repealed the Trade Marks Act, 1940. For example in *M/s. Hidesign v. Hi-Design Creations*[18] while interpreting defence of "acquiescence" under Section 30 of the Trade and Merchandise Marks Act, 1958 Delhi High Court held that, "it is only when the plaintiff sits idly by, while the defendant spends a great deal of time, effort, money in building up of trade in the goods in the impugned name, to which the plaintiff claims exclusively right can a contention of acquiescence be raised."

Interpreting the defence plea of "acquiescence" which the other user of the trade marks could take against the proprietor of the trade within the expression "special circumstances" under Clause (1) of sub-section (b) of Section 30 of the Trade and Merchandise Marks Act, 1958 the Supreme Court of India in *M/s Power Control Appliances and Others v. Sumeet Machines Pvt. Ltd.*[19] held as follows:

" " Acquiescence" is sitting by, when another is invading the rights and spending money on it. It is a course of conduct inconsistent with the claim for

17. *Id.*
18. AIR 1991 Del. 243 at pg. 250.
19. (1994) 2 SCC448.

exclusive rights in trade mark, trade name etc., It implies positive acts, not merely silence or inaction such as involved in laches. It is important to distinguish mere negligence and acquiescene. "Acquiescence" is one facet of delay. If the plaintiff stood by knowingly and let the defendant build up an important trade entitle had become necessary to crush it, then the plaintiff would be stopped by their acquiescence. If the acquiescence in the infringement amounts to consent, it will be a complete defence. The acquiescences must be such as to lead to the inference of a licence sufficient to create a new right in the defendant."

"ACQUIESCENCE": NOT FOR THE FRAUDULENT OTHER USER

At present sec.33 of the Trade Marks Act, 1999 clearly provides that the other user of the trade mark can take the defence of "acquiescence" against the proprietor of the trade mark if he has used the trade mark in good faith. It has been noted that even prior to the Trade Marks Act, 1999, while dealing with the defence of "acquiescence" taken by the other user of the trade mark judicial opinion in India had firmly established that 'where there is fraud there is no room for the doctrine of "acquiescence". Judiciary had consistently held that for the defence of "acquiescence" under trade mark law another essential is this that the other user must have used the trade mark in good faith and in complete ignorance of the tittle of the proprietor to that trade mark.

Judiciary in India has clearly laid down that the other user may prove that the proprietor of the trade mark did not take any action even though he knew about the unauthorized use of his trade mark and by his conduct encouraged the other user to use his trade mark, yet the other user can not take the benefit of the defence of "acquiescence" if he fails to prove that he had used the trade mark in good faith and in entire ignorance that the proprietor had already adopted the trade mark. It was as early as in 1930 much prior to the Trade marks law was enacted in India Calcutta High Court in *Moolji Sicca & Co. v. Ramjan Ali*[20] quoted in its judgment the observation made by Lord Justice Cotton in *Proctor v. Bennis* which read as follows:

" It is necessary that the person who alleges this laying by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title"

Following the observation made by Lord Justice Cotton in *Proctor v. Bennis* in page J. in *Moolji Sicca & Co. v. Ramjan Ali*.[21] categorically held that 'where there is fraud there is no room for the doctrine of "acquiescence".

20. AIR 1930 Cal 678
21. *Id.*

The use of the trade mark by the other user in *good faith* as another essential of the defence of "acquiescence" was also given due recognition by the judiciary when the Trade Mark Law came into force in India . In *M/s. Hindustan Pencils Pvt. Ltd. v. M/s. India Stationary Products Co. Ltd*[22]**.** Delhi High Court had an opportunity to consider the question as to whether relief of injunction can be refused in the case of trade mark to a party merely on the ground of delay and laches under sec. 30 of Trade and Merchandise and Marks Act, 1958. Delhi High Court in this case[23] held that, "Even though there may be some doubt as to whether laches or acquiescence can deny the relief of a permanent injunction, it has been consistently held that if the other user acts fraudulently with the knowledge that he is violating the rights of the proprietor of the trade mark, the relief of injection is not denied." Similarly in *M/s. Hidesign v. Hidesign Creations*[24] Delhi High Court reiterated that, "the "acquiescence" over a period of time has also be on the basis of honest concurrent user of the mark." Thus even prior to the enactment of Trade Marks Act. 1999 judicial opinion in India had firmly established that the other user can not take the defence of "acquiescence" merely by reason of the fact that the proprietor of the trade mark has knowingly not taken any action against the other user of his trade mark. For the defence of "acquiescence" against the proprietor of the trade mark the other user must prove that he had used the trade mark of the proprietor of the trade mark in good faith and in complete ignorance of the title of the proprietor to that trade mark.

In *Hybo Hindustan v. Sethia Hosiery Mills*[25] High Court of Calcutta held that, "if it is established that the defendant is using the mark of the plaintiff with the knowledge that he is violating the plaintiff's right delay should not defeat the prayer for injunction."

At present use of the trade mark by the other user in good faith as an essential for the defence of "acquiescence" has been laid down under sub-section (1) of sec.33 of the Trade Marks Act, 1999.

"ACQUIESCENCE": LEGAL CONSEQUENCES

Denial of the relief of injunction

To protect the proprietor's exclusive right to use his trade mark, against the unauthorized use of his trade mark by the other user *injunction* is an effective remedy under the Trade Marks Law. As injunction is the remedy by which the

22. AIR 1990 Del. 19
23. Id.
24. AIR 1991 Del. 243 at pg.250
25. 2002 (24) PTC 65

other user who has been making the unauthorized use of the trade mark is restrained from using the trade mark that belongs to the proprietor of the trade mark. But the other user of the trade mark may resist the remedy of injunction sought by the proprietor of the trade mark against him if he successfully puts up the defence of "acquiescence" against the proprietor of the trade mark.

About the refusal to grand injunction to the proprietor of the trade against the other use of the trade mark as the direct legal consequence of "acquiescence" the Supreme Court referring to sec. 30(b) of the Trade and Merchandise Marks Act, 1958 in *M/s. Power Control Appliances and Others v. Sumeet Machines Pvt. Ltd.,*[26] held that, "it is not correct to contend that once the trade mark is infringed the plaintiff would be entitled to injunction. Section 30(b) is still applicable and it is open to this respondent to show that there had been an implied consent to the use of the trade mark.

Earlier in *M/s. Hindustan Pencils Pvt. Ltd. v. M/s. India Stationary Products Co. Ltd.*[27] Delhi High Court held as follows:

"Acquiescence may be a good defence even to the grant of a permanent injunction because the defendant may legitimately contend that the encouragement of the plaintiff to the defendant's use of the mark in effect amounted to the abandonment by the plaintiff of his right in the favour of the defendant and, over a period of time, the general public has accepted the goods of the defendant resulting in increase of its sale. However, it will be for the defendant in such cases to prove acquiescence by the plaintiff. Acquiescence can not be inferred merely by reason of the fact that the plaintiff has not taken any action against the infringement of its rights". circumstances of each case. Much earlier in 1941 in *Devi Dass v. Alathur Abbovee Chetty* the Madras High Court held that, "the plaintiff loses his right of action against the defendant by reason of his acquiescence in the defendants in the use of the mark complained of. Each case must depend on its own circumstances, but obviously a person can not be allowed to stand by indefinitely without suffering without the consequences". In *B.L. & Company v. Pfizer Products*[31]**.** Division Bench of Delhi High Court held that where a party permits opposite party to incur promotional and other expenses on trials etc., Launching of products and other such activities, the factor of delay alone is sufficient to deny the restraint order. It the proprietor of trade mark being aware of the use of his trade mark by another trader does not take any action for a continuous period of five years

26. *Id.*
27 AIR 1990 Del. 19 at p.31.
30. AIR 1941 Mad.31.
31. 2001 PTC 797 Del (DB).

against the use of his trade mark by another trader. Then, he is disentitled to oppose the use of his trade mark by the other trader on the ground of acquiescence. Recently in *Sudhir Bhatia & Ors v. Midas Hygiene Industries (P) Ltd.*[32] the defence of "acquiescence" was pleaded by the other user against the proprietor of the trade mark under sec30 of the Trade and Merchandise and Marks Act. 1958. In this case the respondent had used the original trade mark LAXMAN REKHA and the appellant had used the trade mark MAGIC LAXMAN REKHA. The respondent by their inaction for five years has permitted the appellant to make endeavors to increase its business vigorously by using the trade mark MAGIC LAXMAN REKHA. Silence for five years shows an element of acquiescence on the part of respondent. Therefore in this case[33] the relief of interim injunction was not granted in the favour of respondent by the Delhi High Court. Whereas sub-section (1) of sec.33 of the Trade Marks Act. 1999 specifies the *continuous* time period of *five years* during which the proprietor of the trade mark must have acquiesced in the use of his trade mark by the other user. However sec.33 of the Trade Marks Act. 1999 also clearly lays down that the other user can take the benefit of the defence of "acquiescence" against the proprietor of the trade mark only if he has used the trade mark belonging to the proprietor in *good faith*.

At present Sec.33 of the Trade Marks Act, 1999 clearly lays down that if the "acquiescence" on the part of the proprietor of a trade mark continuous for a period of five years and the other user has used the trade mark of the proprietor in good faith then the proprietor of the trade mark not only becomes disentitled to the remedy of injunction against the other user of his trade mark but also loses is right to oppose registration of his trade mark by the other user in his name.

CONCLUSION

In case of infringement of the trade mark if it is registered and passing off a trade mark in case it is not registered, the proprietor of the trade mark can not only restrain the unauthorized use of his trade mark by the remedy of injunction against the other user but has the right to oppose the registration of his trade mark also by the other user under the Trade Marks Law. But the proprietor of a trade mark is disentitled to take the benefit of these remedies if he knowingly does not take any action against the unauthorized use of his trade mark by the other and by his inaction encourages him to invest in popularizing his trade mark and expand his business over a period of time. Such an inaction on the part of

32. 2002 (24) PTC 94(Del) DB)]
33. *Id.*

the proprietor of a trade mark despite his being aware of the use of his mark by the other person over a period of time implies "acquiescence" i.e., *implied consent* of the proprietor of the trade mark in the use of his trade mark by the other. On the other hand it is also the settled principle of law that the other user of the trade mark can take the benefit of the defence of "*acquiescence*" against the proprietor of the trade mark only if he proves that he had used this trade mark in *good faith* and in complete ignorance of the title of the proprietor. It has been seen that prior to the enactment of Trade Marks Act, 1999 the judicial opinion in India had firmly established that for the defence of "*acquiescence*" against the proprietor of the trade mark the other user must satisfy all the four essentials, which are as follows ; i) ignorance of the other user about the proprietor's right to the title to the trade mark, ii) knowledge of the proprietor for the trade mark that the other person is using his trade mark, iiii) no objection from the proprietor of the trade mark despite the knowledge of unauthorized use of his trade mark by the other, and iv) the other person used it over a period of time. All these essentials are now statutorily laid down under sec. 33 of the Trade Marks Act, 1999 which at present is applicable in India. It is also concluded that although under the Trade Marks Law there can be only one mark, one source and one proprietor of a trade mark, yet the "acquiescence" of the proprietor of a trade mark in the use of his trade mark by the other confers a legal right upon the other user to use not only trade mark concurrently with the proprietor of the trade mark but also to apply for the registration of the trade mark in his name under the Trade Marks Law in India.

GENETICALLY MODIFIED FOOD AND REGULATORY REGIME IN INDIA

Dr. Sheeba Pillai*

Freedom from hunger is one of the essential entitlements that have engaged the attention of the World Community at large[1]. The global demand for food is increasing because of the burgeoning world population and decreasing arable land, making it necessary to adhere to various methods for increasing quality and quantity of food supply. States have been pressurised into adopting measures to improve the production, conservation and distribution of food. Not only that, but also to disseminate information about nutrition and to structure the agrarian system to make the best use of natural resources.

Beginning with Louis Pasteur, work with wine, modern food, science and technology has made tremendous contribution to the safety and availability of food[2]. However recent development in the field while offering to extend this progress have posed concern about safety of these technology. Modern technology involving the use of DNA technology has emerged as powerful tool for improving both the quality and quantity of food supply and at the same time has evoked controversial debates relating to the potential impact on human health, environmental risks and also trade related issues[3].

Genetic modification is a special set of technologies that alter the genetic make up of such living organism as animals, plants or bacteria. Biotechnology, a more general term, refers to using living organisms or their components such as enzymes to make products that include tonic, cheese, beer and yogurt. Combining genes from different organisms is known as recombinant DNA technology and the resulting organism is said to be genetically modified, genetically engineered or transgenic. Genetically modified products (current or in the pipeline) include medicine, vaccine, foods or food ingredients, feeds and fibers[4].

---

* Lecturer, School of Indian Legal Thought, MG University, Kottayam.

1. The idea of food entitlement is an ancient one. Confucius stated that feeding the people was the primary obligation of the State. The Old Testament prescribed detailed laws, which Jews were bound to follow, which provided for the poor and hungry to have access to productive land or food growing on the land of others.
2. www.who.int
3. Opponents of bio-technology are skeptical about the role of bio-technology in increasing the food security; they point to the threats that it poses to sustainable development to agricultural and environmental bio-diversity and to public health, they counsel caution about the not yet well known risks of gene technology. Floma Macmillan, WTO and Environment, Sweet and Maxwell, London, 2007.
4. It allows selected individual genes to be transferred from one organisms to another and also between non-related species.

Several genetically modified foods and products have entered the market in the last few decades. These include new protein sources from bacteria, filamentous fungi and yeasts and genetically manipulated plants and animals. The most controversial gene manipulation till date, perhaps has been the insertion of BT (Bacillus Thurungienis), which has entered more than 400 foodstuffs mainly soya-bean and of course cotton[5]. Bt[6] is the most effective in managing insects that are very hard to control for farmers producing cotton. The genetically modified Bt contains the insectidal gene of Bt, that itself makes toxin necessary for protection against pests. In short, it can be said that the plant itself becomes a pesticide and this is where the controversy emnates.

GM foods are developed and marketed because there is some perceived advantage either to the producer or consumer of these foods. The mutual objective for developing plant based on genetically modified organism was to improve crop protection by making them resistant to pests, herbicide, drought etc. For example, Bt crystal protein has been transferred into corn enabling the corn to produce its own pesticides against insects such as European corn borer[7]. Similarly, a plant is modified for herbicide tolerance by wherein the virus resistance is achieved through introduction of a gene from a bacteria, conveying resistance to some herbicide. Likewise plants are developed in a manner to resist disease, tolerate cold and drought, tolerance of salinity etc. Furthermore, plant modifications have also aimed at increasing nutritional levels. For example, the researchers at Swiss Federal Institute of Technology for Plant Science have created a strain of 'golden' rice containing an unusually high content of beta carotene (Vitamin A) [8]. Researchers are also working to develop edible vaccine and medicine, which would be easier to store, ship and administer, as compared to the conventional medicine/vaccine, which are often costly to produce and they require special storage[9].

Finally the food is much tastier and also of very good quality. Thus we can see that genetically modified foods definitely have a potential to change the future by making the developing nations in particular more self-sufficient, by

5. Shwetha Gupta, 'Genetically Modified Crops: a Question or Solution', *Amity Law Review*, Vol.5, Part I, January-June 2004, p.113.
6. It is common soil bacterium - a natural resource that has evolved over millennia, whose spray is one of the most important biological pest control techniques in use worldwide.
7. http//.www.csa.com
8. *Ibid.*
9. In 2003, about 167 million acres (67.7 million hectares) grown by 7 million farmers in 18 countries were planted with transgenic crops, the principal ones being herbicide and insecticide resistant soyabeans, corn, cotton, canola. Other crops grown commercially or field tested are sweet potato; resistant to a virus and could decimate most of the African harvest, rice with increased irons and vitamins that may alleviate chronic malnutrition in Asian countries and variety of plants able to survive weather extremes.

increasing the food security for the growing population.

Though there are several positive points to argue, critics have put forward several issues of concern, which need to be studied and assessed. This food revolution has instilled a fear of corporate control over agriculture leading to domination of world food production by a few companies[10]. This can in turn lead to increasing dependence of developing nation on industrialized nations who are more technologically advanced therefore more equipped in pioneering the production of genetically modified food. But the most serious allegation against genetic modification put forward by the critics is that it is destructive to human health and environment[11].

Hence it is necessary to have specific assessment to evaluate the potential risks to human health and environment unlike with traditional foods. The safety assessment of GM foods generally investigates direct health effect (toxicity). Tendency to provoke allergic reactions (allergenicity), specific components said to have nutritional or toxic properties, the stability of inserted genes, nutritional effects associated with genetic modifications and an unintended effect which could result from gene insertion[12]. However, four main issues currently debated as potential risks to health can be submitted as tendencies to promote newer toxicants, allergic reactions, gene transfer and out-crossing.

Genetic Engineering has the potential to alter such constituents or produce newer toxicants Crops developed for pest resistance and herbicide resistance are particularly focussed for toxicity concerns. The case of GM potato experiencing 'Galanthus Nivalis" lectin gene for insecticidal property is an example of the potential of GM foods to cause toxicity[13]. In a group of rats fed with GM potato, damage to immune system and stunted growth was observed[14].

While traditionally developed foods are not generally tested for allergencity, protocols for tests for GM food have been evaluated by FAO and WHO. Crops modified for insect resistance have shown to have the potential to allergic responses. This was highlighted in the recent findings of Starlink variety of GM maize, which has been shown to possess allergic properties in the food chains

10. *Supra n.*5.
11. The most important difference between genetic modification and older green revolution technologies is that the negative effect of the latter though serious can be reversed. The pollution caused by GM technologies is essentially irreversible.
12. *Supra n.*2.
13. Indian Council for Medical Research, Regulatory regiment for GM foods: the way ahead, April 2004 – at http //www.tccouncil.org
14. A 2005 study found that GM pea which is under development, caused severe immune responses in mice. In another study reported, GM maize fed rats developed major lesions in kidney and liver.

in USA, Europe and Japan[15]. The allergencity potential of GM food has often been difficult to establish with existing methods as the trangenes transferred are frequently from sources not eaten before, many have unknown allergencity or there may be a potential for genetic modification process to result in the increase of allergies already present in food[16].

Gene transfer from GM foods to cells of the body or to bacteria in the gastrointestinal tract could cause concern if the transferred genetic material adversity affects human health. This is particularly relevant if antibiotic resistance genes used in creating GMOs were to be transferred[17].

Outcrossing is the movement of genes from GM plants to conventional crops or related species in the wild (referred to as 'out-crossing') as well as mixing of crops derived from conventional seeds with those grown using GM crops may have an indirect effect on food safety or food security. This risk is real as was shown in traces of a maize type, which was only approved for feed use appeared in maize production for human consumption in the USA[18].

The assessment of risk to environment covers two aspects, that is the GMO concerned and the potential receiving environment. The assessment process includes the evaluation of the characteristic of the GMO and its effect and stability in the environment combined with ecological characteristics of the environment in which the introduction takes place. Issues of concern includes the capacity of the GMO to escape and potentially introduce the engineered genes into the wild population, the persistence of genes after the GMO has been harvested, the susceptibility of non-target organism (insects which are not pests) to the gene product, the stability of the gene, the reduction in the spectrum of other plants including the loss of biodiversity, the increased use of chemicals in agriculture[19]. Further, different GM organisms include different genes inserted in different ways. This means that individual GM foods and their safety should b e assessed on case-by- case basis and it is not possible to make general statements on the safety of all GM foods.

On ethical grounds too, GM crops have led to some controversies such as violation of natural organisms intrinsic values, tampering with nature by mixing genes among species and objection to consuming animal genes in plants and

15. Supra n.13.
16. After GM Soya was introduced in UK cases of allergies went up. It was also suggested that insertion of genes that code for novel proteins, not normally present in traditional foods may result in increased allergic reaction in some consumers. See Kamala Krishnaswamy – GM Foods – Potential benefits and possible hazards, July 2001 at http://nutritionfoundationofindia.res.in
17. Supra n.2
18. Ibid.
19. The environment safety aspects of GM crops vary considerably according to local conditions.

vice versa[20].

Therefore, it becomes all the more important for countries to map out a thorough safety assessment of GM foods before they are made available for consumption. The Codex Alimientaries Commission, an intergovernmental organization, jointly set up by the FAO and WHO, is the main international body responsible for developing international food standards[21]. Codex standards are not mandatory and cannot affect national legislation of foodstuffs[22] but nevertheless they are considered to b e prime authorities in setting standard which nations are persuaded to follow[23]. Other than the Commission, safety assessment of GM food has been addressed by several other international organizations namely the Food and Agricultural Organization (FAO), World Health Organization (WHO) and the Organization of Economic Co-operation and Development (OECD).

GM foods are subjected to an array of analytical tests for food safety evaluation like chemical analysis, allergenity tests and also evaluation of nutrition composition. The fundamental approach to assessing the safety of GM ingredient is based on the principle of substantial equivalence (SE) [24]. SE is concept formulated from the OECD guidelines and is a comparative approach where a comparison of various agronomic, biochemical, chemical and nutritional parameters of the GM food, relative to the existing food or food component is used as a method of assessing safety/quality[25]. If the food is substantially equivalent in composition and physical characteristics, to its conventional counterpart, it is deemed safe.

Though regulation of GM food is a priority today, there is a vast gulf in the manner of regulation. In some countries, GM foods are not regulated. Around 130 or more countries have no regulation[26], while 30-40 countries including India have put into place bio-safety legislation and regulatory institutions to implement them, both for research and trade of GM foods and food ingredients derived from them.

---

20. *Supra n.*5.
21. *Ibid.*
22. Butterworth Law of Food and Drugs, Lexis – Nexis, UK, Issue 77, August 2004, A.22.
23. They are however influential in that products complying with codex standard are either 'accepted' in member countries or are given 'free entry' to the markets of these countries. In a review carried out in late 1986, it was found that there had been 857 specific responses to codex standards of which 70% were 'acceptances' and 30% were 'free entry' notification. In some countries, codex Standard are accepted as basis of legislation and in many other they are influential in determining the final form of such legislation.
24. *Supra n.*16.
25. FAO bio-technology and food safety. FAO food and nutrition paper 61, 1996.
26. *Supra n.*16.

Several ministries and departments are involved in India's program of food quality and safety and hence each one of them has a role to play in the activities related to GM foods in India.

The Ministry of Environment and Forests notified the rules and procedures for the manufacture, import, use, research and release of genetically modified organism (GMO) as well as products made by the use of such organisms, on Decemberr 5th, 1989, under the Environmental Protection Act 1986. Two main agencies responsible for implementation of rules are the Ministry of Environment and Forests (MOEF) and Department of Biotechnology (DBT). There are six competent Committees, which have been set up as per the rules – Recombinant DNA Advisory Committee (RDAC); Review Committee on Genetic Manipulation (RCGM); Genetic Engineering Approval Committee (GEAC); Institutional Bio-safety Committee (IBSC); State Bio-safety Co-ordination Committee (SBCC); District Level Committee (DLC) [27]. As per the provisions of S.11 of Rules 1989, "Food stuffs, ingredients in food stuffs and additions including processing aids containing or consisting of genetically engineered organism or cells shall not be produced, sold, imported or used except with the approval of GEAC."[28].

The Department of Biotechnology holds the Secretariat of Review Committee on genetic modification that gives approval for research and small scale field trials involving GMOs and products thereof. It also interacts with the Institutional Bio-safety Committee (IBSCs), which are set up in all organizations undertaking activities involving GMOs. The Department of Biotechnology had formulated recombinant DNA guidelines in 1990. These guidelines were further revised in 1994 to cover research and development activities involving GMOs, transgeneric crops, large scale production and deliberate release of GMOs, plants, animals and products into environment, shipment and importation of GMOs for laboratory research[29].

Department of Health in the Ministry of Health and Family Welfare is responsible for implementation of Prevention of Food Adulteration Act 1954,

27. Dr. Vibha Ahuja and Dr. Geetha Jotwani, The regulation of Genetically modified organisms in India, at http://www.agbios.org.
28. The new import policy of GMOs/LMOs issued by DFGT – The Ministry of Commerce through DGFT vide notification No.2 (RE 2006)/2004-2009 at 7-4-2006, mandates prior approval of GEAC for all GM products including food items.
29. The guidelines employ the concept of physical and biological containment and principle of good laboratory practices. For containment facilities and bio-safety practices, recommendation in the WHO laboratory safety manual on genetic engineering techniques including microorganisms of different risk groups have been incorporated therein. For release to the environment too, the guidelines specify appropriate containment facilities depending on the type of organisms handled and potential risks involved.

which was enacted with the objective of assessing the quality and safety of food as well as to encourage fair trade practices[30]. On March 10th 2006, the MOH amended the Act rules necessitating compulsory labeling of GM food. The amendment stipulates that no person shall except with approval of and subject to condition that may be imposed by GEAC constituted under Environment Protection Act 1986, manufacture, import, transport, store, distribute or sell raw or processed food, food additives or any food product that may contain GM materials in the country[31].

The Indian Council of Medical Research acts as an advisory body to the Ministry of Health and Family Welfare on various issues including GM foods. Further crucial roles are also played by the Indian Council of Agricultural Research and Ministry of Agriculture particularly in the approval of GM crops as per Seed Policy 2002.

On April 7th 2006, Government of India amended the Foreign Trade (Development and Regulation) Act of 1992 governing rules on import of GM crops. As per the amendment, the imports of GMO for food, feed or processing, industrial processing, research and development for commercialization or environmental release would be allowed only with approval of GEAC. At the same time, all shipments including products containing GMOs have to carry a declaration stating that the product is genetically modified. If the shipment does not contain traces of GM material, the importer is liable for penal action under this Act[32].

In actuality to protect the interest of consumer and also for them to exercise their choice, the labeling should be based on precautionary approach with zero tolerance for any GM contamination. But it is a disappointment to see that the Ministry of Health's amendment requires producer/importer to merely carry a label that would state that the product 'may contain' GM material. Instead of rigorous bio-safety tests before allowing the import, the MOH is merely relying on the safety information provided by the importer[33].

Moreover, facilities present within the country for testing products for presence of GM are grossly inadequate. There is no laboratory in the country, which undertook such testing. Moreover testing protocols have still to be developed. Until such system is put in place it is obvious that the legislation in its

30. Provisions apply to imported food as well as food produced in India.
31. The US claims that the 1989 rules under the EPA are vague and broader than any other existing biotechnology regulation across the world, with regard to import of GM products – they have questioned the rationale of seeking information on every shipment of the same product to be submitted in GEAC.
32. The changed rule came into effect on July 8th 2006.
33. *Supra n.*2

present form is intended to legalize the importance of untested GM food in the country.

Methodology used for food and feed safety tests must be made known to be public and also the laboratories where the safety tests were conducted. All decisions regarding GM crop and food must be taken in accordance with the Cartegena Protocol on Bio-safety.

A competent, transparent and independent regulatory process with more participation from public/civil society to oversee all aspects of GM crops and food must be put in force. At present, there seems to be a few shortfalls, inspite of the elaborate regulatory system in India. For example, soyabean oil imports have been going on for long years primarily to bridge the domestic demand-supply gap of edible oil. It is well known that soyabean produced in major origins such as the US, Brazil and Argentina are laregely genetically modified and these countries, neither segregated genetically modified and non genetically modified material, nor do they follow any labeling policy[34].

GM foods are of much significance for a child's health particularly when they become a part of supplementary feeding programmes. Foods distributed to children as part of the Government supplementary feeding programmes may contain soyabean flour and maize flour as sources of protein and calories in the supplement. The replacement of these foods with GM soya and maize would require a very vigilant system of safety evaluation. In the Indian context wherein adequate testing facilities and monitory system do not exist as yet, such GM foods could escape detection.

All in all, there seems to be a lack of adequate standards for risk assessment. A dearth of skilled personnel and of course the infrastructure has made any kind of assessment mere perfunctory. Risk assessment incorporating the precautionary principle as contained in the Caragena Protocol and the Sanitary and Phytosanitary agreement must be instituted into the regulatory framework. Further, the principle of information exchange, informed consent and labeling as expressed in the Cartagena Protocol must be strictly adhered to.

As India joins other countries in the quest of new technological revolutions, they must be cautious of the potential risks that it may have to man and environment and take the necessary antidotes. Genetically modified food is perhaps here to stay and there is an urgent need to integrate all possible precautions to see that both man and his environment benefit from the progress made by development and research.

34. G. Chandrasekar. "Policy on import of GM foods flawed". The Hindu Business Line, 11th May 2006, at www.gene.ch.

DNA TECHNOLOGY AND ITS IMPACT ON LAW

*Anshu Jain**

1. INTRODUCTION

The focus of all criminal investigations is to link evidence from the crime scene to suspects, and for more than a century, science has played an increasingly important role in this process in presenting a fool proof case as neither such evidences can be fabricated nor can be denied. Fingerprinting was applied to criminal investigations, beginning in the 1880's. Shortly after, the principle of ABO blood typing was reported in 1900 and soon its relevance to forensic investigations became apparent. In the 1960's human leukocyte antigen (HLA) typing became the premier serologic tool for personal identification, although in practice, it was useful for only small percentage of samples. Finally, the 1980's ushered in the age of NDA testing, which permits investigators to perform almost unbelievable feats of identification. With current techniques, it is possible for a single person to be differentiated from all the people that have ever lived using DNA from a single hair root.[1]

The purpose of the present paper is to highlight the importance of DNA evidence in crime detection as well as in sorting out grave issues such as paternity claims, establishing identity from mutilated remains and so on. The paper also seeks to emphasis the fact that the conclusiveness of DNA tests makes it imperative that such evidence be incorporated formally in our legal system besides making provisions for standardization of testing, training of experts and quality controls.

2. WHAT IS DNA?

In simple terms, DNA, or 'Deoxyribo Nucleic Acid' is material that governs inheritance of eye color, hair color, stature, bone density and many other human and animal traits. DNA is a long, but narrow string-like object. Each of our body's cells contains a complete sample of our DNA. There are muscle cells, brain cells, liver cells, blood cells, sperm cells and others. Basically, every part of the body is made up of these tiny cells and each contains a sample or complement of DNA identical to that of every other cell within a given person. There are a few exceptions. For example, our red blood cells lack DNA. Blood itself can be typed because of the DNA contained in our whit blood cells. Moreover, not only does the human body rely on DNA but so do

---

* LL.M. Second Semester Student, Department of Laws, Guru Nanak Dev University (GNDU), Amristar.

1. http:// arbl.cymbs.colostate.edu. Visited on 7/2/2006.

most loving things including plants, animal and bacteria.[2]

Sir Alec J.Jefferys discovered the use of DNA for forensic analysis in 1984. The structure of DNA is different in every individual and except identical twins, no two individuals can have identical DNA. Variation in human DNA is known as 'polymorphism'. It is these polymorphic segments in the DNA molecule, which serve as a tool to identify individuals. DNA in one sense is an individual's Genetic Code', the blue print which makes you what you are.[3]

DNA is found in blood and blood stains, semen and semen stains, saliva, hair and hair roots, tooth canal toot pulp, finger nail pairings, skin cells, perspiration, brain cells, mucus, bone and bone marrow, urine as well as other body fluids. Further, it is a fairly stable compound and can be obtained from as old as 5 years old semen stains and 4 years old blood stains. The biggest advantages of this technique is its ability to analyse small and environmentally exposed samples to establish their origin with high degree of certainty. Due to the advent of amplification of material clues through cell generation technology- Polymerase Chain Reaction, the quantity required for test has further lessened. The other advantage of DNA profiling is that contamination of evidentiary clues does not prevent its identification.

DNA evidence can be used to establish percentage, identify mutilated remains; establish biological relationships for immigration, organ transplant and property inheritance cases; identify missing children and child swapping in hospitals, identify species in wildlife poaching cases and also identifying and authenticating seed/plant varieties.

3. DNA PROFILING

The complete analysis of DNA is known as 'DNA Profiling' or 'DNA typing'. DNA Profiling is essentially a biological tool that allows the scientist to compare samples of DNA material. As mentioned above, with the exception of identical twins, the DNA of every individual is different and unique and this is what makes DNA profiling such an invaluable tool in investigative procedures. DNA analysis reveals the genetic profile of a person and when this is compared with the samples obtained from scene of crime or in case of proving paternity, with the sample of the other person, it provides a conclusive proof of connection or relation.

---

2. www.scientific.org Visited on 7/2/2006.
3. J.K. Mason and McCall Smith, "Medico-legal Encyclopedia", Butterworths,London, 1995, p. 16.

4. INSTANCES OF USE OF DNA EVIDENCE

i) DNA evidence was used to establish the identity of persons who died in the 9/11 attacks in the United State of America.

ii) Similarly DNA identification was made use of to determine the percentage of children separated from their parents during the tsunami in December 2004.

iii) It was used to identify bodies recovered from mass graves in Gujarat, after the Hindu-Muslim riots in 2002.

iv) DNA test was done by the American government in order to ensure that the man arrested by the American army from his underground abode was indeed, Saddam Hussain.

v) DNA evidence is increasingly and successfully being used to identify culprits in sexual assault cases.

vi) In the Rajiv Gandhi Assasination case, the DNA samples of the alleged assassin Dhanu, were used to provide a conclusive proof of her involvement in the crime. Likewise, the assassin of Late Chief Minister, Beant Singh was identified.

vii) In the United States, DNA evidence obtained from Monica Lewinsky's dress proved Bill Clinton's involvement with her.

viii) DNA technology was used to resolve famous cases like the Naina Sahni case, Madhumita Shukla murder case, Shivani Bhatnagar case and the Priyadarsini Matto case.

These are merely some instances of the importance of DNA technology and DNA evidence is increasingly being used in various kinds of investigations, particularly in crime detection. So much has been the magnitude of the success of DNA profiling that even International Crime Prevention and Detection Organisations such as the Interpol, have come to accept the value of DNA and are whole-heartedly supporting this new crime investigation tool.[4]

5. DNA EVIDENCE AND PATERNITY ISSUES IN INDIA

DNA tests can provide a conclusive evidence of paternity. The technique is called 'finger printing'. The essential difference between conventional blood tests and DNA finger printing lies in the extremely polarized possibility. It a man

4. Gurjeet Singh, "DNA Profiling: Its Impact and Application on Law", Souvenir of the Two Days National Seminar on DNA Test and the Law: New Dimensions, SLS Students Council, Jalandhar, 27-28 March 2004, p. 13.

is not the father of the child the odds of failing to get exclusion in such a case are roughly, 30,000 million to one. If the man matifies the child in blood group, even then the odds that he is not the father are of a similar magnitude. The probabilities are of such an astronomical scale that they reduced the result to an absolute certainty.[5]

Notwithstainding, the useful ness of this technique it is doubtful, whether DNA finger printing can be used to establish paternity with respect to section 112 of The India Evidence Act, 1872. Section 112 days down that 'the fact that any person was born during the continuance of a valid marriage between his mother and any man, and within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be a conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at the time when it could have been begotten.'

This rule is based on the fact that the courts always lean in favour upholding the legitimacy of the child. Corts have always desisted from lightly or hastily rendering a verdict that too, on the basis of slender material which will have the effect of branding a child as a bastard and his mother as an unchaste woman.[6]

In view of the provision section 112 of The Indian Evidence Act, there is no scope of permitting the husband to avail of blood test for dislodging the presumption of legitimacy and paternity arising out of this section.[7] Blood group test to determine the paternity of a child born during wedlock is not permissible.[8]

The Hon'ble Supreme Court in Gautam Kundu v. State of West Bengal[9] laid down the following guidelines regarding permissibility of blood tests to prove paternity:

(1) That the courts in India cannot order blood tests as a matter of course.

(2) Whenever applications made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prime facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.

---

5. Ratan Lal and Dhiraj Lal, "The Law of Evidence", Wadhwa and Company, Nagpur, 2002, p.960
6. *Smt. Dukhtar Jahan v. Mohammed Farooq*, AIR 1987 SC 1049.
7. *Goutam Kundu v. Shaswati Kundu*, Criminal Revision No: 800/92 (Cal.).
8. *Tushar Roy v. Shukla Roy*, 1993 Cri. L.J 1659 (Cal.)
9. AIR 1993 SC 2295

(4) The court must carefully examine as to what would be the consequences of ordering the blood test; whether it would have the effect of branding a child as a bastard and his mother as an unchaste woman.

(5) No one can be compelled to give the sample for analysis.

However medically it is quite possible that the pregnancy may last for more than 280 days. There may be instances when the husband and wife may be living together and the wife may have gone astray and conceived the child through illicit relationship. But in view of section 112 of the Evidence Act, the legal presumption is in favour of the child being legitimate and the husband has to bear fatherhood of the child. Due to the aforesaid provision contained in the Evidence Act, such anomalous situation exists in our country, although science and technology has advanced so much that it can be accurately ascertained with the help of DNA testing as to whether parties to dispute have to be given. But there is no provision in the Indian Evidence Act or the Code of Criminal Procedure, 1973 providing for direction to the part concerned to submit himself/ herself for giving blood samples for examination.[10] The court has the power to give direction to a party to give samples for examination but the said party cannot be compelled to give the sample. The Apex Court in yet another case of Smt.Kanti Devi v. Poshi Ram[11] while accepting the accuracy of the test held that the result of genuine DNA Test is said to be scientifically true but that is not enough to escape from conclusiveness of section 112 of the Indian Evidence Act. It was further observed therein that this may look hard from the point of view of the father, but in such cases the law leans in favour of the innocent child. Thus we see that there is a serious lacuna in our law and DNA evidence should be made a part of the statute book so as to conclusively and accurately prove the parentage of the child.

6. RELEVANCE OF DNA EVIDENCE IN CRIMINAL CASES

Unlike paternity cases, the criminal courts in India have accepted DNA evidence. Although the Criminal Law is silent on DNA analysis the courts have interpreted the same in the spirit of section 53 of the Code of Criminal Procedure, 1973. The Andhra Pradesh High Court in Ananth Kumar v. Satate of Andhra Pradesh[12] has held that although there is no clear provision in the criminal procedure code for taking such blood samples, yet there is no prohibition for

10. Col. P.S.Rathore, "DNA and Criminal Justice System: Role of DNA Test in the Defence Forces.", Souvenir of the Two Days National Seminar on DNA Test and the Law: New Dimensions. SLS Students Council, Jalandhar, 27-28 March 2004, p.25.
11. AIR 2001 SC 2226
12. 1977 Cr LJ 1797

taking such blood samples of an accused by exercising powers under section 53 of the code. The Hon'ble Court observed that taking samples of blood and semen would come within the scope of examination of the arrested person and therefore, "examination of a person by a medical practitioner must logically take in examination by testing his blood, sputum, semen, urine etc." The court further held that section 53 provides the use of such force as is reasonably necessary for making such an examination. Therefore, it was held that whatever discomfort might be caused, when samples of blood or semen are taken from an arrested person, would be justified under the provision of sections 53 and 54 of the criminal procedure code. Further in the case of Jamshed v. State of Uttar Pradesh[13]a Division Bench of the Allahabad High Court, relying on the judgement of the supreme Court in State of Bombay v. Kathi Kalu[14] held that taking blood and urine test is not hit by article 20(3) of the constitution.

7. DNA EVIDENCE AND ARTICLE 20(3)

Article 20(3) of the Indian Constitution provides that no person accused of any offence shall be compelled to be a witness against himself. This article is a guarantee against self-incrimination and aims at protecting the accused against the possible police torture during investigation. Hence, a person can remain silent if the answer to any question would tend to incriminate him. This has resulted in a debate as to whether DNA or other tests can be done on the accused. However, it is also a well settle principle of law that no one can take advantage of his own wrong. Moreover, Article 21 also speaks of a fair and reasonable procedure. So, making use of DNA technology for investigative purposes does not mean a denial of the right under article 20930 of the constitution especially when it is carried out under the supervision of the judiciary so as to ensure that the procedure is just and fair. Hence, DNA tests should be made us of as it would not only enable the investigative agencies to reach the real culprit but also ensure speedy investigation agencies to reach the real culprit but also ensure speedy investigation and trial.

As far as criminal cases are concerned right to privacy has a very limited application. When public interest or advancement of justice demands, right to privacy has to yield in favour of them. In civil cases, involving the question of maternity, paternity; secrecy should be maintained provided the right of the interested person is not undermined.[15]

---

13. 1976 Cr LJ 1680
14. AIR 1961 SC 1808.
15. Shashikant Y. Deshmukh, "DNA Technology: Its Application and Impact on law.", Souvenir of the Two Days National Seminar on DNA Test and the Law: New Dimensions. SLS Students Council, Jalandhar, 27-28 March 2004, p.66.

8. SUGGESTIONS OF THE MALIMATH COMMITTEE

The Malimath Committee constituted by the Ministry of Home Affairs, Government of India on reforms of Criminal Justice System recommends that DNA expert be included in the list of experts. It also recommend that an amendment be made in criminal procedure code in the following words:

> *"Every court shall have inherent power to make such orders as may be necessary to discover truth or to give effective orders under this code or to prevent abuse of the process of the court or otherwise to secure the ends of justice."*[16]

The Malimath Committee also recommended the amendment of section 4 of the Identification of Prisoners Act, 1920 on the lines section 27 of the Prevention of Terrorism Act, 2002. Section 27 of the Prevention of Terrorism Act provides that the police officer while investigation any case can request the court of CJM or the court of the CMM, as the case may be, in writing for obtaining samples of handwriting, fingerprints, blood, saliva etc. from any accused person. And only under the direction of the corts, the samples may be taken. Thus, adequate safeguards are provided in this regard. The section also provides that is case the accused refuses to give samples, the court can derive adverse inference against him. Hence, we see that these recommendations lean towards making use of DNA evidence.

9. CONCLUSION

From the above discussion it is evident that the advancements in forensic science, particularly with respect to DNA Technology, have proved to be of tremendous help to law enforcement agencies worldwide. Many countries like the United Kingdom, Canada and the United States of America have framed specific legislation relating to DNA evidence. However, in India we have no specific law in this regard. Another obstacle in using the DNA evidence effectively is that at time its use is seen as violative of the civil liberties of individuals. This has led to a debate as to the use of this highly accurate and conclusive piece of evidence. Hence, what our country needs is a specific legislation in this respect so that DNA evidence can be effectively used in various investigations and in administration of justice.

---

16. Recommendations of the Malimath Committee Report on Reforms of Criminal Justice System submitted to the Ministry of Home Affairs, Government of India, 2003.

SOURCES AND SELECT REFERENCES

Deshmukh, Shashikant Y; "DNA Technology: Its Application and Impact on law.", Souvenir of the Two Days National Seminar on DNA Test and the Law; New Dimensions, SLS Students Council, Jalandhar, 27-28 March 2004.

http:// arbl.cvmbs.colostate.edu.

Malimath Committee Report on Reforms of Criminal Justice System 2003.

Lal Ratan and Dhiraj Lal, "The Law of Evidence", Wadhwa and Company, Nagpur, 2002.

Mason J.K. and McCall Smith, Medico-legal Encyclopedia, Butterworths, London, 1995.

Rathore, Col.P.S., "DNA and Criminal Justice System: Role of DNA Test in the Defence Forces.", Souvenir of the Two Days National Seminar on DNA Test and the Law: New Dimensions, SLS Students Council, Jalandhar, 27-28 March 2004.

Sharma, B.R., "Forensic Science in Criminal Investigation and Trials", Universal Law Publishing Co.Pvt.Ltd.,2003.

www.scientific.org. Visited on 7/2/2006.

PREVENTIVE DETENTION AND HUMAN RIGHTS

Dr. M. S. Malik*

The detention of Mr. Gandhi, MP. Pilibhit (U.P.) has again proved that the preventive detention is a negation of the rule of law and the principles of fair trial. Through the Hon'ble Supreme Court of India has recently settled the issue after disposing of the petition filed by Mr. Gandhi. However, it needs to be examined in detail as to why the Executive authorities misuse law without proper application of mind at different times, places and circumstances.

It is also quite strange that there is no authoritative definition of the term preventive detention under the Indian Law. However, this impression and its original language was used by the law lords in England while explaining the nature of Detention under Regulation 14 (b) made under the Defence of the Realm Act, 1924 passed on the outbreak of Word War and the same repeated with emergency Regulation during World War. Hence, the term Preventive Detention is used world wide concerning detention of a person by executive order prevent him from endangering the security of the State, disturbing public order of essential services/ supplies adversely affecting specified object of public interest.

TABLE 1: PREVENTIVE DETENTION, THE STATE AND THE LAW

Country	**Legal Basis for Preventive Detention**	**Who has power to detain**	**Administrative Review**
Bangladesh	Constitution, Art 141-A, Special Powers Act 1974	Government	Automatic and binding
India	Constitution Sch 7; National Security Act 1980 conservation of Foreign Exchange & Prevention of Smuggling Act 1874; Terrorist & Disruptive Activities Prevention Act, 1967	Central & State Governments Limited delegation to police Civil servants & District Magistrates	Automatic but not for Periods of less than 2 months, not binding
Kenya	Constitution, S. 83; Preservation of Public Security Act.	Minister	Automatic and not binding.
Malaysia	Constitution, Art, 150; Internal Security Act; 1960; Emergency (Public Order & Prevention of Crime) Ordinance.	Minister and Police	At detainees' election; not binding

* IPS(Rtd.) President Federation of Jat Institutions & Jat Sabha Chandigarh.

Malawi	Preservation of Public Security Act, 1965.	Minister and Police	At detainees' election; not binding
Nageria	State Security (Detention of Persons) Decree 1984	Vice-President	Uncertain
Pakistan	Security of Pakistan Act, 1952, Maintenance of Public Order Ordinance 1960	Central Government & District Magistrates	Automatic and binding
Singapore	Internal Security Act, 1960	President, acting on advice from Govt; Police & Internal Security personnel	At detainees election; not binding
South Africa	International Security Act 1982; Public Safety Act, 1953	Minister for Law and Order & Police	At detainees election; not binding
Sri Lanks	Prevention of Terrorism (Temporary Provisions) Act, 1979; Public Security Ordinance under state of emergency.	Minister	At detainees' election; but not for members of prescribed organisation; not binding.
Swaziland	Detection Order, 1978	Prime Minister (subject to consent of the King)	At election of detainee or any family member, not binding.
Tazania	Preventive Detention Act, 1962; Deportation Ordinance, 1921; Expulsion of Undesirable Persons Ordinance 1930; Area Commissioners Act, 1962; Regions & Regional Commissioners Act, 1962	President	Automatic after three months, not binding
Trinidad & Tobago	Constitution, S. 6	Minister of National Security	At detainees' election then every six months; not binding.
United Kingdom	Prevention of Terrorism (Temporary Provision) Act, 1974; Northern Ireland Emergency Powers Act, 1991.	Secretary of State & Police	On request within one year of detention; thereafter every six months; not binding.
Zambia	Prevention of Public Security Act.	President	At detainees' election; not binding.
Zimbabwe	None at present	Minister of Home Affairs & Police.	Automatic; not binding

TABLE 2: DETA INEES' RIGHTS

Country	**Judicial Review**	**Notification of grounds**	**Maximum length successive detention**	**Rights in admin. review process**
Bangladesh	Objective text	Within 15 days	Indefinite with approval of Min/Yes.	Representation in writing only, no legal repn.
India	Quite vigorous subjective test	Within 15 days; relatives informed in writing	1 year; 2 Years in Punjab & Chandigarh/No	Oral and documentary evidence; examination of witnesses; detainee has right to cross-examine
Kenya	Weak & limited	Within 5 days	Indefinite	Six monthly review
Malaysia	Subjective rest imposed by statute	As soon as possible & allegations of fact	2 years; 60 days police detention/unlimited (extendable in period of two years even on original grounds)	No right to legal representation
Malawi	Very limited	No right to be informed	Indefinite (ministerial); police investigative detention subject to reasonableness test	No formal hearing no opportunity to make representation.
Nigeria	Subjective rwar	No right to be informed	6 weeks/unlimited	Procedure unclear
Pakistan	Objective test	Within 15 days unless Federal Govt. otherwise directs	8 to 12 months in any period of 24 months/in 3 months increments subject to review board approval	Right to legal representation
Singapore	Subjective rest imposed by statute	As soon as may be	2 years (President); 30 days (police must report to Minister after 14 days)/in increments of 2 years.	
South Africa	Quite Vigorous subjective test	Right to be adequately informed of reasons	Indefinite(Minis); 180 (police).	Legal advice in drafting written representation to review board; Min must give reasons to RB; RB can hear oral evidence including from detainee.

Sri Lanka	Quite vigorous despite constitutional limitations.	Right to be informed at AC	Indefinite under state of emergency (but this must be renewal monthly)	
Swaziland	Very weak	Pulished in Govt. Gazettee	60 days/renewable for unlimited	No formal review process.
Tanzania	Subjective test	Formal entitlement to release if not informed of ground witnin 15 days	Indefite	Procedure unclear
Trinidad & Tobago	Uncertain	Grounds must be cited in detention order	Indefinite	
United Kingdom	Uncertain	As soon as possible	Indefinite	Oral and written representations, legal costs in representations; no legal representation.
Zambia	Objective Test	Within 14 days	Indefinite	Right to legal to representation.
Zimbabwe	Objective test	Within 7 days; sufficient to make meaningful representation.	Indefinite (mins) 30 days (police)/no re-detention within 180 days of release unless fresh grounds	Right to legal representation usually doc evid. only but detainee can call witness and give evidence.

Hence, it is essential to have a glance at the tables given below indicating briefly the Preventive Detention, the State and the law, and also the rights of the Detenus in different countries of the World.

It is indicated at Serial No. 1 of table 1 above that the Preventive Detention has a Constitutional validity in our Country.

Article 22 (4) -(7) relates to the Preventive Detention. The first case with regard to Preventive Detention being *Gopalan's case*[1] The Article in class (4) states that no law providing for preventive Detention shall authorize the detention of a person longer than three months unless an Advisory Board reports reports that in its opinion sufficient cause for such detention exists. Further more, the right of communication of the ground at the earliest possible

1. AIR 1950 SC 27.
2. AIR 1951 SC 174.
3. AIR 1991 SC 336.

in provided in Clause (5). From *Tarapada De V State of West Bengal*.[2] till a decision in *P.U. Abdul Rahiman V.U.O.I*.[3] the court has held that non-supply of the grounds of the arrest was an infringement of the right conferred by Article 22(5). The accused is not only to be informed of the grounds of the arrest but these grounds must not be vague or irrelevant, must be in the language which the detinue understands so as to enable him to make a purposeful and effective representation and if the grounds are served in a language which he does not understand the purpose is not served. Article 22 (5) gives the detenu the right to make a representation for the personal liberty of a person is at stake. The emphasis has been laid on giving the detenu an opportunity to make a representation. It not only affords the chance to make a representation but the representation be considered and disposed of expenditiously as possible so that it does not lose both its purpose and meaning.

In a decision, *Kartar Singh V. State of Punjab*[4] of the apex court considered Preventive Detention and other aspects in relation to it, very widely. It emphasized that laws should give the person of ordinary intelligence, a reasonable opportunity to know what is prohibited so that he may act accordingly. Court laid down certain guidelines regarding confession also. It also stressed that designated Courts should dispose of case pending without any delay in consonance with "speeding trial" an essential parts of fundamental rights.

The Court in *Attorney General for India V. Amartlal Prejivandas*[5], did not agree with submission of petitioner's counsel, that Government had not chosen to specify the date from which amendments to substitution of Clause (4) and (7) of Article 22 come into force. It was of the view that it was not necessary to decide as the failure of the government to specify the date still after lapse of more than 14 years, in this case and applicability of *A.K. Roy's case*[6], decision was not in need to be considered, though the court had an opportunity to re-examine the decision in *A.K. Roy's case* and consider the question of applicability and enforcement of amendments left on Central Government to specify, which have been lying dead for past so many years.

The question regarding the release on bail has been considered in *Sanjay Dutt V. State*[7] case, where the Division Bench held that the provision to Section 167 (2) of code read with Section 20(4) (f) of TADA, creates an defeasible right in an accused person on account of the "default" by the investigating

4. AIR 1994 3 SCC 569.
5 AIR1994 SCC 54.
6. AIR 1982 SC 710.
7. AIR 1994 5 SC 402.

agency in the completion of investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail. Another obligation cast on the court is to inform the accused of his right of being released on bail and enable him to make an appropriate course in that behalf.

If reasoning and logic underlying observation in *Hitendra Vashu Thakur*[8] are extended it could mean that every time magisterial order authorizes the detention of accused in custody beyond 15 days, he would be obliged to give notice to the accused and hear him. Such a course may neither be feasible nor warranted. The view taken probably calls for a reconsideration.

In *Sanjay Dutt V. State*[9] case, it was expressed that if accused applied for bail under the provision of expiry of period of 180 days or extended period as the case may be, he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provision of Cr. P.C. It is settled that petition seeking the writ of habeas corpus on the ground of absence of a valid order of detention of accused has to be dismissed. It is the nature and extent of the right of accused to be released on bail under section 20(4) (bb) of TADA Act read with Section 167 Cr. P.C. in such a situation. Thus the position in *Hitendra Vishnu Thakur's*[10] 9-A case is classified.

In view of the decision of Constitutional Bench in *Kartar Singh*[11] case, on meaning and scope of sub-section (8) of Section 20 of TADA Act the court expressed the opinion that it does not require any further elucidation.

It is submitted that the rights inherent in Article 22 that all arrested, detained or imprisoned shall be provided with opportunity to be represented or consult a lawyer in consonance with Human Rights as laid under International Instruments. As majority of the Indian masses are poor, illiterate and not aware of their rights, so all of them should be educated as to take care of themselves. Since wheels of the same cart, the courts should take care that the Article is given full effect so as to avoid any injustice and no opportunity or exploitation of these poor and uneducated persons is allowed to prevail. If the detained persons are dealt with cruelty, they should be entitled to such remedy, as on a release as justice requires.

8. AIR 1994 4 SCC 602.
9. AIR 1994 5 SCC 410.
10. AIR 1994 4 SCC 602.
11. AIR 1994 3 SCC 569.

Preventive Detention on the ground of public or State security is a flimsy and highly suspect justification for the deprivation of liberty. Abuse of power is seemingly widespread throughout the jurisdiction surveyed here. This does not mean that preventive detention can never be justified. But such more rigorous criteria than generally applied ought to be met if the practice is to be convincingly defended.

Preventive Detention is typically based upon alleged and vague prospective suspicion rather than, as for detentions in the criminal judicial system, accusations resting on a specific criminal offence retrospectively proved. The suspicions which result in the issuing of detention order originate in secret and intimately political decision making processes. Detainees are seemingly often suspected criminals and political dissidents, rather than those who pose a genuine threat to public order or national security. Few details of the grounds for detention are likely to be disclosed to the detainee. Nor is it intended that detentions should be reviewed by genuinely independent administrative or judicial agencies before whom a defense can be offered with a real hope of release from potentially indeterminate confinement. As stravros states, "there exists a point in time beyond which the administrative deprivation of liberty sheds the character of preventive measure and is transformed into a sanction imposed without due process".

The Principal task in this field for justice and others should be as follows. **First,** the complex relationship between political and legal systems should be carefully studied in order to ascertain why some countries appear more predisposed to instability or intolerance and hence to preventive detention, than others. **Secondly,** much stronger safeguards with respect to the decision to detain should be developed by all states. Constitutions should expressly limit preventive detention times of war, or states of public emergency which threaten the life off the nation. These should be declared in accordance with international norms and should be subjected to domestic legislative and judicial review. **Thirdly,** the lawyers should be allowed to be present before the Review Board, otherwise how can a layman fight his case before the Board without the help of the counsel. Hon'ble Apex Court has already held that no absolute immunity could be claimed by the administrative authorities as and when fundamental rights of citizens inclusive of freedom of movements and pursuit of normal life and liberty are involved. **Fourthly,** The necessary amendments should be made as per the recommendations of The National Commission for reviewing the working of the constitution for inclusion of all serving High Court Judges in the

Advisory Board as Chairman and members. At the same time, the detention should not exceed six months. **Fifthly,** High standards of proof are must for the preventive detention as the laws need to maintain a balance between the Human Rights and the security of the Nation for maintenance of public order etc. **Sixthly,** There should be a provision for adequate monetary compensation for the state though the same is not enough to compensate for detenu's mental torture, harassment and loss of reputation.

Within this framework, the circumstances in which detainees can legally be held should be defined as strictly as possible by legislation. All cases of preventive detention should automatically be referred to Administrative Review Boards where detainees should be entitled to legal representation at the expense of the State. Review penal decisions should be binding upon the detaining authorities. All detainees should also have speedy access to the Courts through habeas corpus, or its equivalent. In reviewing detentions, independents Courts should apply the objective tests, with the burden of proof resting firmly on the executive to justify its decision to detain.

Thus, it is the dignity of Human beings and the society which is being protected, it is the judiciary which came to rescue of individual against the excessive and abusive use of power by the State. It is for the judiciary to protect individual freedom and liberty against draconian laws of the State. Hence, no activity of the Sate is beyond judicial scrutiny. The judiciary has rightly been striking down arbitrary, irrational and unfair actions of the State.

Further, the Law Commission may be asked to reexamine the entire scope of preventive detention in accordance with contemporary needs, requirements and need for checks and balances. In the meantime, Hon'ble Supreme Court may also lay down elaborate guidelines to be followed by the state governments prior to issue of orders for preventive detention.

Above all, the State Human Rights Commissions should be constituted in all states and Union Territories as per the provision of National Human Rights Acts. Then only the National and State Human Rights Commissions can play a pivotal role in cases of abuse and misuse of powers relating to preventive detention.

At the same time, preventive detention should also be incorporated as a separate chapter in the Criminal Procedure Code through an appropriate amendment.

References:

- Jaswal Nishtha (Ed.), Role of S.C. with regard to life and Personal Liberty (Ashish Publishing House, New Delhi, 1990).
- Palkhivala, N.A., "Our Constitution, Defaced and Defiled" (The MacMillan Co. of India Ltd., New Delhi, 1974).
- Ramcharan, B.G. (Ed.), "Human Rights : 30 Years after Universal Declarations" (Martinus Nighoff, London, 1979).
- Ramachandran, V.G., Fundamental Rights and Constitutional Remedies-Vol.II (Eastern Book Co., Lucknow, 1979).
- Punjab University Law Review.
- Supreme Court Cases.
- Hindustan Times.
- The Tribune.
- Personal knowledge/experience.

INTERNATIONAL LAW VIS-À-VIS HUMAN RIGHTS OF WOMEN IN INDIA : ROLE OF THE SUPREME COURT*

Dr. Devinder Singh**

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. The United Nations in its Charter affirmed the faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom. They are derived from the dignity and worth inherent in the human person. The Universal Declaration of Human Rights (UDHR), 1948 has reiterated human rights and fundamental freedoms. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual enforcement. The human rights of women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation of women in political, social, economical and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically.

India is a signatory to various International conventions and treaties. The Universal Declaration of Human Rights, adopted by United Nations on 10th December, 1948 set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. This was followed in the series of conventions. On 18th December, 1979 the United Nations adopted the Convention on the Elimination of all forms of Discrimination Against Women, 1979 (CEDAW). The General Assembly has adopted the declaration on the Elimination of Violence against Women, 1993.[1] The Government of India who was an active participant to CEDAW ratified it on 19th June,1993 and acceded to it on 8th August 1993 with reservation on Articles (5e), 16(1), 16(2) and 29 thereof. At the Fourth World Conference on Women in Beijing, the government of India has also made an official commitment, *inter alia*, to formulate and operationalise a national policy on women, which will continuously guide and inform action at every level and in every sector. To set up a Commission for Women to act as a public defender of women's human rights; to institutionalize

---

* Paper presented in the two days AIL - ISIL Workshop on the "Emerging Role of International Law" On 8-9 Jan 2005 at Army Institute of Law, Mohali, Punjab.

** LL.M. Ph.D, Lecturer in Law, Punjab University Regional Centre, Ludhiana, Punjab 141001. Ph : 0161 - 2443830(O) 2424165 (R), E-mail : thakur_dsingh@yahoo.com

1 In the Article 3, it was specified that women are entitled to the equal enjoyment and protection of all human rights, which would include inter alia (a) the right to life (b) the right to equality, and (c) the right to liberty and security of person.

a national level mechanism to monitor the implementation of the Platform for Action.[2] Under such circumstances, there should be no hesitation for the Supreme Court to place reliance on the International conventions and treaties.

The Judicial Colloquia (Judges and Lawyers) at Banglore considered the domestic application of International human rights and norms in 1988. It was later affirmed by the Colloquia that it was vital duty of an independent judiciary to interpret and apply national Constitutions in the lights of those principles. Further Colloquia were convened in 1994 at *Zimbabwe*, in 1996 at *Hong Kong* and in 1997 at *Guyana.* In all those Colloquia, the question of domestic application of International and regional human rights specially in relation to women, was considered. The *Zimbabwe* Declaration 1994, *inter alia,* stated: "Judges and Lawyers have duty to familiarize themselves with the growing International jurisprudence of human rights and particularly with the expanding material on protection and promotion of the human rights of women."[3] Our Constitution guarantees all the basic and fundamental human rights set out in the International conventions and pays due regard for them.[4] The obligation of the court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the *Beijing* Statement of Principles of independence of the judiciary in the *LAWASIA* region. The chief justices of the Asia and the Pacific at *Beijing* accepted these principles in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The object of the judiciary mentioned in the *Beijing* are : (a) to ensure that all person are able to live securely under the rule of law; (b) to promote , within the proper limits of the judicial function, the observance and the attainment of human rights; and (c) to administer the law impartially among persons and between persons and the state.[5] Keeping in view the above developments, the Supreme Court has applied International law in the area of domestic jurisprudence. The apex court applied the principles of International law in other cases[6] also. In this paper, application of International law concerning

2 As quoted in *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

3 As quoted in C*hairman Railway Board v. Chandrima Das*, AIR 2000 S C 997.

4 Article 51 provides that promotion of International peace and treaty obligation in the dealing of organized people with one another. Article 51A provides that it shall be the duty of every citizen of India:- (a) to abide by the Constitution and respect its ideals and institutions…

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

6 In Jolly George Varghese v. Bank of Cochin, AIR 1980 SC 471. The Supreme observed that to be poor, in this land of poverty is no crime and recover debt by the procedure of putting one in prison is too unreasonable. The International Covenant on Civil and Political Rights, 1965 bans imprisonment merely for not discharging the decree debt. Unless there be some other vise or *mens-rea* apart form failure to foot the decree, International law frowns on holding the debtor's person, as hostage by the court.

human rights of women by Supreme Court shall be discussed.

In *Nilabati Behera v. State of Orissa,*[7] a provision in the International Convention on Civil and Political Rights, 1966 (ICCPR) was referred to support the view taken that case that 'an enforceable right to compensation is not alien to the concept to the enforcement of a guaranteed right'. As a public law remedy under Article 32, is distinct from the private law remedy in torts. Therefore, there is no reason why these International conventions and norms cannot, be used for construing the fundamental rights expressly guaranteed by in the Constitution of India, which embody the basic concept of gender equality in all spheres of human activity. In the instant case, petitioner demanded the compensation for the death of her son in the police custody. The court referred to Article 9(5)[8] of the ICCPR, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Consequently, the court awarded the monetary compensation to the petitioner after considering among other grounds, the provisions of 1966 Convention.

In *Madhu Kishwar v. State*[9], the Supreme Count considered the provisions of the Convention on the Elimination of All forms of Discrimintion Against Woman,1979 (CEDAW) and held the same to be integral scheme of the Fundamental rights and the Directive Principles. Artice 2 (e) of CEDAW enjoins the state parties to breathe life into the dry bones of the Constitution, International Conventions and the Protection of Human Rights Act,1993 to prevent gender based discrimination and and to effectuate rights to life including empowerment of economic, social and cultural rights. Article 2 (f) read with Articles 3, 14 and 15 of the CEDAW embodies concomitant right to development as an integral scheme of Indian Constitution and the Human Right Act. The Court observed that the state should by appropriate measures including legislation, modify law and abolish gender-based discrimination in the existing laws, regulations, customs and practices, which constitute discrimination against women. In the instant case, the Court has taken the Minority view as per Justice *K. Ramaswamy* that provision of Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the scheduled tribes, the principle contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Accordingly, the scheduled tribe women would succeed to the estate of their parent, brother husband, as heirs by intestate succession and inherit the property with equal share with

7 (1993) 2 SCC 746.

8 "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

9 (1996) 5 SCC 125.

male heir with absolute rights as per the general principle of Hindu Succession Act, 1956 as interpreted by this court and equally of the Indian Succession Act, 1925 to tribal Christians. Ironically, the Majority view taken by the Justice *M.M.Punchhi* and Justice *Kuldip Singh* had not accepted the same view.

The Supreme Court considered the provisions of UDHR and CEDAW in *Municipal Corporation of Delhi v. Female Worker.*[10] In this case female workers (muster roll) engaged by the corporation raised a demand for the grant of maternity leave which was made available to regular female employees but was denied to them on the ground that their services were not regularized and therefore they were not entitled to any maternity leave. The court after considering the principles of International law observed that these principles have to be read into the contract of service between Municipal Corporation of Delhi and the women employees (muster roll). By reading these provisions, the employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961. Again in *Githa Hariharan v. Reserve Bank of India*,[11] the Supreme Court interpreted section 6 (a) of the Hindu Minority and Guardians and Wards Act, 1890 with the help of CEDAW guidelines and held that father and mother get equal status as guardian of a minor child.

In *Chairman Railway Board v. Chandrima Das,*[12] the apex court observed, the International Conventions and Declarations as adopted by the United Nations has to be respected by all signatory states and meaning given to the words those declarations and conventions have to be such as would help in effective implementation of those rights. The applicability of UDHR and principles thereof may be read, if need be, into the domestic jurisprudence. In the instant case a gang rape was committed by the railway employee in the building of railways namely *Yatri Niwas,* on a women from *Bangladesh*, the court held that central government would be vicariously liable to pay the compensation to the victim. The court observed that establishing *Yatri Niwas* at various places to provide for the boarding and lodging of the passengers on payment of charge is apart of the commercial activity of the state and it can not be equated with the exercise of the sovereign power.

In landmark judgment of *Vishaka v. State of Rajasthan*[13]*,* the Supreme Court observed that it is now an accepted rule of judicial construction that regard must be given to International Conventions and norms for construing domestic law when there is no inconsistency among them and there is a need of

10 AIR 2000 SC 1282.
11 AIR 1999 SC 1149.
12 AIR 2000 SC 997.
13 AIR 1997 SC 3011.

improvement in the domestic law. In the absence of domestic law, effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality. Right to work with human dignity is provided under Articles 14, 15, 19 (1) (g) and 21 of the Constitution. The safeguards against sexual harassment are implicit therein. Any International Convention not in consistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to the subject of Constitutional guarantee. In the instant case, an incident of brutal gang rape of a social worker took place in a village of Rajasthan. This incident revealed the hazards to which working women may be exposed. In the absence of the legislative measures, the Supreme Court after taking help from CEDAW guidelines, passed certain directions to employers of women to protect them from sexual harassment at the workplace. In the similar case,[14] the apex court observed that the courts are under an obligation to give due regard to International conventions and norms for construing domestic laws more so when there is no inconsistency between them and there is void in the domestic law. In 1993 at the International Labour Organization (ILO) seminar held at *Manila,* it was recognized that sexual harassment of women at workplace was a form of 'gender discrimination against women'.

Subsequently, in *Grammophone Company of India Ltd. v .Barendra Pandey*[15], the Supreme Court held the comity of nations require that rules of International law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. The doctrine of Incorporation also recognizes the position that the rules of International law are incorporated into national law and considered a part of it unless they are in conflict with the domestic law.

Recently, in *Sakshi v. Union of India*,[16] it was pleaded among other grounds before the Supreme Court that Indian Penal Code (IPC),1861 has to be interpreted in the light of the problems of present day and a purposive interpretation has to be given. In this connection, United Nations Convention on the Elimination of All forms of Discrimination Against Women, 1979 and also United Nations Convention on the Rights of the Child, 1989 were referred. The main argument in this case was that the words 'sexual intercourse' in the section 375 of the IPC should include all types of 'penetration' and victim of child abuse and rape should be given sufficient protection inside the court during

14 *Apparel Export Promotion Council v. A.K Chopra*, AIR 1999 SC 625.
15 AIR 1984 SC 667.
16 AIR 2004 SC 2881.

trial. The court observed that the suggestions made by the petitioner will advance the cause of justice and are in the larger interest of the society. The cases of child abuse and rape are increasing at alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that the Parliament will give serious attention to the points highlighted in the petition and make appropriate legislation[17] with all promptness which it deserves.

The Indian Supreme Court has tried to adopt the International standard of gender-justice, if the provisions of International law are not inconsistent with the National law. In this process, the impact of International human rights law has now permeated the judicial thinking. In this regard the apex court has liberally used and frequently relied upon the International law e.g. UDHR, CEDAW, Beijing Declaration, ICCPR etc.,which are the principal source of gender justice. The court has been so much influenced by the International women's human rights jurisprudence that it has stressed the need to read these principles into the domestic law. The Supreme Court of India is heading in the right direction and it has done a commendable job. The only suggestion, in view of the above, is that the protective umbrella of International law concerning human rights of women should be expanded by the apex court to all women who are in need of it.

17 Article 253 provides that legislation for giving effect to International law to International agreements. Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or any decision made at any International Conference, association or other body. Entry 14 of the Union List in the Seventh Schedule provides that entering into treaties and agreement with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

INTERNATIONAL CRIMINAL COURT: SOME CONFLICTING AND CONTROVERSIAL ISSUES

Gurjeet Singh**

"In the prospect of an International Criminal Court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no state, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights and that those who violate those rights will be punished."

. . . Kofi Annan, UN Secretary General

1. INTRODUCTION

The United Nations Diplomatic Conference of Plenipotentiaries held in Rome in the year 1998 concluded with the adoption of a statute on the establishment of an international criminal court.[1] The adoption of the Rome statute was a legitimate outcome of the international community's consensus on the need for a permanent body to check the crimes against humanity and to save the succeeding generations from gross and inhuman violations of their human rights. International Criminal Court (ICC) is the first ever permanent treaty based criminal court established to promote the rule of law, to protect human rights, and to ensure that

---

* Paper contributed to the Third International Conference of the Indian Society of International Law (ISIL), New Delhi on "The Emerging Trends in International Criminal Law Jurisprudence" (10-11 December, 2005). This is third in the series of research writings by the author on the subject. The first paper entitled: "International Criminal Court: A Step Towards Codification of International Criminal Law and Policy in the Post-Cold War Era: Some Comments, Suggestions and Observations was published in: The Indian Socio-Legal Journal, Vol. 30, Nos. 1-2 (2004), pp. 17-44. The second writing entitled: Codification of International Criminal Law: A Study of the Role and Functioning of International Criminal Court (2003) was submitted to the International Committee of the Red Cross, Regional Delegation, New Delhi as a Project Report in fulfilment of the requirements for the Henry Dunant Research Fellowship awarded to the author.

** B.A. (Hons.), M.A. (Eco., Pol. Sce. and Pub. Admn.), LL.M. (GNDU), Ph.D. (GNDU), Ph.D. (SOAS, London). Professor and Formerly Head, Department of Laws, Guru Nanak Dev University, Amritsar. Presently in Paris (France) on the University Grants Commission, New Delhi Sponsored Indo-French Social Scientists Exchange Programme (2005) to do a comparative study of the European and Asian Human Rights Redressal Mechanisms.

1 On 17 July 1998, at Rome, 120 States voted to adopt the Rome Statute of the International Criminal Court. Less than four years later - far sooner than even the most optimistic observers had imagined - the statute had obtained the requisite sixty (60) ratifications for its entry into force, on 1 July 2002. By early 2003, the number had climbed to nearly ninety (90). On 28 October 2005, Mexico ratified the Rome Statute, thereby bringing the total number of States Parties to the Rome Statute to 100. There are in total 139 signatories till date.

the gravest international crimes do not go unpunished. It is perhaps the last major international institution of the 20th century, the most innovative and exciting development in international law and an evidence of the global community's desire to divest itself of a hateful legacy of aggressions, genocide, hostilities and war crimes. It constitutes "a benchmark in the progressive development of the international human rights"[2] as its statute introduces a new dimension in international criminal jurisprudence by re-defining the scope of individual criminal responsibility and creating judicial mechanism in the form of an international court for the prosecution of individuals accused of the commission of grave and heinous crimes.

Notwithstanding the fact that some of the nations like China, India, Israel, Iraq, Qatar, Sudan, United States, and Yemen did not sign the Rome Statute, its adoption nevertheless has certainly been considered as a big achievement of the entire international community. It is being hoped that the influence of the Rome Statute will certainly "extend deep into domestic criminal law, enriching the jurisprudence of national courts and challenging prosecutors and judges to display greater zeal in the repression of serious violation of human rights"[3] and that establishment of an all powerful criminal court at the international level will indeed be a deterrent for the criminals and perpetrators of the crimes and atrocities across the world.

In one of my earlier writings, I have discussed in detail the historical background of establishment of the ICC in two phases: **Phase One** covering the developments between 1900 to 1990 and the **Phase Two** covering developments between 1990 to 2003.[4] Similarly, in another work, I have discussed in detail the composition of the court;[5] the law applicable to its functioning; jurisdiction of the court;[6] investigation mechanism; procedure regarding the

2 William A. Schabas (2004): An Introduction to the International Criminal Court, Second Edition, Cambridge: Cambridge University Press, p. iii.

3 *ibid.*, p. 24.

4 For details, see: Gurjeet Singh (2004): "International Criminal Court: A Step Towards Codification of International Criminal Law and Policy in the Post-Cold War Era: Some Comments, Suggestions and Observations." In: The Indian Socio-Legal Journal, Vol. 30, Nos. 1-2, pp. 17-44.

5 It includes: (a) The Presidency; (b) The Chambers; (c) The Office of the Prosecutor; (d) The Registry; and (d) The Judges.

6 This includes the Complementary Jurisdiction as well as the Subject Matter Jurisdiction covering: (i) Crime of Genocide; (ii) Crimes Against Humanity; (iii) War Crimes including (a) Grave Breaches of the Geneva Conventions of 1949; (b) Other Serious Violation of the Laws and Customs Applicable in International Armed Conflicts; (c) Serious Violations of Article 3 Common to Geneva Conventions in Armed Conflicts not of International Character; and (d) Other Serious Violations of the Laws and Customs Applicable in Armed Conflicts not of International Character; and (iv) Crime of Aggression (It is a very controversial issue and has been discussed in detail in the paragraphs below) .

enforcement of the orders of the court and their compliance; relationship of the ICC with the United Nations and the Security Council; and the operation of the court etc. etc.[7]

Thus, the object of the present paper is to discuss some of the conflicting as well as controversial issues with regard to the functioning of the ICC. These, inter alia, include the jurisdictional issues - both relating to its complimentary jurisdiction as well as to the subject matter jurisdiction. Besides, I have also made an endeavour to discuss some of the apprehensions of the countries like the United States and India with regard to the Rome Statute and the reasons for their not signing it till date.

2. THE ICC AND SOME CONTROVERSIAL ISSUES

The passing of the Rome Statute was not something that could be attained very easily. There was a lot of debate and discussion followed by argumentation and counter-argumentation on some of the controversial issues. One of these issues related to the jurisdictional aspects of the ICC. I would like to discuss some of these issues briefly.

2.1 Issue Relating to Complementary Jurisdiction of the ICC

The first important and the most controversial issue concerns the jurisdiction of the ICC. As a matter of fact, the ICC has been empowered to have a 'Complimentary Jurisdiction'. That means there will exist a relationship between the ICC and the national judicial systems. However, the term 'Complimentary Jurisdiction' created a lot of controversy regarding the jurisdictional aspects of the ICC. A number of writings came on the issue and different authors and scholars expressed different viewpoints.[8] Notwithstanding the divergent opinions on the issue, one thing is very clear and that is that the ICC will not supersede national jurisdiction. It is intended to come into picture

7 For details, see: Gurjeet Singh (2003): "Codification of International Criminal Law: A Study of the Role and Functioning of International Criminal Court", A Project Report submitted to the International Committee of the Red Cross, Regional Delegation, New Delhi.

8 For further details, see: John T. Homes (1999): "The Principle of Complementarity." In: Roy S. Lee (ed.): The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results, The Hague: Kluwer Academic Publishers, pp. 1-40; Michael A. Newton (2001): "A Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court." In: Military Law Review, Vol. 167 (March), pp. 20-73; Oscar Solera (2002): "Complementary Jurisdiction and International Criminal Justice." In: International Review of the Red Cross, Vol. 84, No. 845 (March), pp. 145-71; and P. Benvenuti (2000): "Complementarity of the International Criminal Court to National Criminal Jurisdictions." In: F. Lattanzi and W. Schabs (eds.): Essays on the Rome Statute of the International Criminal Court, Ripa Di Fagnano Alto: Editrice il Sirente.

only when the state concerned is unwilling or is genuinely unable to carry out the investigation or prosecution of the persons who are alleged to have committed any one of the crimes listed in the Rome Statute, that is, 'Crime of Genocide', 'Crimes Relating to Humanity' and 'War Crimes'. In other words, if the national courts function properly and assume jurisdiction over these crimes, the ICC will not exercise its jurisdiction. Thus the principle of complimentarity signifies that the jurisdiction of this court is complementary to the national criminal justice system, that is, the court will exercise its jurisdiction only in cases where states do not exercise their national jurisdiction, because they are unable or unwilling to do so. The principle is of great importance because most of the countries like to ensure that their own jurisdiction will not be superseded unnecessarily.[9]

It may be interesting to mention here that the issue relating to the complementary jurisdiction of the ICC were strongly supported by the countries that wanted to limit the ICC's reach. Their immediate concern was to ensure that the ICC would not oust a functioning national judicial system that is available to deal with allegations of wrong doing against a country's own nationals.[10] However, the United States of America, the otherwise most ardent supporter of the ICC, voted against the ICC Treaty at Rome, as it had got a fear that its sovereignty will perhaps be compromised if it acceded to the jurisdiction of the ICC. On the other hand, South Africa, which partly successfully experimented with the setting up of a Truth and Reconciliation Commission, played an indispensable leadership role in the signing of the Treaty.

2.2 Issues Relating to Subject Matter Jurisdiction of the ICC

It may be appropriate to mention here that the jurisdiction of the ICC is limited to the most serious crimes of concern to the international community. According to some scholars, the main reason for restricting the jurisdiction of the Court only to most serious crimes of concern to international community is the need to strengthen universal acceptance of the Court as well as to avoid its overburdening the.[11] The ICC has jurisdiction in respect of the following crimes: (i) The Crime of Genocide; (ii) Crimes Against Humanity; (iii) War Crimes; and (iv) The Crime of Aggression. Out of all these, the inclusion of two types of

9 Gurdip Singh (1998a): "International Criminal Court: Ratione Material Jurisdiction." In: Indian Journal of Contemporary Law, Vol. 2, pp. 1-13, at p. 3. Also see: Gurdip Singh (1998b): "International Criminal Court: Trigger Mechanisms." In: National Capital Law Journal, Vol. 3 (1998), pp. 51-59 and Jerry Fowler (1998-99): "The International Criminal Court: A Measured Step Towards Ending Impunity." In: INTERIGHTS Bulletin, Vol. 12, No. 2, pp. 55-59.

10 Jerry Fowler (1998-99), p. 56.

11 Gurdip Singh (1998a), p. 4.

crimes, that is, Crimes Against Humanity and Crime of Aggression came in for a sharp controversy that is discussed below.

2.2.1 Issues Relating to Crimes Against Humanity

Article 7 of the Rome Statute defines 'Crimes Against Humanity' which means any of the following acts when communicated as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack: (i) murder; (ii) extermination;[12] (iii) enslavement;[13] (iv) deportation or forcible transfer of population;[14] (v) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (vi) torture;[15] (vii) rape, sexual slavery, enforced prostitution, forced pregnancy,[16] enforced sterlisation, or any other form of sexual violence of comparable gravity; (viii) persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law; (ix) enforced disappearance of persons; (x) the crime of apartheid; and (xi) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The most contentious issue surrounding crimes against humanity was whether the Court's jurisdiction would extend to 'widespread or systematic attack(s) directed against any civilian population'. Some countries argued that the Court should have jurisdiction only over 'widespread and systematic' attacks. Human Rights Groups responded that requiring attacks to be 'widespread and systematic' would unnecessary limit the Court to those cases where there is evidence of a plan or policy. They contended that widespread commission of acts such as murder and extermination should be enough to support the Court's jurisdiction.[17]

---

12 'Extermination' includes the international infliction of conditions of life, inter alia, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.

13 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

14 'Deportation or Forcible Transfer of Population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present without grounds permitted under the international law.

15 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from inherent in or incidental to, lawful sanction.

16 'Forced Pregnancy' means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

17 *id*.

A compromise left the basic standard as 'widespread or systematic' [Article 7(1)] but defined 'attack directed against any civilian population' as 'a course of conduct . . . pursuant to or in furtherance of a State or organizational policy to commit such an attack' [Article 7(2)(a)]. This formulation essentially requires a showing that the crimes are both widespread and systematic. Requiring a defendant's knowledge of the 'attack', that is, the larger plan or policy, was a further limitation that will significantly restrict the Court's jurisdiction.[18]

2.2.2 Issues Relating to Crime of Aggression

According to the experts, the issue of the inclusion of crime of aggression in the ICC's jurisdiction had witnessed stiff controversy and that part of the controversy centred on finding an acceptable definition of the term 'Crime of Aggression'. According to them, while arguments to include aggression centred on its extreme gravity and international repercussions, arguments against its inclusion centred on the lack of a sufficiently precise definition. Further, another part of the controversy focused on the role of the Security Council in this regard.[19] Pursuant to Article 39 of the UN Charter, the Security Council "shall determine" the existence of an "act of aggression". Consequently, the issue is inseparably linked with the maintenance of international peace and security. It is a matter of common knowledge that it has indeed been a difficult task to find an acceptable way to reflect in a balanced manner the responsibility of the Security Council, on the one hand, and the judicial independence of the Court, on other.[20]

When the UN General Assembly unanimously affirmed the Nuremberg principles in 1946, it affirmed the principle of individual accountability for such crimes. Early efforts in the United Nations to create an International Criminal Court were set aside while the international community set out to define the term 'aggression'. The General Assembly defined 'aggression' as 'the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.' The definition of aggression is followed by the illustrations in the General Assembly Resolution of 1974, which loudly proclaims that a war of aggression is a crime against international peace and gives rise to international responsibility. The General Assembly Resolution defined aggression as necessarily being the act of state and described the specific actions of one state against another, which constitute aggression. In its work on the Draft

18 *id*.
19 Gurdeep Singh (1998a), p. 10.
20 *id*.

Code of Crimes Against the Peace and Security of Mankind, the International Law Commission, echoing the Nuremberg Tribunal, also concluded that individuals could be held accountable for acts of aggression. The Commission indicated the specific conduct for which individuals could be held accountable-initiating, planning, preparing, or waging aggression and that only those individuals in position of leadership who order or actively participate in the acts could incur responsibility. Its definition focused on individual accountability rather than on the rule of international law, which prohibits aggression by a State.[21]

Some states were of the view that excluding aggression from the jurisdiction of the ICC would leave a significant gap in the Court's jurisdiction. Another reason supporting its inclusion is also one of the strongest reasons for creating the Court: to break the cycle of impunity. To hold individuals accountable for war crimes or crimes against humanity while granting impunity to the architects of the conflict in which those crimes occurred is not justifiable. It is also argued that holding individuals responsible for the crime of aggression would act as a deterrent from the beginning of the conflict and would prevent the commission of war crimes against humanity. Accordingly, it would, therefore, be retrogressive to adopt a statute that does not include the crime of aggression 50 years after the Nuremberg recognised such conduct as an international crime.

Some of the proponents of the inclusion of aggression as a war crime have proposed lessening the need for a definition of aggression by allowing the determination of an act of aggression to rest with the Security Council. The argument is, if states commit aggression for which individuals can be held accountable, and then the Security Council should determine whether an act of aggression has been committed by a state and the court should determine whether an individual was responsible for that act. The proposal that is also heart in other contexts: linking the work of the Court to the Security Council may lead to politicization of the Court. Some states are concerned regarding any connection between the Security Council and the Court.[22]

The statute of the ICC does not contain any definition of the term 'Crime of Aggression' despite the fact that aggression is described as a crime within the jurisdiction of the Court. The absence of the definition of aggression in the statute of the ICC is ascribed to the failure of the states to arrive at a consensus on the issue. The statute places a moratorium on the power of the court, which shall exercise jurisdiction only after the statute is amended or revised so as to

21 *id*.
22 *ibid*., p. 11.

include a definition of the crime of aggression and the conditions under which the court shall exercise jurisdiction with respect to this crime. Thus the court has no jurisdiction to deal with the crime of aggression and the conditions of the exercise of jurisdiction by the court over the crime of aggression are set out in the statute of the court.[23]

2.2.3 Issues Relating to Terrorism

The issue of 'Terrorism' has also been quite a controversial issue with regard to its inclusion in the jurisdiction of the ICC. There is no denying the fact that there is a pressing need for international criminalization of terrorism and inclusion of the 'Crime of Terrorism' within the jurisdiction of the ICC. This is particularly necessitated after 11th September Attacks on the World Trade Tower in the United States. Thus, to sharpen the edge of international criminal jurisprudence, the statute of the ICC should spell out specific acts as amounting to crime of terrorism falling within the ratione materiae jurisdiction of the court.

The 'Crime of Terrorism' may be defined in the statute as (a) undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another state directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, group of persons, the general public or population, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious, or such other nature that may be invoked to justify them; (b) offences under the Convention for the Suppression of Unlawful Seizure of Aircraft and the International Convention Against the Taking of Hostages; (c) offence involving the use of firearms, weapons, explosive and dangerous substances when used as a means to perpetrate indiscriminate violence death or serious bodily injury or persons or groups of persons or population or serious damage to property.

It is in this context that the issue of 'Narco Terrorism' also assumes utmost significance. It is a matter of common observance that the illicit traffic in narcotic drugs and psychotropic substances also has serious consequences for the world population.[24] Accordingly, the experts are of the strong viewpoint that the ratione materiae jurisdiction of the ICC needs further expansion so as to include the crime of illicit traffic in narcotic drugs and psychotropic substances.[25]

---

23 *id*.

24 For a detailed study of the problem of illicit trafficking in drugs and narcotics and its consequences and ramification, see: Gurjeet Singh (1997): "The Problem of Drug Abuse and Drug Trafficking: Causes, Consequences and Control." In: Global Drugs Law Conference Souvenir (March), New Delhi: The Indian Law Institute, pp. 172-79.

25 *id.*

2.3 Some Other Controversial Issues

In addition to the above mentioned issues relating to the jurisdictional aspects of the ICC, there have been a couple of more issues, rather misapprehensions with regard to the ICC's functioning. In the first place, for instance, it was apprehended that the ICC might be asked to take up some politically motivated cases. This is, however, a wrong apprehension as there are numerous safeguards in the Rome Statute to prevent this.

In the second place, it was apprehended that the ICC will have jurisdiction over past crimes. However the true fact is that the ICC will not have any authority over the crimes committed in the past. Its jurisdiction has begun with effect from 1 July 2002 when the Rome Treaty was signed and adopted.[26]

The next apprehension was that that the ICC will deter the states from taking military action to protect their national interests. The best and the most appropriate answer to this misapprehension could be that history is witness to this fact international tribunals have never ever in the past been able to present a barrier to the necessary military action, whatsoever and wheresoever.

3. ICC AND THE RELUCTANT NATIONS'S RESERVATIONS

Now, I come to the reservations expressed by some prominent nations at the time the Rome Treaty was being discussed and debated. At the Rome Conference, the United States, in particular, remained conspicuously absent from the list of nations that approved the ICC Statute and as mentioned above, the US was joined in its opposition by China, India, Iraq, Israel, Qatar, Sudan, and Yemen.

Talking particularly about the US, the US has opposed the ICC from the very beginning, surprising and even disappointing many people. Human rights organisations around the world, and from within the US, too, were very critical of the US stance, given its dominance in world affairs. The US did eventually signed upto the ICC just before the December 2002 deadline to ensure that it would be a State Party that could participate in decision-making about how the ICC works. However, by May 2002, the Bush Administration 'unsigned' the Rome Statute.

---

26 This is clearly evident from the statement of the Philippe Kirch, the Hon'ble President of the ICC, who while addressing the Associated Press categorically stated that the ICC cannot try Saddam Hussein, the former President of Iraq for the simple reason that the ICC assumed jurisdiction w.e.f. July 2002 and the crimes for which the President of Iraq is to be tried are the ones alleged to have committed by him much earlier than the year 2002.

As regards the United States' reservations about the Rome Statute, the US has long been afraid of an international body having jurisdiction over the United States and that cases will be brought against the US civil and military authorities on political grounds. Notwithstanding the US reservations, the reality is, as I have already mentioned above, that the ICC would not undermine the sovereignty of nations because it would function only where states are unable and willing to act. Very surprisingly, the US not only opposed the Rome Statute, it also threatened to use military force, if the US nationals were held at the Hague. Not only this, the US continues to pressure many countries to sign agreement not to surrender the US citizens to the ICC in any case whatsoever.[27]

Coming to Indian objections to the Rome Statute, the first objection of India was that it has got a well established and an effectively functioning investigative and judicial system and it is, therefore, competent to try the criminals accused of having committed even the most heinous crimes. India's second objection was that it was inappropriate to vest unbridled competence in the hands of an individual prosecutor to initiate investigations suo moto and thus trigger the jurisdiction of the court. India's third argument was that the crime of terrorism including the cross border terrorism should also be brought within the ambit and jurisdiction of the ICC. Further it also wanted that the crimes relating to drug trafficking and narco-terrorism should also be brought within its jurisdiction.

Further, like some other nations, India, too made some interesting proposals like making the use of nuclear weapons a 'War Crime' but this move of India was seen more as wrecking ball than a serious one in spite of the 1996 Advisory Opinion of the International Court of Justice on the use of nuclear weapons that it is nearly impossible for nations to use nuclear or other weapons of mass destruction without committing 'Crimes Against Humanity' as these are defined.[28] Some other countries, however, did not wish these to be included in the list. Thus, it was difficult to reach the consensus on this issue, too.

There is no denying the fact that the nuclear weapons have disastrous consequences for the mankind and possess the potential of extinguishing the life on the planet many times over. Moreover, the use of anti-personnel land mines and blinding lasers not only twist and torture but completely negate human

---

27 For further details, see: Anup Shah (2005): "United States and the ICC" available at: www. globalissues. org / Geopolitics / ICC. asp. Visited on 12 November 2005.

28 Sukant Gupta (2000): "The International Criminal Court: Issues of Constitutional Law and Sovereignty of States." Paper Presented at the International Committee of the Red Cross Sponsored One Day Seminar on the International Criminal Court held at the Department of Laws, Punjab University, Chandigarh on 29 January 2000, pp. 1-5, at pp. 2-3.

rights and humanitarian law, and constitute crimes against humanity. The administration of the international criminal jurisdiction, therefore, mandates the inclusion of nuclear weapons, anti-personnel land mines and blinding laser weapons in the list of international crimes falling within the jurisdiction of the ICC.[29] However, according to some experts, till the time these weapons are actually and specifically brought within the ambit of the ICC Statute, their use may be considered as a war crime.[30]

Thus, these are some of the prominent arguments advanced by the nations who opposed the Rome Statute, India being one of the prominent among these nations. There are a couple of more issues that need attention and discussion but due to space constraints, it is not possible to discuss them here.

4. CONCLUDING OBSERVATIONS

As mentioned above, International Criminal Court is the last major institution of the 20th century and an evidence of the international community's desire to divest itself of a hateful legacy of 'Genocide', 'Hostilities', 'Aggressions' and 'War Crimes'. It is a treaty based permanent institution and a historic step in the direction of securing international peace, justice and security. Its statute is "one of the most complex international instruments ever negotiated, a sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of more political propositions that touch the very heart of the state concerns with their own sovereignty."[31] Without any doubt, its creation is the result of the human rights agenda that has steadily taken centre stage within the United Nations since Article 1 of the Charter proclaimed the promotion of human rights to be one of its purposes. From a hesitant commitment in 1945, to an ambitious Universal Declaration of Human Rights in 1948, we have now reached a point where individual criminal liability is established for those responsible for serious violations of human rights, and where an institution is created to see that this is "more than just some pious wish".[32]

In summing up, I would like to state that though the ICC has already started working at the Hague, the real challenge before the international diplomatic community now is to bring even those nations to the table of negotiations who have not yet become the signatories so as to secure their signatures to the Rome Statute and later have their ratification. As the final version of the Rome

29 *ibid*., p. 13.
30 See: Report of the Regional Conference on the Implementation of the Rome Statute of the International Criminal Court (Budapest 6-8 June 2002), Geneva: ICRC, p. 42.
31 William A. Schabas (2004), p. 25.
32 *id*.

Statute is not without serious flaws and the ICC has certain jurisdictional limits, all nations, big or small, need to stand together in their pursuit for international justice so that it could be the most important institutional innovations since the founding of the United Nations. Very recently, while reacting to the 100th ratification of the Rome Statute, the ICC President Judge Philippe Kirsch had also noted that the "ICC was established to help put an end to the most serious international crimes. Because of the limits on the court's jurisdiction, universal ratification is a necessary part of achieving this goal."[33] It is hoped that very soon countries like the United States and India and some others who had withheld their signatures would build up consensus to join the international community in their pursuit to secure justice for the victims of atrocities, brutalities, heinous crimes, and all other types of gross human rights violations and this world will soon become a much better place to live in peacefully and fearlessly.

33 For details, see: www. global issues. org / icc. asp. Visited on 15 November 2005.

CONTRARIETY BETWEEN LEGISLATURE AND JUDICIARY VIS-A-VIS PARLIAMENTARY PRIVILEGES: SOME SUBMONITIONS FOR PERFECTING THEIR COHESION*

*Aman A.Cheema** * and Ashish Virk** **

1. Introduction

In the changed political phenomenon after the 1967 elections, a tendency has grown in some quarters that views one organ of the State as superior to the other. Every organ of the State - the Legislature, the Executive and the Judiciary - has its own place and role under the Constitution. It is wrong to presume supremacy of one over the other. As a matter of fact, it is the Constitution which is paramount. The aspirations of the Constitution are to secure to all citizens - justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and fraternity, assuring the dignity of the individual and the unity of the nation. All the organs of the State are enjoined to promote and secure these aspirations for the people. The ultimate source and sanction of the Constitution is the public - the people of India.

The Constitution envisages 'mutual independence' among the basic organs of the State. To assure this mutual independence, it makes provisions which debar courts from enquiring into the proceedings of Parliament of or a State Legislature on the grounds of alleged irregularity of procedure, parliamentary privileges and restricting discussion in the Legislature and in Parliament in respect of judicial conduct.

1. Meaning and Concept

According to Sir Thomas Erskine May[1]

Parliamentary Privileges is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the Parliament and by members

---

* Paper Presented in the Two-Day National Seminar on *Relations in Working of Legislature, Executive and Judiciary: An Introspection and Prospective Vision,* organised by the University Institute of Laws, Punjab University Regional Centre, Civil Lines, Ludhiana, Punjab on 24-25 February 2006..

** LL.M., Ph.D., Lecturer in Laws, University Institute of Laws, Panjab University Regional Centre, Civil Lines, Ludhiana-141001.

***LL.M., Lecturer in Laws, University Institute of Laws, Panjab University Regional Centre, Civil Lines, Ludhiana-141001.

1 Thomas Erskine May (1815-1886) began his career in the House of Commons in 1831 when he became assistant Librarian. In total he worked for that House for 55 years and in so doing acquired a wealth of experience and knowledge of Parliamentary procedure. May's most famous work is his book *A Practical Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, otherwise known as *Parliamentary Practice*.

of each House individually, without which they could not discharge their functions efficiently and effectively and which exceed those privileges that are possessed by other bodies or individuals.[2]

Thus, parliamentary privileges or legislative privileges connotes certain rights accruing to each House of Parliament collectively and also to members individually without which it would not be possible to maintain either independence of action or the dignity and efficiency of a sovereign legislature. The Parliament has been given somewhat wider personal liberty and freedom of speech than an ordinary citizen enjoys for the reason that a House cannot function effectively without the unimpeded and uninterrupted use of their services. These legislative privileges are deemed to be essential in order to enable the House to fulfil its constitutional functions, to conduct its business and maintenance of its authority.

In India, parliamentary privileges are available not only to the members of a House but also to those who, though not members of a House, are under the Constitution entitled to speak and take part in the proceedings of a House or any of its Committees. For example every minister or Attorney-General of India shall have the right to speak in, and otherwise to take part in the proceedings if either House, any joint sittings if the House, and any Committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote.[3]

Article 105 of the Constitution of India very clearly defines the privileges of the two Houses of the Parliament. This constitutional provision does not exhaustively enumerate the privileges of the two Houses. It specifically defines only a few privileges, but, for the rest, it assimilates the position of a House to that of House of Commons in the United Kingdom as Article 105 Clause (3) says that the other powers, privileges and immunities of the members and of each House, "shall be those of the House of Commons" unless defined by law. This provision has given rise to problems. If we look at the origin and rationale of the privileges of the House of Commons in England, we find that they are not exactly the same as in India.

As Erskine May points out, the House of Commons was a weaker body and "had a fiercer and more prolonged struggle for the assertion of their own privileges not only against the Crown and the Courts, but also against the Lords" The privilege was a part of "King's peace" enjoyed by all the King's subjects. As a matter of fact, they served as a shield in the fight of people and their

2 Erskine May, *A Practical Treatise on the Law, Privileges, Proceedings and Usage of Parliament* at p. 42 as quoted in J.N. Pandy, *Constitutional Law of India*, Central Law Agency, Allahabad, 14th ed.(2003) at p. 538.

3 Article 88 of the Constitution of India.

representatives against the monarchy through the House of Commons. The basis of immunity from the judiciary also sprang from the same roots. The Courts like King's Bench or the Court of Star Chamber were used by the King to safeguard his own interests. Moreover, till today, when the British Parliament is omnipotent, at the commencement of every Parliament, the Speaker of the House of Commons presents a petition to the Crown asking for rights and privileges of Commons. This practice itself shows that the fight for privileges was against the Crown and its royal courts.[4]

In India, there is no question of any struggle between the Executive and the Courts on one hand and the Legislature on the other. We have a written Constitution unlike the British who conduct their governmental business on the basis of conventions. The President is elected and there are provisions dealing with his powers. Judiciary is to interpret the Constitution and to defend the citizen against the State. Thus, the Supreme Court of India has to play its role cautiously, impartially, and fearlessly.

In India some legislative privileges are expressly mentioned in the Constitution vide Article 105 as referred above while the others are recognised in the Rules of Procedure and Conduct of Business in the Lok Sabha framed under its rule making power.[5] The privileges mentioned in the Constitution are as under:

(a) Freedom of Speech

(b) Right of Publication of Proceedings under Parliamentary Authority

(c) Rule - Making Power

(d) Internal Autonomy

However, it may be noted here, that in the context of Article 105 (Privileges of Members of Parliament) applies *mutatis mutandis*[6] to the State Legislatures under Article 194 of the Constitution of India as well.

With regard to the 'Other Privileges', the following are recognised under the Rules of Procedure and Conduct of Business in Lok Sabha as well as by certain laws:

(a) Freedom from arrest of members in civil cases during continuance of the Session of the House and 40 days before its commencement and 40 days after its conclusion.[7]

---

4 Erskine May, *A Practical Treatise on the Law, Privileges, Proceedings and Usage of Parliament,* 17th ed., (1964) as quoted in K.C. Joshi, "Parliamentary Privileges"in (1970) 2 SCC (Jour) 10.

5 Subhash C. Kashyap, *Our Parliament*, National Book Trust, New Delhi (1995), pp. 234-236.

6 Brayan A. Garner, Black's Law Dictionary, West Group, St. Paul, Minn., 7th ed.,(1999) at p. 1089: explains the Latin word *mutatis mutandis* as 'All necessary changes having been made' or 'necessary changes'.

7 Section 135-A of the *Code of Civil Procedure*, 1908.

(b) Exemptions of Members from liability to serve as jurors.[8]

(c) Right of the House to receive immediate information of the arrest, detention, conviction, imprisonment and release of the Member.[9]

(d) Prohibition of arrest and service of legal process with the precincts of the House without obtaining the permission of the Speaker.[10]

(e) Prohibition of disclosure of the proceedings or decisions of a secret sitting of the House.[11]

(f) All Parliamentary Committees are empowered to send for persons, papers and records relevant for the purpose of the enquiry by a committee.[12]

(g) A Parliamentary Committee may administer oath or affirmation to a witness examined before it.[13]

(h) The evidence tendered before a Parliamentary Committee and its report and proceedings cannot be disclosed or published by anyone until these have been laid down on the table of the House.[14]

(i) The Right to prohibit the publication of its debates and proceedings.

(j) Right to exclude strangers from the House.[15]

(k) Right to commit persons for breach of privilege or contempt of the House, whether they are members of the House or not.[16]

3. Contentious Orb Between Parliament and Judiciary

There have been certain areas in Indian democratic system where one organ of the government is trying to encroach upon the area given to the other by the Constitution. This attitude had resulted in certain controversies. Some of these are discussed below:

3.1 Parliamentary Privileges and Fundamental Rights

It has always been a matter of debate that if in a case of conflict between the privileges of Parliament and fundamental rights of individuals, which one is

---

8 *Supra note* 5.

9 Rules 229 and 230 of the Rules of Procedure and Conduct of Business in Lok Sabha, Lok Sabha Secretariat, New Delhi (1989) as quoted in Subhash C. Kashyap, *Our Parliament*, National Book Trust, New Delhi (1999).

10 Rules 232 and 233 *ibid.*

11 Rule 252 *ibid.*

12 Rules 269 and 270 *ibid*.

13 Rule 272 *ibid*.

14 Rule 275 *ibid.*

15 Rule 249 *ibid.*

16 Rule 248 *ibid.*

going to have overriding effect. The matter had been in front of the Courts many times. It was for the first time debated in *Gunupati's* Case.[17] The 'Blitz' in one of its issues published a news item casting derogatory remarks on the Speaker of the U.P. Legislative Assembly. The Speaker referred the matter to the Committee of Privileges of the House for investigations and reports. After failure of summons, an arrest warrant against Mistry (editor of Blitz) to force him to appear before the House was issued, by the Speaker who was authorised for it by Assembly's resolution. Mistry was arrested in Bombay and brought to Lucknow where he was lodged in a hotel for a week without anything further. A writ of *habeas corpus* was filed on the ground of violation of Article 22(2)[18]. The Apex Court accepted the contention as the fundamental right under Article 22(2) was infringed and the Court ordered his release. The judgment created an impression that the fundamental rights would have upper hand on parliamentary privileges.

However, in 1959, in *Searchlight I* Case,[19] the Supreme Court held that Parliament Privileges were not subject to Article 19(1)(a)[20]. A House was entitled to prohibit the publication of any report of its debates even if the prohibition contravenes the fundamental right of speech and expression of the publisher under Article 19(1)(a). Any inconsistency between the two articles i.e. Art.19(1)(a) and Art.105 could be resolved by 'harmonious construction' of the two provisions. It was also held by the Court that the House under Article 118 (House of Parliament) and Article 208 (House of State Legislature) can make rules for regulating the procedure for enforcing its powers, privileges and immunities.

However, in *Searchlight II*,[21] the Court held that Article 21[22] would apply to parliament privileges and a person would be free to come to the Court for a writ of *habeas corpus* on the ground *that* he is deprived of his personal liberty not in accordance with the law but for malafide reasons.

Thus, the position appears to be that it is wrong to suppose that no fundamental right applies to the area of legislative privileges. However, if

17 *Gunupati Keshavram Reddy v. Nafisul Hasan*, AIR 1954 SC 636.

18 Article 22(2) provides "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of the magistrate".

19 *M.S.M.Sharma v. Sinha (I),* AIR 1959 SC 395.

20 Article 19(1)(a) provides " All citizens shall have the right to freedom of speech and expression".

21 *M.S.M.Sharma v. Sinha (II)*, AIR 1960 SC 1186.

22 Article 21 provides "No person shall be deprived of his life or personal liberty except according to procedure established by law".

Parliament were to enact a law defining its privileges, then such a law would not be free from the controlling effect of the fundamental rights. Such provisions of law as contravene fundamental rights would be invalid.

3.2 Parliamentary Privilege of Committal for Contempt

As discussed earlier the Constitution of India grants certain privileges to the Parliament and State Legislatures under Article 105 and Article 194 respectively. If any individual or authority disregards any of these privileges, it is called breach of privilege. Referring from the constitutional point of view there is a difference between the two terms often interchangeably used, i.e., *Breach of Privilege* and *Contempt of Court.* 'When any individual or authority disregards or attacks any of the privileges, rights and immunities, either of the members individually or of the House in its collective capacity', the offence is called a *Breach of Privilege*. It is punishable by the House. Besides, actions in the nature of offences against the authority or dignity of the House, such as disobedience to its legitimate orders or libels upon itself, its members, committees or officers also constitute *Breach of Privilege*. On the other hand, *Contempt of the House* may be defined generally as 'any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any Member or Officer of such House in the discharge of his duty or which has the tendency, directly or indirectly, to produce such results.'

The question of Parliament-Court Relationship often arises in privilege matter in almost all democratic countries. In Britain the controversy came before the Court in *Stockdale's* case.[23] Though the balancing lines have now been drawn, these are as follows:

a) The Courts recognise the common law privileges

b) The new privileges can be created for the House only by a law passed by the Parliament and not merely by a resolution of one House.

c) Whether a particular privilege claimed by a House exists or not is a question for the Courts to decide.

d) The courts do not interfere with the way in which the House exercise the recognised privileges.

The position is that while the courts deny to the House of Commons the right to determine the limits of its own privileges, they allow its exclusive jurisdiction to exercise these privileges within the established limits.

---

23 *Stockdale v. Hansard*, (1839) L.J.(N.S.) Q.B. 294.

However, in India, a House of Parliament may claim a privilege if:

a) it has been created by a law of Parliament or

b) the Constitution grants it specifically or

c) it is enjoyed by the House under Article 105(3).

Hence, when a question arises whether a particular privilege exists or not, it is for the courts to give a definite answer by finding out whether it falls under any of the sources and this brings the Court into the area of parliamentary privileges.

In number of cases the courts have decided that whether a particular privilege claimed by a House exists or not on the basis that whether it was enjoyed by House of Commons or not. Each House of the Parliament, however, has power to commit a person for its contempt. But the position remains ambiguous on the question whether such committal is immune from judicial scrutiny or not. The question whether courts can interfere with the powers of a House to commit for contempt arose in *Keshav Singh's* Case.[24] The facts of the case are that one Keshav Singh published a pamphlet against a member of the State Legislative Assembly. The House adjudged him guilty of committing its contempt and sentenced him to be reprimanded. When Speaker administered a reprimand to him, he behaved in objectionable manner. He was then imprisoned for 7 days by the Speaker. On behalf of Keshav, Advocate Solomon filed a writ petition under Article 226[25] of *habeas corpus*. Court ordered interim bail for his release. The House held Keshav Singh, Adv. Solomon and 2 Judges had committed contempt of House and they be brought before it in custody. The Judges filed petition under Article 226 asserting the resolution to be unconstitutional. A full Bench consisting of all the 28 Judges of High Court ordered stay of implementation of resolution till the disposal of the petition. However, clarificatory resolution was passed by House, for which too stay was granted by the Court.

The President of India then referred the matter to the Supreme Court for its advisory opinion under Article 143. By majority of 6:1 the Court held that,

(a) Two Judges had not committed contempt of the Legislature by issuing the bail orders.

(b) The Assembly was not competent to direct the custody and production before itself of the advocate and the judges.

---

24 *Keshav Singh v. Speaker, Legislative Assembly*, AIR 1965 All. 349.

25 Article 226 provides Power of High Court to issue certain writs.

(c) The harmonious working of the three constituents of the democratic state will help the peaceful development, growth and stabilisation of the democratic way of life in the country.

(d) The Court held that the right of the citizens to move the judicature and the rights of the advocates to assist that process must remain uncontrolled by Article 105(3) or Article 194(3).

(e) The Court rejected the contention of the Assembly that it had absolute power to commit a person for its contempt and a general warrant issued by it would be conclusive and free from judicial scrutiny.

Keshav Singh's case is often regarded as the high-water mark of Legislature-Judiciary conflict in a privilege matter in which the relationship between the two was brought to a very critical point.

4. Conclusion and Sub monitions

The Indian Parliament is the creature of the written Constitution, unlike British Parliament, which implies that the Parliament has to work within the limitations imposed on it by the written document as this document is the fundamental law of the country. In *Keshav Singh's* case two ideas cropped up regarding the relationship between the two organs. On the one hand, the Speakers wanted the Constitution to be amended so as to concede an absolute power to the House to commit anyone for contempt. On the other hand, there arose a demand for codification of legislature privileges. A strong case has been made out for codifying legislative privileges, especially the circumstances which constitute contempt of the House. It is desirable from the people and press point of view. There are certain areas within Indian Constitution which need certain amendments. Some of which are as follows:

(i) To make a Legislature itself a judge in the privilege cases. It appears necessary to amend Article 19(2) wherein the expression 'Contempt of Legislature' should be added. This course of action would remove some uncertainty from the area while at the same time the Houses would not lose its flexibility of approach.

(ii) There should be relaxation of the rules against reporting of proceedings before Parliamentary Committees about which the general principle should be that the proceedings should be open and reportable unless the public interest clearly requires otherwise.

(iii) As regards investigation of complaints of contempt, the person against whom a complaint is being investigated should be represented by the

lawyer, to call witnesses and be paid for legal aid. The person against whom the charges are framed should attend personally all the proceedings and should be given full and fair opportunity to defend himself and explain his conduct.

(iv) The Committee of Privileges should be given separate independent status. It is usually observed that the members of the Committees do not have a non-political approach while performing their duties. Hence their recommendations have the chances of being bias

(v) The Constitution of India should be amended to change the constitution of the Committee of Privileges. Apart from the members of Lok Sabha and Rajya Sabha, some retired or acting members of the Judiciary too should be made to constitute its membership.

(vi) Moreover, the recommendations of the Committee are not binding on the House which may accept, modify or even reject the same. Hence, the Committee's observations should have a binding effect and certain powers should be given to the Committee itself making it a bit strong and effective.

(vii) This Committee headed by the Speaker or the Chairperson as the case may be, should be empowered to decide and investigate the contempt proceedings.

(viii) The framers of the Constitution were anxious to confer plenary powers on the Houses in India. They felt that legislative privileges should be defined not in a hurry but after giving some thought to the matter. The power was left to the Legislatures to define their privileges. Hence, the Indian democracy had matured itself with the passage of time that an Act for codification of its privileges should be enacted. *Justice Subha Rao* in *Searchlight I* has strongly pleaded for codification of privileges instead of keeping 'this branch of law in a nebulous state, with the result that a citizen will have to make a research into the unwritten law of privileges of the House of Commons at the risk of being the bar of the Legislature'.

(ix) Simply codifying the law would not plug the loopholes and put an end to the dispute as certain privileges can be codified which are in excess of the powers granted by the Constitution. Hence, a separate committee should be constituted consisting of members of Lok Sabha, Rajya Sabha and Judiciary (retired or acting) to work on the codification of the parliamentary privileges. A Bill should be drafted and then brought before

the Parliament for discussion.

The judicial approach which could be gathered from the above mentioned cases is that when the question arises whether a recognised and established privilege of the House has been breached or not, it is for the House to decide the question. The Courts cannot decide the question. The Courts do not interfere with such decision of the House unless it is the case of malafide. However, when the question is whether a privilege exists or not, then it's a matter for the Courts to decide, for a privilege claimed is under constitutional provision. The justification behind it is that it is the constitutional function of the Supreme Court and High Courts to interpret its provisions, no legislature can claim any such power. Hence, it is the amendments in constitution and powers of the Committee of privileges and the codification of privileges that too by independent Committee, that could reduce the tensions between the two important organs of the country. A democratic legislature and an independent judiciary are two pillars of a democratic system; both have to function in cooperative spirit to further the cause of the rule of law in the country.

SERVICE LITIGATION: A CASE STUDY OF ANDHRA PRADESH ADMINISTRATIVE TRIBUNAL (APAT)

By DVLN Murthy
A. Vijay Krishna

Introduction

Unlike India, in most other countries of the world one does not notice the Government and its employees fighting large scale litigation. One main reason for this seems to be the lack of an alternative machinery which can impartially mediate between the Government and its employee. The disputes that arise between Government and employees are of two kinds. Firstly they are of a general nature and secondly they are of an individual nature. While it is the right of every person in the service set up to expect just and fair treatment in regard to his employment, frequent litigation between him and the state involving countless other co-employees in the service in the battle is a deviation from the right direction. There has been a phenomenal rise in service disputes in recent times leading a tremendous amount of litigation and the consequent burden on the judiciary, government and the concerned employees. It is time that serious attention is devoted to discover the reason for it and take effective steps to ensure curtailment of such litigation. Frequent litigations between the state and its employees ultimately affects the efficiency of the service and brings about indiscipline, lack of loyalty and an attitude of indifference. This paper attempts to identify the critical areas causing litigation in service cases taking the Andhra Pradesh Administrative Tribunal (APAT) as a case study.

Article 323-A of the Constitution created Administrative Tribunals for adjudication of disputes relating to service matters of employees in public service for the centre and other states. The outcome of this exercise is the Administrative Tribunal Act 1985.

> *An Act to provide for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of [1][any corporation or society owned or controlled by the Government in pursuance of Article 323-A of the Constitution] and for the matters connected therewith or incidental thereto.*

In this paper empirical data was analysed based upon the cases filed at the APAT. Information was collected from APAT regarding the number of

OAs pending along with information relating to counters filed or not from 1994 to 1999 and without information about counters from 2000 to 2002. In total over 22,000 cases were taken for analysis. This included all the cases pending at APAT as on December 2002. Along with the statistical data certain key judgements and policy decisions at various levels and a few case studies relating to the main areas of litigation were studied in detail to highlight the reasons causing litigation in those areas. A sample survey was also conducted in a range of government departments. In this exercise, the Secretaries to Government, senior officers of the secretariat and staff, heads of departments and their officers, Chairman of APAT, retired judges of the AP High Court and the Supreme Court were interviewed.

Current Reality

Number of OAs Filed Every Year: An Analysis of the Category-wise Contribution

As part of the empirical study all the cases between 1995 and 2002 were taken into account and a statistical analysis was done. In total there were around 22,000 cases in the APAT during this period (as of January 2003). The statistical analysis is split into two levels. The first level shows individual contributions of each category every year. For each year, the category contributing to 5% or more of the inflow was taken into account. The table below shows the categories contributing to 5 % or more of the OAs filed in the APAT.

Category	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**
Appointment	20	22	22	20	20	22	23	27
Promotion	26	23	20	16	15	19	16	16
Seniority	19	19	15	12	8	8	5	4
Absorption/Regularisation	5	5	5	8	5	7	8	6
Major punishment	6	6	8	9	11	6	6	7
Suspension				6	5	5	7	4
Pay Fixation & Recovery					5			5
Pensionary benefits						5	5	
Transfers						8		10
Total	**76**	**75**	**70**	**71**	**69**	**80**	**70**	**79**

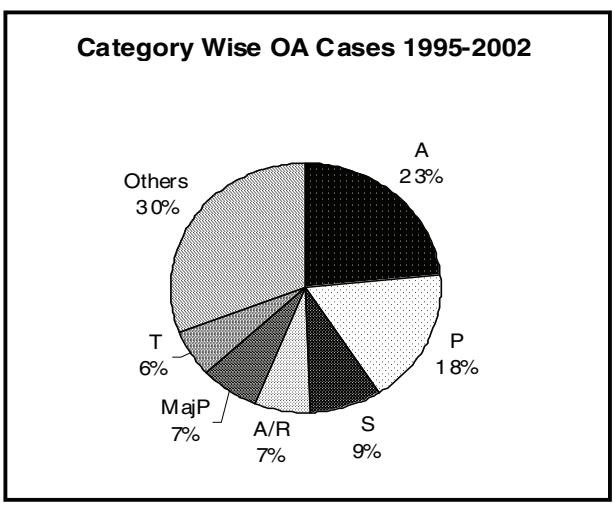
Note: *All figures given in percentage terms*

During the period 1995 to 1997, the five categories of appointment, promotion, seniority, absorption and regularisation, and major punishment contributed to the majority of OAs being filed at the APAT. From the year 1998 onwards, suspensions also contributed to more than 5% of the OAs being filed. In the period covering 1999 and 2002, another new category, 'pay fixation and

recovery' contributed to more than 5% of the cases. However, this category is not significant throughout the sample period. Pensionary benefits are high in 2000 and 2001 and transfers are high in 2000 and 2002. Most of the pension cases are likely to be related to administrative issues and are likely to be cleared quickly. Similarly, in the case of transfers, most of the cases are related to general transfers and are likely to be disposed off quickly by the tribunal. Interestingly, transfers contribute to nearly 10% of litigations in 2002, resulting in the distortion of more important areas like seniority and suspension which drop down to 4%. However, most of these transfer cases falling under the general transfer category, which are likely to be disposed off in the first quarter of 2003, making the other two areas namely, seniority and suspensions, more significant. In general, the first five categories contribute to more than 60% of the litigations.

One must exercise caution while considering major punishments as one of the significant categories. The APAT (OA cases) files from 1995 to 1999 did not specify whether the punishment was major or minor in a majority of cases. Hence, it was decided to classify the punishment as major or minor on a purely arbitrary basis. Therefore, it is quite possible that some of the cases classified as major punishments belong to the minor punishment category or vice-versa. However, from 2000 onwards it was specified whether the penalty was major or minor and the above problem ceased to exist. Nonetheless, punishments as a whole are a significant contributing factor to litigations in courts.

The second level of analysis deals with entire sample period from 1995 to 2002. Those categories contributing to more than 5% of the cases filed were taken into account.



Over the entire sample period from 1995 to 2002, the six categories of appointment, promotion, seniority, major punishment, absorption and regularisation and transfers contribute to more than 70% of the total number of OAs filed in the APAT. Out of these six areas, one can discount transfers to a great extent as they are mostly cases relating to general transfers which are likely to be disposed off quickly. The other five areas have been identified as the areas which deserve special attention. An aspect which needs to be studied is whether the current government policy regarding the above five categories is contributing to more litigations. If this is the case, then one needs to take corrective steps to rectify the current government policy and introduce more dynamic policies which are more foolproof and litigation free.

From the above analysis the following key areas were identified for an in-depth analysis as these areas contribute to the maximum amount of litigation:

- Appointments
- Absorption and regularisation
- Promotion
- Seniority
- Disciplinary proceedings
- Suspensions

Case Studies on Major Litigation Areas

Case Study I: Appointments/Absorption and Regularisation

Appointments

This group of cases consistently occupied more than 20% of cases instituted in APAT. An indepth analysis revealed that selection process constituted a heavy percentage of cases under the classification of appointments. OA 7613, 7678 and batch of 150 cases was heard and decided by APAT in the year 1999 relating to appointment. In this batch, the issue revolved around the selection process of para medical officers in Medical & Health department. During the year 1998, the Director of Medical education invited applications for filling up the posts of radiographers, opthalmic assistant, staff nurse, pharmacist grade II and laboratory technician. The batch of OAs 7613/98 and batch were filed by Laboratory technicians when their applications were rejected on the ground of non possession of valid qualification certificates. At the admission stage, the Tribunal directed the respondents to accept their applications and permit them to appear for the written examination pending disposal of OAs and not to announce their results. One of the important issues that came up for consideration was whether the certificate of certified laboratory technician course of

recognised institutions other than those referenced in Annexure III of the relevant service rules can be accepted for appointment. The bench held that the certificates issued by institutions recognised by a Central Act, State Act, Provincial Act as stated in item (i) of category (2) of class-XI subject to their imparting the training course imparted by the institutions shown in Annexure III of the rules are in order. The bench concluded that the certificates issued by any recognised institution imparting the curriculum prescribed by the institutions shown in Annexure III should be sufficient. Such ambiguity in rules is causing litigation in every recruitment process.

Similarly, recruitment to the para medical services was notified by the Department of Medical and Health during the year 2002. The notification did not mention the minimum marks required for selection of a candidate to the service. Similarly it did not specify the recognised institutions whose certificates qualify for the selection. After conducting the written examination and announcement of results, the government ordered an enquiry into the training imparted by some of the private institutions and took a decision to cancel the examination, leading to litigation.

Absorption and Regularisation

OA 5912/94, OA 6199/96 and batch of more than 100 cases relates to the appointment of part time lecturers in education department. The main issue in these batches revolved around the appointment of the applicants as lecturers in the education department in the existing vacancies as they were recruited as part time lecturers by the authorities from time to time. Part time lecturers batch discloses the continuation of part time lecturers for years without filling up the posts either by promotion or direct recruitment, the two methods available under the special services rules. The continuation and the subsequent absorption on humanitarian grounds exposed the scope for favouritism, nepotism and non compliance of statutory reservations guaranteed by the Constitution and the AP State and Subordinate Service Rules, and the resultant litigation.

The scope for litigation in appointments arises due to the following reasons.

- Change of rules of recruitment after issue of recruitment notification
- Cancellation of examination (recruitment process) after setting in motion selection process.
- Compassionate appointment - medical invalidation scheme/death of government servant on duty; appointment of displaced (persons under major projects); reservation (backlog) vacancies/ad hoc appointment (like badli workers) in municipalities. As a part of the

welfare philosophy, the state opened up avenues for appointment of the kith and kin of affected persons under this welfare programme. While the welfare programme is laudable it landed the government into service litigation in the following areas:

a) Rival claimants claiming posts. Such as spouse versus children and also step children.

b) Under-aged claimants seeking appointment after reaching the age prescribed under the rules.

c) To avail the medical invalidation welfare scheme, government servants started resorting to voluntary retirement with bogus medical certificates of diseases.

d) In the case of major projects where state has announced a policy of appointment for one member of a family of displaced persons besides paying compensation (a scheme covered by GO 98 of irrigation department). According to the scheme, the project authorities have to maintain a list of eligible candidates and provide employment on first come first served basis. As the development activities of the state are expanding, the state is not able to cope with the demand for employment in the government departments. This leads to endless litigation, besides non observance of rules of reservation provided in the constitution. If the intention is to provide succour to the displaced persons, the state should have offered self-employment schemes or enhanced monetary compensation.

e) Under Rule 22 of AP State and Sub-ordinate service rules, an offshoot of the constitutional guarantee provided to the backward classes/scheduled castes/scheduled tribes/women the state is legally bound to follow the rotation laid down under the rules. The appointments against reservations and ad hoc appointments have opened up floodgates for litigation.

Case Study II: Promotion

Our study revealed that promotion constitutes 18% of the litigation during the years 1995-2002 in APAT. We took up a detailed case study of OA 1834, 2063 of 1995 and batch relating to promotion of direct recruits to the position of Deputy Executive Engineers in the Irrigation Department vs, promotees in the same department. The tribunal considered the following issues before delivering the judgement.

1. What are the principles to determine inter se seniority between direct recruits and promotees in the category of deputy executive engineers in our state.

2. Whether quota rule was disregarded in AP and what is the impact of quota rule on seniority?

3. What is the impact of the Presidential Order on the finalisation of the seniority list of deputy executive engineers?

4. Whether the government has power to make retrospective regularisation?

The tribunal examined the concept of seniority as enunciated in the state and subordinate service rules, special rules in the background of presidential order issued under Article 371(D) of the Constitution. According to Rule 2(C)(1) of the AP Engineering Service rules published in GO MS Number 285 (special rule),

> *All the substantive vacancies in the category of deputy executive engineer, 37 and half shall be filled by recruitment and the remaining 62 and a half shall be filled by transfer of additional assistant and draughtsmen of the Andhra Pradesh Engineering Sub-ordinate service and by promotion from among assistant executive engineers.*

The bench examined provisions of the general rules and special rules applicable to the civil servants in Andhra Pradesh and also the case law on the subject. It came to the conclusion that,

> *if the provisions of the general rules and special rules are read together in the canvas of presidential order, the deputy executive engineer being a zonal post will have to be filed up by direct recruits and promotees/transferees in the ratio fixed in rule 2(C) of special rules and the seniority of the members of that cader will be with reference to appointment in a vacancy meant for that particular source. In other words, merely because temporary appointment or promotion came to be made, seniority cannot be counted from the date of officiation except when the appointment was made in accordance with rules and as regards to direct recruits their seniority will have to be counted from the date of their joining, as such appointment is in regular vacancy meant for that source.*

Another important issue which needed immediate consideration was whether the government has the power to make retrospective regularisaton. The bench heard the Advocate General of the State also. Besides, it referred to the judgement of the Supreme Court in R.Nanjundappa vs. T.Thimmaiah 1972(2) SCR 799 and Aswini Kumar's case 1997 to SCC (1), in the matter and referred to para 13 of the judgement which we considered appropriate to reproduce.

> *So far as the question of confirmation of these employees whose entry itself was illegal and void is concerned it is to be noted that the question of confirmation or regularisation of an irregularly appointed candidate would arise if the candidate concerned is appointed in an irregular manner or on adhoc basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorised and is not against any sanctioned vacancy, question of regularising the incumbent on such non existing vacancy would never survive for consideration and even if such purported regularisation or conformation is given it would be an exercise in futility. It would amount to decorating still born baby.*

After examining the issue threadbare, the bench came to the conclusion that the government has the power to make retrospective regularisation provided such regularisation is as per law. An in-depth study of a few cases like the ones referred above revealed that there are instances of, non observance of the quota fixed in the special rules between the direct recruits and the promotees in almost every service of the state government. A person directly recruited to the first level gazetted post in any of these services is not sure of rising to the level of non cadre highest post in the hierarchy of the department.

In this backdrop of non filling of direct recruitment vacancies in the majority of services for inexplicable reasons and making temporary promotions, ad hoc appointments, in charge arrangements being subsequently made regular, are the main sources of litigation in the seniority promotion area. This only reveals that the cadre controlling authority is not serious about inducting fresh blood, dynamism, etc, which a direct recruit is supposed to bring with him into the service. If the executive finds that the functions of the government can be carried efficiently and effectively without induction of direct recruitment at a few levels in the hierarchy, it can as well amend the service rules and thus limit the scope for direct recruitment. Similarly a liberal policy of relaxation of rules and thereby regularisation of ad hoc promotions must be put to an end to reduce service litigation.

Case Study III: Seniority/Promotion

Our study revealed that the number of cases on seniority in the tribunal from 1995 to 2002 constituted 9% of the total number of cases. We took up the study of OA 7175/95 batch filed in the tribunal for an analysis relating to the handling of seniority disputes in the Revenue Department. Judgement by the

tribunal in OA 7171 of 95 delivered on 1-7-1997 is one of the cases picked up for study. In this judgement, the tribunal heard 36 OA's, Vacate Miscellaneous Applications and Miscellaneous applications. This batch of OA's went up to the Supreme Court, and were decided in the year 1998 (AIR 2001 Supreme Court 1210)

The main issue in this OA's centred round the preparation of the seniority list in the category of the Deputy Tahsildars in the Revenue Department of Andhra Pradesh. According to the special rules issued in GO 1279 GAD dated 12.10.61 for the AP Revenue subordinate service appointment of the category of the Deputy Tahsildar shall be made by direct recruitment and by transfer by promotion from the feeder categories in the ratio 1:1. Several in-service candidates were promoted as Deputy Tahsildars for the year 1980-85 in the available vacancies. In the year 1985 direct recruitment was made directly to the Deputy Tahsildars. Thereafter upto January 1990, appointment of in service candidates by transfer or by promotion was made. Again in January 1990 direct appointment for the post of Deputy Tahsildars was made. Up to the year 1980 the rules framed in 1961 were in force and seniority was to be settled only in terms of rule 33 A of AP State subordinate services. Without finalizing the seniority list in accordance with the then existing rules the government brought an amendment to the special rules governing the service conditions of Deputy Tahsildars with retrospect effect from 12th October 1961. Litigation started in the category of the Deputy Tahsildars by filing RP no. 1988 and batch in the erstwhile APAT. That batch was disposed off in the year 1984. The Supreme Court confirmed the decision of the full of bench of APAT in the year 1988 (SLR 1988 (1) 775). The Supreme Court came down very heavily on the government for not following the rule.

> Para 9. *Though Rule 3(b) fixes the ratio as 1:1 in respect of substantive vacancies, the recruitment has not been regular and systematic. We have come across several instances where the State Governments do not take steps to give effect to their own rules and, therefore, though there is one mode of prescription, in action a different situation is brought about. Rules have binding effect and they bind the state and the citizens alike once they are in force. In order that law may regulate conduct, the state has to feel bound by its own laws and by willingly abiding by the law exhibit an ideal situation for the citizens to emulate. We disapprove of the callous conduct of the state and direct that the rule shall henceforth*

> *be followed scrupulously by effecting recruitment at regular intervals according to the scheme of the rule. The State shall within four months from today compute the substantive vacancies in the cadre and determine the quota of direct recruits to the rank of Deputy Tahsildars and after working out the vacancies available to be filled by the direct recruitment on the basis of 50 per cent of the total number, fill up the same by making direct recruitment within a period of four months thereafter. Once, that is done and regular recruitment is effect, the impasse which has now been created would not continue. The state is directed to draw up the seniority list on the basis of rule 4(e) on or before 31st December, 1988. We have given a long time to eliminate the scope for making for an application for extension.*

The Government of Andhra Pradesh did not prepare the seniority list as directed by the Supreme Court within the time prescribed and promulgated new rules in the year 1992. From the litigation in the seniority matter of deputy Tahsildars in the Revenue Department discussed above, it is seen that the executive authority did not take steps for preparation of seniority list every year, as required under the rules and allowed the litigation to continue and as a result the whole service is a divided house.

Case Study IV: Suspensions

The case law on suspensions and the instructions of the government on the disposal of cases is clear and categorical. Following the judgement of the administrative tribunal in OA 7909/92 dated 10-4-93. Government issued elaborate instructions on suspensions of government servants.

> *Judgement: The order of suspension needs to be reviewed by the authorities periodically. The criminal trial or disciplinary proceedings may take a long time and the government is to review the need for continuing suspension on relevant grounds periodically. The observation in Para 5 of the impugned order the applicant shall continue under suspension until the terminations of all proceedings relating to the criminal charge does not imply that till the trail, if any, is concluded, the order of suspension need not be reviewed or revoked. It will be for the government to review the need for continued suspension at reasonable periodical intervals say six months.*

The GAD fixed a time frame of six months for completion of an enquiry and awarding a punishment for delinquent officer. The pending of cases in courts and disposal of cases by the authorities came in for sharp criticism in the hands of courts. The following table illustrates a few cases of tardy progress of disciplinary enquiry in government departments.

Department	File No	Date of Appointment of Enquiry Officer	Date of Receipt of Enquiry Report	Time taken by Enquiry Officer	Bench Mark Fixed by CVC & GAD	Excess or Less Time by Enquiry Officer	Remarks
Commercial Taxes	D3/602 /88	30-03-88	28-05-92 / 27-04-94	49 Months & 28 Days	3 Months	45 Months & 28 Days	
Medical & Health	83627/ E1/77	05-06-86	07-07-94	97 Months	3 Months	94 Months	
Transport	3262/97	20-10-98	Case Pending	4 Years / 2 Years, 7 Months 15 days	3 Months	+ 4 Years / 2 Years & 7 Months	Case is pending for non-receipt of articles of charges from ACB
Transport	29868/92	15-03-90 / 04-09-2000	Not yet Received	12 Years / 8 Months 15 days	3 Months	+ 12 Years 5 Months / 1 Year 9 Months	Accused Officer Retired

Following the discussions of the secretaries to Government in the year 1992, on the issue of inordinate delays in finalising enquiries both departmental and ACB resulting in hardship to employees, government revised its earlier instructions in Government order 86 of GAD dated 8-3-94.

- The order of suspension of the government servant shall be reviewed at the end of every six months.
- The appropriate reviewing authority should take a decision regarding continuance or otherwise of the government servant under suspension with reference to the nature of charges as also delays in finalising enquiry proceedings.
- An outer limit of two year, be provided from the date of suspension for keeping the Government servant under suspension and he shall be reinstated without prejudice to the proceedings. However, in exceptional cases permitted the suspension to be continued.

Another GO 74 of GAD dated 24-2-1994 permitted for considering the promotion of offices against whom disciplinary cases are pending resulting in a lot of litigation at courts.

Courts are not normally interfering in the orders of suspension passed by the executive authorities and in majority of cases directions are being issued to the departments to reconsider orders keeping in view the instructions of the government and the case law on the subject. From the statistics available from 1995 to 2002, there are 1050 cases of suspension still pending as writ petitions with APAT. On an average the gross emoluments came to Rs. 12,000 per month. Calculating at 100% of dearness allowance and 75% of basic pay scale, the average pay for an employee placed under suspension comes to Rs. 10,500 per month (this figure was worked out on the assumption that the range of the salary of a government employee under suspension varies from last grade servant with emoluments of Rs. 4000 per month and to a non cadre head of department with gross emoluments of Rs. 20,000 per month). Therefore, the total cost per month (1050 cases X Rs. 10,500) comes to Rs. 1,10,25,000 and the total cost per year comes to Rs. 13,23,00,000 (estimate based on lower values and the true cost due to non disposal of suspension cases likely to be much higher). In this back drop the heavy pendency of cases relating to suspensions deserves to be studied in- depth by the concerned departments and steps taken for early disposal.

Conclusion

Main cause for the high degree of litigation in service matters is executive policy. Lack of grievance redressal mechanisms, ad hoc policies regarding service matters and not adhering to its own rules has made the government itself a victim of heavy litigation in service matters, which is destroying the very fabric of the government services. This paper has shown the way in identifying the main areas contributing to the maximum amount of litigation in service matters. The government must use the means available to focus on these areas and reduce the amount of litigation. Similarly the administrative tribunal can reduce the backlog of cases by bunching of cases based on the above major litigation areas. If the Government does not have a coherent policy directed towards tackling litigation then the problem is likely to worsen in the future. It is estimated that there are over 60,000 grievance cases pending in the various departments. If immediate action is not taken towards redressal of these grievances there is every possibility of these entering the court area and consequently litigation will increase manifold times. Although this paper has

attempted to empirically prove the main areas of litigation in service matters and also detail the reasons for this, it has not attempted to provide the solutions available to tackle this litigation effectively. This will form the basis for a future paper.

REFERENCES

1 Government of Andhra Pradesh (1964) *AP (Civil) Service Conduct Rules, 1964*.

2 Government of Andhra Pradesh (1991) *AP Classification Control and Appeal Rules, 1991*.

3 Government of Andhra Pradesh *AP State and Subordinate Service Rules*

4 Government of Andhra Pradesh *AP Ministerial Service Rules.*

5 Government of Andhra Pradesh *AP Last Grade Service Rules.*

6 Government of Andhra Pradesh *AP State and Subordinate Service Rules.*

7 Government of Andhra Pradesh *AP Public Service Commission Regulations.*

8 Government of Andhra Pradesh *AP State and Subordinate Service Rules.*

9 Government of Andhra Pradesh *AP Public Employment Act 1993.*

10 Government of Andhra Pradesh *AP Regulation of Appointment to Public Services Act, 1994.*

11 Government of Andhra Pradesh *AP Civil Service Rules 1962.*

12 Government of India *Constitution of India.*

13 Government of India *Andhra Pradesh Administrative Tribunals Act 1985.*

14 Government of India (December, 1999) *Constitution of Permanent and Continuous Lok Adalat in Ministeries and Departments of Government of India,* Circular – 12/22/99-CL.IV, Ministry of Law, Justice & Company Affairs. Link: http://www.dca.nic.in/cir/gcir1099.html, Date visited: 18/1/2003.

15 Indiainfo.com Law (2003) *Beyond Two is Too Many,* Link: http://law.indiainfo.com/tax-fin/beyondtwo.html, Date visited: 21/12/2002.

16 Krishna Iyer V.R., (2003) *Judicial Odyssey Calls for a Just Critique*, Link: http://lawindiainfo.com/constitution/odyssey.html, Date visited: 5/11/2002.

17 Mahadevan K.S., (2003) *Who is Stalling Judicial Reform?* Link: http://www.chennaionline.com/columns/life/life63.asp, Date visited: 5/11/2002.

18 Mehaffy J.W., (2003) *Electronic Filing – Its Development and its Future.* Link: www.misko.com/library/electronicfiling.pdf, Date visited: 5/1/2003.

19 Meenakshisundaram (2003) *Public Services Reform*. Link: http://www.india-seminar.com/2002/514/514%20s.s.%20meenakshisundaram.htm, Date visited: 26/11/2002.

20 Ravish K, (2003) *Significance of Lok Adalat*, Link: http://www.legalserviceindia.com/articles/article+1e.htm, Date visited: 18/1/2003.

21 Supreme Court of India (1985) *Karampal Vs Union of India, AIR, SC 774,* pp 779.

22 Supreme Court of India (1997) *L Chandra Kumar vs Government of India, 1997(2)SLRI SC.*

23 UNDP (2002) "UNDP Priorities in Support of Good Governance", in Governance for Sustainable Human Development: A UNDP Policy Document. Link:http://magnet.undp.org/policy/chapter2.htm, Date visited: 5/11/2002.

24 World Bank (2002) "The Judicial System", in World Development Report 2002, pp 188, Link: http://www.worldbank.org/wdr/2001/fulltext/fulltext2002, Date visited: 5/1/2003.

25 World Bank (2002) "Good Governance: The Business of Government", pp 42, Link:http://in.geocities.com/kstability/projects/integrity2/anticor1.html, Date visited: 26/11/2002.

DISARTICULATION OF INDIGENOUS PEOPLE: IS JUDICIARY THE ULTIMATE SAVIOUR?!

Prof. Ranbir Singh*

By way of an Introduction: An Indian Perspective

Four decades after the Constitution was brought into force, its most conspicuous feature has been the expansion of the Indian Judiciary and its pre-eminence over the other two political branches of government namely, the Legislature and the Executive. In no other country in the world has the Judiciary assumed such ascendancy as in India. In one of his last pronouncements from the Supreme Court, Chief Justice Pathak in a proud understatement thus spoke of the Indian Judiciary, *"The range of judicial review recognised in the superior Judiciary of India is perhaps the widest and most extensive known in the world of law."*[1]

To this, it may be safely added that the Indian Supreme Court is today the most powerful of all Apex Courts in the world. It has surpassed in its power even the United States Supreme Court which Lord Bryce and Tocqueville thought in their times was the most powerful of all Courts in the world.

From an institution entrusted with the task of *applying* the law in cases brought before it, the Supreme Court has recast itself into an institution which *makes* law.[2] In *Laxmi Kant Pandey v Union of India;*[3] the Court formulated a compulsory procedure to be followed during inter-country adoption of Indian children. In *Vishakha v State of Rajasthan,*[4] the Supreme Court laid down a twelve point elaborate "guideline" to promote gender justice in work places. In M *C. Mehta v State of Tamil Nadu,*[5] it laid down a mechanism to ensure compliance with the Child Labour (Prohibition and Regulation) Act, 1986 In all these cases, and many more, the Judiciary *made* law in the sense of Legislature *making* it. As the general argument goes, the lawmaking role imparted by the Supreme Court is in conflict with the doctrine of separation of powers and the principle of representative democracy contained in our Constitution.[6] Today, the Judiciary's powers over the State are so expansive that no activity of the State is beyond judicial scrutiny as such. Of no subject can it be said that the

---

* Vice-Chancellor, NALSAR University of Law, Hyderabad, India

1 *Union of India* v. *Raghubir Singh,* AIR 1989 SC 1933-1938. *See also P.S.R. Sadhanantham* v. *Arunachalam,,* AIR 1980 SC 856-862, per Pathak J. • *See* M. N. Rao., Judicial Activism. 1-10 at 3 (Jour) 8 SCC (1997).

3 AIR 1987 SC 232.

4 AIR 1997 SC 3011.

5 (1996) 6 SCC 756.

6 *See* S.P. sathe , judicial activism in india (2001)

Court has no jurisdiction at the threshold to entertain it, provided a formal compliance of the Court's jurisdiction is made out. The only limitation it seems is the Court's own sense of propriety not to interfere on the merits of the issue.

An expansive judicial control has been achieved by the Supreme Court evolving a theory of controlling "arbitrary" actions of the State and its instrumentalities linked to a "new dimension" of the equality Article of the Constitution viz., Article 14. The author of this theory Mr. Justice P. N. Bhagwati, as he then was, propounded it first in *Royappa v. T.N.* and in four later judgements of his own with different shades of emphasis and refinement.[4] According to this theory, Article 14 does not embody merely the theory of classification of persons and things, but is a "dynamic concept having an activist magnitude." *"Equality is antithetic to arbitrariness" it is said, and "in fact equality and arbitrariness arc sworn enemies.""* When an act is "arbitrary," it is said "it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14." The principle *of "non-arbitrariness"* pervades Article 14 like a *"brooding omnipresence.'"*

Short of such metaphoric and florid language repeated in successive cases, it is difficult to formulate "non-arbitrariness" as an aspect of equality. The original legal meaning of "arbitrary" was "determinable by the decision of Judge or Tribunal rather than defined by statute." Its modern meaning is "capricious, randomly chosen." Even in its modern sense, arbitrariness does not necessarily result in unequal treatment. The Queen in *Alice in Wonderland* acted quite capriciously when she ordered anyone's "head to be taken off who irritated her but there was no question of her acting unequally. Similarly, one can act quite "arbitrarily" to a person or body without violating any concept of equality as when permission is refused to a sole applicant on the ground that the applicant has red hair. No case of inequality also arises if all the applicants have red hair and are capriciously refused permission on the ground that they have red hair. It is only when permissions arc refused capriciously on the ground that some have red hair and are granted to others because they have black hair that a question of unequal treatment arises, in which case it is the old theory of the absence of a rational reason for the distinction made that comes into operation. 'Arbitrariness' is certainly opposed to rational action but it is not necessarily opposed to equality. To act arbitrarily is merely to act irrationally. Irrational conduct does not *per se* take away any persons right to equal treatment which is all that Article 14 is really about despite its "activist magnitude."

Over time, it is not just the rights of the socially excluded that have been put up for judicial review and intervention, whole gamut of issues such as the environment, consumer affairs, property rights, the practices

of municipal corporations, educational institutions, politicians and political parties, to name a few areas, have been presented before the Courts to prescribe public policy outcomes. The widening of subject matter has caused Indian judicial activism to be celebrated as a device of engineering social change. The project seeks to ascertain the reason for this lawmaking role which the Supreme Court has been imparting, when it is in conflict with established constitutional doctrines and principles.[7]

Contextualizing the Trends in Judicial Activism in India: A Step towards "better" Governance?!

The word "govern", according to its literal meaning, would refer to *"rule with authority", "conduct the policy, actions and affairs of the state either despotically orconstitutionally"*. In the Indian context, having adopted the democratic form of government, the question of despotism does not arise at all but for the temporary aberration of the 1975-77 emergency period. As Churchill pointed out, democracy may be the worst form of government except when you consider all other alternatives for governance. In the context of our country, how has our democracy worked? Are we governing ourselves effectively? If our governance was better, we would be a less corrupt country because better governance also leads perhaps to a better sense of values and better moral standards in the society in general. Of course one can raise a question whether it is better morals in a society which leads to better governance or vice versa? Corruption can be need-based or greed-based. Better governance can at least help to check need based corruption. Better governance can check greed based corruption also because punishment for the corrupt will be very effective and prompt in a better governed country.[8] *Thus, we have to understand the*

---

7 I have attempted to show, with the help of celebrated cases where the Supreme Court has *made* laws, that while the Constitution guarantees fundamental rights, there are no legal rights that is, those arising out of laws made by the Legislature, to enforce the fundamental rights. As such, it is in the process of enforcing these fundamental rights, not backed by legal rights, created by statutes, that the Supreme Court makes laws i.e. while bridging the gap between fundamental rights and legal rights.

8 Concerning the constitutional mandate, it may be noted that under our Constitution, we have the Executive, Judiciary and the Legislature as the three major arms for governance. Each has to play its role and if any one of these agencies is not able to perform, then there is a danger of the others entering into the vacuum so created. For instance judicial activism we have seen in recent times can be attributed to the failure of the Executive and Legislature. Between the Executive and Legislature, we find that the role of the politicians representing the Legislature and bureaucrats representing Executive have undergone dramatic changes over the period of fifty years. There was a concept many years back that the policy making will be the responsibility of the political leadership and implementation will be that of the bureaucracy. But over the years, the situation has almost been reversed with the politicians taking direct interest in day to day administration like postings, transfers and so on and the bureaucracy hopefully left with the task of working out policy options. Though much is made of the doctrine, the fact of the matter

dynamics and diachronic of governance before we explore what could be done for better governance and how accountability and transparency can help in the process.

Judicial activism in India has been perceived in certain quarters as a success of constitutional governance, while others have sought to condemn it, often with the specific charge that the judicial activism movement has caused the judiciary to overstep the bounds of 'proper' judicial behaviour. The appearance of judicial activism in India can be functionally correlated with the emergence of Public Interest Litigation (PIL), though it would be erroneous to think of PIL and judicial activism as necessarily synonymous. Starting in the last 1970s, in a series of cases, the Supreme Court enlarged its reach and jurisdiction in two ways One, by re-interpreting the Constitution to expand the scope and content of various fundamental rights, and two, by moderating the ancient requirement of locus standi (standing and interest) for access to judicial remedies and redress As a consequence, where it was felt that there had been gross violation of fundamental rights, procedural requirements were eased to enable individuals or organisations to approach the Supreme Court and high Courts on the behalf of those unable to do so themselves - 'in the public interest'.

This widening of subject matter has caused Indian judicial activism to be celebrated as a device of engineering social change Indeed, the very characterization of judicial activism has been linked to social transformation, as in a recent work by S.P. Sathe where he defines an activist Court in the following manner: *"A Court giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individual is said to be an activist Court"*. In the same breath he goes on to state that such activism "can be positive as well as negative". Since it is not always possible to have a determinate discourse on "expanding the horizon of the rights of the individual" and the arena of the 'social and economic' is also open to contest. Sathe's mode of analysis suggests that the evaluation of judicial activism lies in the juxtaposition of one's perspectives of social and economic change against the standards of the activist Court. It is perhaps this that leads Upendra Baxi to state in the preface to S.P. Sathe's book that 'Judicial activism has no permanent essence and its histories are merely chronicles of contingency.'[9]

---

is that in adopting the British Parliamentary system, the framers of our Constitution rejected the rigid separation of powers inherent in the American Constitution. The sole reference is to be found in a Directive Principle of State Policy, Art. 50 which directs the State to strive to ensure separation of powers between the Executive and the Judiciary, that too in the public services.

9 Sathe (2002), p. xii.

The claim that judicial activism is necessary to rescue us from bondage to the past— from having the writers of the Constitution "rule us from the grave"— defies both logic and history. The contest is between those living individuals who wish to see control of change in judicial hands and those who wish to see it in other hands. There has been no argument that either statutory or constitutional laws are not to change. The only meaningful question is: *Who* is to change them? The reiterated emphasis on change, like the reiterated emphasis on morality, argues what is not at issue and glides over what is crucially at issue: Why are *judges* the authorized instrument? The original cognitive meaning of laws— constitutional or statutory— is important, not out of deference to the dead, but because that is the agreed-upon meaning among the living, until they choose to make an open and explicit change— not have one foisted on them by the verbal sleight-of-hand of judges.[10]

Existing social philosophies and political alignments cannot be presupposed in discussions of long-run questions, such as constitutional interpretation. Even within the judiciary, differences in "substantive values" have been drastic over time, and by no means negligible even at a given time. The belief that a constitutional structure can be maintained while jurists with radically different visions make "substantive choices" within it seems dangerously similar to a belief that one can slide half-way down a slippery slope. The argument for judicial activism must stand or fall in general and enduring terms, not simply on whether some current political or social creed is considered so superior to competing creeds as to justify judges' decisions in its favor. It is ultimately not a question of the relative merits of particular political or social creeds but of the long-run consequences of opening the floodgates to the generic principle of constitutional decisions based on "substantive values." Once you have opened the floodgates, you cannot tell the water where to go.

---

10 *Rule of the ruler and not rule of law!!*
We seem to be going back to our old ethos of the rule of the ruler instead of the rule of the law. As a result today we find in many states that the civil servants have come to be identified with certain political leaders and their fortunes rise and fall in tandem with the rise and fall in the fortune of their political masters. This is perhaps one of the major factors that has contributed to the deterioration of the quality of governance. The first step to ensure better governance therefore would be to have the concept of the rule of law restored. The second step is to ensure that bureaucracy is depoliticised. The rule of law will be maintained if the Judiciary is able to effectively perform and ensure that the laws are implemented. In fact, though it is the function of the Legislature to legislate the law and the Executive to implement the law, many a time Judiciary has to intervene because the Executive has been failing in its duty. We had in the late 1990s the spectacle of the politicians being involved in scams and the Courts taking an active part and going to the extent of even directing the CBI and monitoring the progress of the investigations. This perhaps is a temporary phase in the governance of our country because the judicial activism becomes necessary only when the Legislature and Executive fail.

What must be rejected is precisely the general principle that judges' "substantive values "should govern constitutional decisions. Nor is anything fundamentally changed by saying that judges are only agents of general moral ideas, rather than their own personal inclinations. If the Constitution does not enact Herbert Spencer's Social Statics, neither does it enact John Stuart Mill's On Liberty or John Rawls' A Theory of Justice.

Hum Log: The Tribes[11]

The Constitution of India does not define Scheduled Tribes as such. Article 366(25) refers to scheduled tribes as those communities who are scheduled in accordance with Article 342 of the Constitution. According to Article 342 of the Constitution, the Scheduled Tribes are the tribes or tribal communities or part of or groups within these tribes and tribal communities, which have been declared as such by the President through a public notification. The Scheduled Tribes account for 67.76 million of strength, representing 8.08 percent of the country's population[12]. *Scheduled Tribes are spread across the country mainly in forest and hilly regions.*

The essential characteristics of these communities are:-

- Primitive traits
- Geographical location
- Distinct culture
- Isolated from the mainstream community at large
- Economically backward.

As per 1991 census, 42.02 percent of the Scheduled Tribes populations are main workers of whom 54.50 percent are cultivators and 32.69 per cent agricultural laborers. Thus, about 87 percent of the main workers from these communities are engaged in primary sector activities. The literacy rate of Scheduled Tribes is around 29.60 percent, as against the national average of 52 percent. More than three-quarters of Scheduled Tribes women are illiterate. These disparities are compounded by higher dropout rates in formal education resulting in disproportionately low representation in higher education.

Not surprisingly, the cumulative effect has been that the proportion of Scheduled Tribes below the poverty line is substantially higher than the national average. 51.92 percentrural and 41.4 percent urban Scheduled Tribes were still living below the poverty line.[13] The progress over the years on the literacy front

11 Majority of the data collected is from Ministry of Tribal Affairs
12 As per the 1991 Census,
13 The estimate of poverty made by Planning Commission for the year 1993-94

may be seen from the following[14]:-

	1961	1971	1981	1991
Total literate population	24	29.4	36.2	52.2
Scheduled Tribes (STs) population	8.5	11.3	16.3	29.6
Total female population	12.9	18.6	29.8	39.3
Total Scheduled Tribes (STs) female population	3.2	4.8	8.0	18.2

There are approximately two hundred million tribal people in the entire globe, which means, about 4% of the global population. They are found in many regions of the world and majority of them are the poorest amongst poor. According to 1981 census, the population of Scheduled Tribes in the country was 5.16 crores, consisting about 7.76% of total Indian population, which means one tribesman for every 13 Indians. Among tribes, there are so many communities. The major identified tribes in country number about the 428 scheduled tribes in India though the total number of tribal communities are reported to be 642 and several of them have become extinct or merged with other communities as the tendency for fusion and fission among tribal population is a continuous process. Thus, if the sub-tribes and state tribes will be taken into consideration, the number will be many more. These 428 communities speaking 106 different languages have been so far notified as the scheduled tribes in 19 states and 6 union territories. They have their own socio-cultural and economic milieu. In fact, the largest concentration of tribal people, anywhere in the world and except perhaps Africa is in India. About 50% of the tribal population of the country is concentrated in the states of Madhya Pradesh, Chhatisgarh, Jharkhand, Bihar and Orissa. Besides, there is a sizeable tribal population in Maharastra, Gujarat, Rajasthan and West Bengal.

Land Holdings of Tribal population[15]

1) Marginal and small holdings 62.42%
2) Semi-medium 20.59%
3) Medium 13.58%
4) Large Holdings 3.41% Total 100.00

14 All figures are in millions

15 Orissa review, Feb-March 2005, *Tribal development in India - a study in human development* by Pillai Kulamani.Pg, 71-78

So What Did the Godfather Say

The fundamental principles laid down by the first Prime Minister late Jawaharlal Nehru in this regard became the guiding force. These principles are:

1. Tribal people should develop along the lines of their own genus and we should avoid imposing any thing on them. We should try to encourage in every way, their own traditional arts and culture.
2. Tribal people's rights in land forest should be respected.
3. We should try to train and build up a team of their own people to do the work of administration and development. Some technical personnel from outside will no doubt be needed especially in the beginning. But we should avoid introducing too many outsiders in to tribal territory and,
4. We should not over administer these areas or overwhelm them with a multiplicity of schemes. We should rather work through and not in rivalry to their own social and cultural institutions.

Little did he know, how in the future course of time, a mockery of all his principles will take the nation in a state of over 8 crore pair of eyes imploring for livelihood.

The Good Earth: Development Induced Displacement

"Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border." says Francis Deng[16].

The case for arguing that development- induced displacement is clearly covered by the Principles is bolstered by Principle 6.2(c)[17] which reads: *"The prohibition of arbitrary displacement includes displacement: [...] (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests [...]"*

The tribal population has been disproportionally affected. An estimated two per cent of the total Indian population has been displaced by development

16 Francis Deng is the UN Secretary General's Special Representative on Development Induced Displacement.

17 The UN Guiding Principles on Internal Displacement developed by Francis Deng. Op. Cit. 12

projects. Of these, 40 percent are tribals although they constitute only 8 percent of the total population, as perW. Courtland Robinson[18]. Cernea's[19] impoverishment risk and reconstruction model proposes, "The onset of impoverishment can be represented through a model of eight interlinked potential risks intrinsic to displacement."[20] These are:

- *Landlessness.*
- *Joblessness.*
- *Homelessness.*
- *Marginalization* (Marginalization occurs when families lose economic power and spiral on a "downward mobility" path. Many individuals cannot use their earlier acquired skills at the new location; human capital is lost or rendered inactive or obsolete.)
- *Food Insecurity.*
- *Increased Morbidity and Mortality.*
- *Loss of Access to Common Property.*
- *Social Disintegration* (The fundamental feature of forced displacement is that it causes a profound unraveling of existing patterns of social organization. The cumulative effect is that the social fabric is torn apart[21]. Others have suggested the addition of other risks such as the loss of access to public services, loss of access to schooling for school-age children, and the loss of civil rights or abuse of human rights.[22])
- *Loss of Access to Community Services.*
- *Violation of Human Rights* (The impoverishment risk and reconstruction model already has been used to analyze several situations of internal displacement. Lakshman Mahapatra applied the model to India, where he

18 W. Courtland Robinson is a Research Associate at the Center for International Emergency, Disaster and Refugee Studies at the Johns Hopkins University Bloomberg. School of Public Health in Baltimore, Maryland.

19 Michael Cernea is a sociologist based at the World Bank who has researched development induced displacement and resettlement for two decades.

20 Michael Cernea, 1996, "Bridging the Research Divide: Studying Development Oustees." In Tim Alien (ed), *In Search of Cool Ground: War, Flight and Homecoming in Northeast Africa* (London: United Nations Research Institute for Social Development, Africa World Press and James Currey).

21 Descriptions of the first seven risk factors are drawn from Michael Cernea, 2000, "Risks, Safeguards and Reconstruction." The description of the eighth risk, social disintegration, is from Michael Cernea, 1996, *Public Policy Responses to Development-Induced Population Displacements* (Washington, DC: World Bank Reprint Series: Number 479).

22 Robert Muggah, 2000, "Through the Developmentalist's Looking Glass: Conflict-Induced Displacement and Involuntary Resettlement in Colombia." In *Journal of Refugee Studies* 13(2): 133-164.

estimates that as many as 25 million people have been displaced by development projects from 1947-1997.[23])

Cernea's impoverishment risk and reconstruction model offers a valuable tool for the assessment of the many risks inherent in development-induced displacement. Balakrishnan Rajagopal of the Massachusetts Institute of Technology has noted five "human rights challenges" that arise in relation to development-induced displacement:[24]

Right to Development and Self-Determination

In 1986, the UN General Assembly adopted a Declaration on the Right to Development, which asserted the right of peoples to self-determination and "their inalienable right to full sovereignty over all their natural wealth and resources."[25] In Rajagopal's interpretation, such language makes it "clear that local communities and individuals, not states, have the right to development."[26]

Right to Participation

If self-determination is the right to say whether development is needed or not, participation rights begin to be relevant when development begins. The right to participation is based on various articles of the International Bill of Human Rights, which consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[27] More specifically, the 1991 International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries[28] stipulates[29] that indigenous and tribal peoples shall participate in the formulation, implementation and evaluation of national and regional development plans that affect them[30].

Right to Life and Livelihood

When security forces take Action to move people forcibly or to quell civil

23 Lakshman K. Mahapatra, 1999, "Testing the Risks and Reconstruction Model on India's Resettlement Experiences." In Michael Cernea (ed) The Economics of Involuntary Resettlement: Questions and Challenges (Washington, DC: World Bank).

24 Balakrishnan Rajagopal, 2000, *Human Rights and Development* (World Commission on Dams, Thematic Review V.4, Working Paper). Although Rajagopal's discussion focuses on dams, the human rights challenges apply in other types of development-induced displacement.

25 UN General Assembly, 1996, *Declaration on the Right to Development* (A/RES/41/128).

26 Rajagopal, Human Rights and Development, p. 5.

27 Fact Sheet No. 2 (Rev.l), *The International Bill of Human Rights* (www.unhchr.ch). 28ILO Convention 169

29 Article 7

30 Cited in Sarah C. Aird, 2001, "China's Three Gorges: The Impact of Dam Construction on Emerging Human Rights," *Human Rights Brief 24,* Winter 2001.

dissent against development projects, this may constitute a direct threat to the right to life, which is protected in the UDHR[31] and the ICCPR[32]. The right to livelihood is threatened by the loss of home and the means to make a living when people are displaced from habitual residences and traditional homelands. The rights to own property and not to be arbitrarily deprived of this property as well as the right to work are spelled out in the UDHR[33].

Rights of Vulnerable Groups

Growing evidence shows that, development projects disproportionately affect groups that are vulnerable to begin with, particularly indigenous groups and women. Human rights of vulnerable groups are protected generically in the International Bill of Human Rights. The ILO Convention 169 spells out protections for indigenous groups.

Right to Remedy

The right to remedy is asserted in the UDHR[34] and in the ICCPR[35]. As Rajagopal notes, "they need a quick and efficacious remedy that can halt on-going violations and prevent future ones. The right to remedy is therefore crucial...to all development projects."[36] Put more broadly, "A right without a remedy is no right at all."

There are more that 4850 indigenous communities in India, most of whom are hunters-gatherers, shifting cultivators, fisher folks, small peasants etc. they are mostly defenseless people who are at the same time socially oppressed and economically exploited. When they are displaced, they are so engrossed in fending for themselves that that they find it impossible to protect themselves and their culture.

Even though India has a large number of internally displaced persons, there is no legislation that specifically deals with them. The Judiciary is virtually handicapped in the matters of the internally displaced persons. The role of the various NGO's as well in protecting the legal rights of the displaced persons has not borne much fruit. Thus they remain legally deprived. Needless to mention, what would be the image of India in the mind of international community. We may later build up the argument from instances of aggravation of plight of tribals, how India stands far behind the ILO convention and international commitments to Human Rights and Displacement.

31 Article 3
32 Article 6
33 Articles 17 and 23, respectively
34 Article 8
35 Article 2
36 Rajagopal, Human Rights and Development, p. 11.

Judiciary in Jungles

Perhaps no judiciary in the world has devoted as much time, effort and innovativeness in protecting our forests as the Supreme Court of India has for the last eight years. In doing so it reinterpreted the Forest (Conservation) Act, 1980, created new institutions and structures and conferred additional powers on the existing ones. It has been a process of continuous involvement of the Apex Court in forest management assuming the nature of *continuing mandamus.*

The Herculean task of the Apex Court has been carried out through its intervention in the following two cases:

- The *T. N. Godavarman Thirumulkpad v/s Union of India* and ors (Writ Petition 202 of 1995), concerning implementation of the Forest Conservation Act, 1980.
- The *Centre for Environmental Law* (CEL) *v/s Union of India* and ors. (Writ Petition 337 of 1995) concerning the issue of settlement of rights in National Parks and Sanctuaries and other issues under the Wild Life (Protection) Act, 1972.

These cases are being heard since then as part of what is known as the continuing mandamus, whereby Courts rather than passing final judgements, keep passing orders and directions with a view of monitoring the functioning of the executive. *"There is currently very little information about this case, its orders and how they effect the region. Any intervention first needs to begin with the awareness. The legal complexities need to be demystified, creating the space and possibility for simple but factual communication on the issue as well as public debates on concerns and solutions. These tasks though daunting are certainly achievable",* say Ritwik Duta and Kanchi Kohli.[37]

Intersections between Ruralisation and Poverty: A Global Landscape

The second half of the twentieth century was marked by mass migration of people from rural to urban areas and this mass migration will continue for the foreseeable future. Hundreds of millions of people have moved or are moving from country to city. This reflects the hardship of rural life and the judgement of people that their aspiration to improve their well-being and that of their families will be best attained by moving to the city. The majority of the world's population still lives in rural areas. However, within five years for the first time the numbers

37 Ritwick Dutta is an advocate in the Supreme Court. Kanchi Kohli is based in New Delhi and a member of the Kalpavriksh Environmental Action Group. They jointly coordinate Forest Case Update, a newsletter service

of city dwellers and rural dwellers will be equal and after that the proportion of the world's population living in rural areas will decline rapidly.

Percentage of population living in rural areas[38]

	1950	2000	2030
Africa	**85.3**	**62.8**	**47.1**
Asia	**82.6**	**62.5**	**45.9**
Europe	**47.6**	**26.6**	**19.5**
Latin America and the Carribean	**58.1**	**24.6**	**16.0**
Oceania	**38.4**	**25.9**	**22.7**
World	**70.2**	**52.8**	**38.8**

The world's population will continue to grow in the coming decades but most of those additional people will live in cities. There will be relatively small growth in the world's rural population, an estimated ninety-five million between 2000 and 2030.[39] As this mass migration from country to city continues and swells, those who remain in the country are becoming increasingly isolated and marginalised in political and economic terms.

Mass migration from rural areas is changing the nature of the rural population:

- because the search for work and income is a principal driver of migration, more men tend to migrate than women, leaving a disproportionate share of the rural population female and with lesser income;
- because rural families tend to have more children than urban families, the numbers of children in rural areas continues to grow and so family income needs continue to grow; and
- because of adult male migration to cities, the child to adult ratio in rural areas is growing significantly.

Indigenous, cultural and ethnic minority groups tend to remain where they are because of traditional links with community, place and land. This is especially significant in Latin America where the rural population is already less than a quarter of the total population and will decline to a sixth by 2030.

38 Derived from United Nations Population Division *World Urbanisation Prospects: The 2001 Revision* 20 March 2002 UN document ESA/P/WP.173 Table A.2.

39 United Nations Population Division *World Urbanisation Prospects: The 2001 Revision* 20 March 2002 UN document ESA/P/WP.173 Table A.4.

Indigenous peoples and cultural minorities want to preserve their traditional ways of life and for them, this is best done on their traditional lands. These groups are usually excluded from the institutions and systems of the dominant culture and society. Their exclusion is exacerbated by rural isolation. Rural people as a whole have lower enjoyment of human rights than many urban people. This is associated with isolation and poverty.

Poverty itself is a human rights violation. Rural poverty is endemic in most countries. Most of the poor are rural and will be so for several decades. Their income, spending and employment usually concentrate on staple food. They have little land, schooling or other assets, and face many interlocking barriers to progress. Poverty and hunger have fallen massively, mainly due to rural and agricultural development, especially between 1975 and 1990. Yet this improvement, and parallel progress in agricultural production, have stalled during the last decade, and many rural regions have been excluded. Rural-urban poverty gaps have not declined globally.[40]

Certainly some rural dwellers are relatively rich but the great majority of the people are poor and almost a third are desperately poor. Worldwide, 1.2 billion people are "dollar poor", that is, they consume less than a dollar a day. Of those seventy-five per cent live and work in rural areas. It is projected that, even with the massive migration to cities, in 2025, sixty per cent of the dollar poor will still be rural.[41] Poverty affects not only those dependent on a cash income but also those in the subsistence economy. Where there is good soil, good water and fair distribution of access to land, rural people may escape malnutrition through subsistence farming. Too often, however, concentrations of land ownership and the use of land for export crops leave families without adequate food even in agriculturally rich areas. Others, who depend on fishing for subsistence, are affected by pollution of the seas and lakes and the exhaustion of fishing stocks by commercial exploitation.

Poverty in turn produces or exacerbates other human rights violations. Poverty affects women more than men. Women have less access to land, credit, technology, education, health care and skilled work.[42] The endemic rural poverty in many countries is exacerbated or even caused by inequitable distribution and control of land. Brazil provides a stark example of this. The concentration of land tenure in Brazil is among the highest in the world. Fewer than fifty thousand landowners have estates more than one thousand hectares, controlling more

40 International Fund for Agricultural Development *Rural Poverty Report 2001* OUP Oxford 2001 p 15.
41 Ibid, p. 15.
42 Ibid.

than fifty per cent of all agricultural land. Close to one per cent of rural landowners hold roughly forty per cent of agricultural land. There are nearly 4.8 million landless families in the country. These are people who live as renters, sharecroppers, squatters, or who hold rural properties smaller than five hectares.[43] Rural poverty declined globally between 1980 and 2000 but the decline was uneven. In some regions and in some countries there was little or no decline. In other regions and countries, rural poverty declined at a slower rate than urban poverty and so the urban-rural poverty gap increased. Rural-urban gaps remain wide in Latin America in spite of some falls in both urban and rural poverty. Faster falls in rural poverty occurred in Asia, especially though not exclusively in East Asia, but the gaps have increased since 1985, especially in China. Most of Africa, except Ethiopia and Uganda, has seen little poverty reduction over the last twenty years but the rural to urban gap has decreased. The rate of poverty reduction has slowed since the late 1980s and, in East and South East Asia, especially since the economic crisis of 1998.

Sharp rises in poverty, especially in farming areas, have occurred in ten transitional countries since the late 1980s. Overall there has been no global correction since the late 1970s of the urban biases that sentence rural people to more widespread and deeper poverty, illiteracy and ill-health.[44] These many, varied dimensions of rural experience form a *consistent, inter-related pattern of human rights violation* that is difficult to escape. They do not occur in isolation from each other. They constitute a web of mutually reinforcing disadvantages for rural people. Remoteness makes it difficult to access services which in turn affects education and health, which in turn affects employment and productive ability and so produce or sustain poverty. Poor nutrition leads to poor health and so to difficulty in receiving education and entering employment. Poverty prevents access to communications and other technology that could overcome the disadvantages of distance and the relative lack of services. It also drives migration, especially of adult workers and especially of adult male workers, that leaves families without necessary support and exposes the migrant workers themselves to other forms of human rights violation. Rural people often seem to be trapped no matter what they do.

It is high time we delineated trajectories of the globalization of law and map the changing contours of legal pluralism using empirical material on World Bank financed infrastructure and biodiversity projects in India. The role of international institutions, social movements and NGOs, which challenge the

43 Centro de Judico Global 'Agrarian reform and rural violence' *Human rights in Brazil 2000* www.mstbrazil.org/humanRights.html.

44 IFAD *op cit* p38.

monopoly of the state over the production of law and the definition of the common good, is analysed with reference to conflicts over privatization of natural resources, struggles against forced displacement and loss of livelihood as well as the complaints on behalf of indigenous communities before the World Bank Inspection Panel. It is argued that despite scattered sovereignties in the new architecture of global governance, the state remains a central albeit contested terrain. Its pivotal role in selectively transposing conditionalities, law and policies into the national arena as well as its strategies to avoid accountability are foregrounded against the attempts by civil society actors to use national and international legal platforms to enforce compliance with environmental and human rights standards.

Land Rights: A Crucial Component of ESC rights?

Land rights, particularly in the context of developing countries, are inextricably linked with the right to food, the right to work and a host of other human rights. In many instances, the right to land is bound up with a community's identity, its livelihood and thus its very survival. For farmers, peasants and fisherfolk, land is a vital component of a particular way of life. For this reason, peasants and poor farmers are generally opposed to the conversion of vast tracts of land for commercial mono-cropping, such as for sugar, tobacco, rubber, palm oil, etc. Fisherfolk are usually opposed to large infrastructure and commercial projects along rivers, lakes and coasts because of pollution, dispossession of land, limitations on access to traditional livelihood and other disruptive changes that threaten their survival.

In India recently thousands of subsistence farmers, traditional fisherfolk, workers, women's groups and villagers protested *en masse* against the World Trade Organization's policies. The protests were partly sparked off by the suicides of 450 peasant farmers in the states of Andhra Pradesh and Karnataka. In India, more than 600 million people-70% of the population-are desperately poor and depend directly on the land and environment for survival. *"It is the life resource of the majority of our people whose subsistence directly depends on the water, forests and the land. It is about justice. "*

For the urban poor on the other hand, land is more than simply living space. In most instances, the urban poor live in communities that have been settled for a substantial period of time. Development of the community includes access to a means of livelihood, to education, to health care, all of which stand to be disrupted in cases of eviction. It is not difficult to see why historically land rights have been a flash point and landlessness invariably a cause of social unrest.

Feudal exploitation, the process of colonization and the passing of natural resources to state control, encroachments by private commercial interests and now globalization-these are the main historical factors that have defined contemporary conflicts involving land and land rights. It is perhaps the historical importance of land that has made the question of the rights to land a very broad and complex subject matter. The Muslim rebellion in the Philippines, the Palestinians' struggle for the return of their homeland, the Zapatista movement in Mexico and many other conflicts that are very much part of today's news, involve land. Indeed, issues of access to land and land security continue to have an impact on a very significant part of the world's population who still depend on land access and security for their subsistence and livelihood.

"For the billions of the world's rural poor, land security must be seen as a necessary precondition for the realization of other internationally protected human rights."5 Despite this, land rights issues have rarely been addressed from an international human rights perspective. This is in part due to the fact that land issues are very complex. Land rights do not just pertain to the right of ownership. They also refer to access, use, possession and occupation of land, and security of such use, possession or tenure. Local and national landowning and land use systems vary considerably from country to country and, frequently, within countries. As a result, identifying and reaching agreement on principles and standards that can usefully be applied across borders and systems have proved to be very difficult.

The rural poor face a keen need for information directly relevant to their livelihoods— information such as market prices for their crops, alternative cropping or pest control options, the availability of government assistance or training programs, or opportunities for developing new products or markets for environmental goods, from local crafts to ecotourism. Agriculture-related information is often one of the most immediate needs, since small-scale agriculture is so important to household incomes in rural areas. Information on current crop prices, fertilizer and pesticide costs, and the availability of improved seeds and low-cost improvements in farm technology can help guide the purchases of farm inputs and equipment, or help farmers successfully obtain credit.

Without information of this type, poor families find it harder to take advantage of new opportunities for generating income and increasing their assets. Numerous organizations, from multilateral agencies to local NGOs, are trying to improve access to livelihood-related information. One such effort is the farmer field schools developed by the UN Food and Agriculture Organization (FAO)

as part of an Integrated Pest Management project in Indonesia. Using a participatory learning approach aimed at incorporating local knowledge and experience, these farmer field schools are yielding lessons that are being applied to information activities on sustainable livelihoods in other sectors, such as community forestry (Chapman et al. 2003:5).

Securing and Enforcing Property Rights

Clearly defined property rights, and confidence that these rights can be efficiently defended against interlopers, are fundamental to governance systems built on the rule of law. As mentioned earlier, appropriate property rights regimes are also central to encouraging the poor to invest in their land or in resource management in ways that bring economic development and poverty reduction. However, in many developing economies, corruption, excessive regulation, and complicated property registration procedures significantly burden citizens, especially the poor.

In Guayaquil, Ecuador, for example, it has been three decades since the passage of land reform laws, and most households are aware of their property rights and the importance of securing title to land. But the majority of these poor households are incapable of navigating the legal labyrinth—including long delays and high costs—surrounding the land titling process. In theory, the process costs about $350, or as much as three months of a typical worker's salary. In practice, the actual cost is closer to $750—a prohibitive sum for most poor families (Moser 2004:42-44). A similar situation exists in Peru, where land registration processes to secure property rights requires land holders to engage with 14 different agencies involved in conferring a single title (Narayan 2002:54).

In several countries, poor people's associations and cooperatives are working with local authorities and financial institutions to address the need for secure land tenure rights and housing. In Mumbai, India, a slum-dwellers' organization has been able to acquire land, housing, and basic infrastructure services for its members. In the Philippines, a scavengers' association whose members live on a 15-hectare municipal dump in Quezon City has helped mobilize member savings to acquire legal rights to land through land purchase. And in Guatemala, 50,000 squatters have formed cooperatives, acquired land through legal means, and are now repaying long-term loans (Narayan 2002:66). Meanwhile, Ghana's land registration law specifically provides for registration of customary land rights, and pilot projects are now underway to build capacity among traditional-land administrators to improve record-keeping and land registries (Bruce 2005).

By Way of an Epilogue

The link between environmental issues and human rights is rarely appreciated. Yet the fact is that environmental damage is often worst in countries and in areas with human rights abuse. Law and policy relating to environmental protection has to meet two distinct yet interrelated objectives. The first is to ensure the conservation and protecting the environment and the second is safeguarding the genuine interest of disarticulated indigenous people in the ambits of their rights. In order to meet the above twin requirements law and policies have to gear themselves to develop mechanisms that prove to be instrumental in gaining '*grounds'* literally as well as figuratively when tribes are the foci.

The Government rarely takes International Environmental Conventions seriously. Very little debate takes place and no proper preparation for the meetings is held. Unfortunately, India has till date not meaningfully participated in the drafting of the existing international laws or set the international agendas for which protocols are required.

Amidst the hue and cry, the best possible solution to the problem dealt with in the paper is Community Forestry. People's involvement in the forests along with a partnership with continuous monitoring agencies in a tailored approach is bound to adjust the dynamics of the conflict. Apart from the subsistence and economic benefits to the communities, the kind of forest management proposed shall, in the course of time, essentially improve upon the issue of forest conservation. Community forestry is not a panacea, but in mostof the cases, and especially in Indian context, it appears to be necessary from the point of view of conservation as well as social justice. What is required is a diversified, farsighted, concrete and persevered approach in order to behold a country of blooming flowers sprawling everywhere spreading fragrance of social justice. After all, Robert Frost referred to a forest when he said:

The woods are lovely, dark and deep,
And 1 have promises to keep,
And miles to go before I sleep
And miles to go before I sleep.

RESURRECTING/RENEGOTIATING LABOUR RIGHTS IN A GLOBALISING WORLD : CRITICAL THEORY AND CONTRACT LABOUR

*Nimushakavi Vasanthi**

USING CRITICAL LEGAL THEORY IN CONTRACT LABOUR

Introduction:

Critical Legal Studies with its focus on transformative efforts is particularly relevant to labour law. The need to identify a vision for the law from which reasoning must proceed is relevant at a time when this vision for labour law seems to be either absent or disorganized. The vision of a socialist state of India, dominated labour jurisprudence for a long time. It helped judges read into a statute, rights that were not expressly provided for[1] and also paved the way for statutes to be enacted to provide for social justice. One such instance is the Contract Labour (Regulation and Abolition) Act, 1970 in short the CLRA[2]. Recent Judgements have been seen as a setback to this legislation. There has been a marked shift in judicial stance towards this issue, which is being highlighted in this paper.

Contract Labour in India represents a system of hiring people through middlemen, i.e. contractors, who are informal hiring agencies, by employers in both the public and private sector of the industry. This system of hiring is an ancient system, prevalent since colonial rule in India. Indentured labour was contract labour, who worked to pay off a debt or advance paid to them or their families. Modern industry introduced a system of hiring that was transparent and dignified, being based on skills rather than bondage. However, in the area of unskilled labour there continued a practice of hiring through contractors, which remained unchanged.

The system of contract labour denies workers their status of workmen of the employer and a denial of liability and responsibility by the employer. It

---

* *Assistant Professor, Nalsar University of Law, Hyderabad*

1 The provisions of the Industrial Disputes Act on the scope of the conditions of recruitment, or the definition of an industry, or the industrial adjudicators power to intervene and set aside unfair terminations have all been cited as examples of reading into the Act rights that improved the condition of labour.

2 The legislation was drafted following the recommendations of the National Commission of Labour, which observed that the contract labour system worked to the disadvantage of the employee and recommended that it should be abolished. The Commission was chaired by Justice P.B.Gajendragadkar who gave the judgement in the Standard Vacuum refining Co. of India v. Its workmen and ors. All India Reporter 1960 Supreme Court 948, a decision that influenced the drafting of the provisions of the CLRA

results in uneven benefits at work between those in regular employment and contract workers. It often results in what is termed as disguised employment, where the employer can deny that the worker is in a relationship of employment.

This system of contract labour is now being promoted actively as the simple solution to all labour 'problems', i.e. problems of unionization, demands for benefits and responsibilities at the workplace, complete control over recruitment and removal, profits linked to wages, in short all legal protection at the workplace. This system till now a feature of unskilled labour is now becoming a feature of employment across the board with contract workers replacing a regular workforce reaching a situation of permanent temporary workers or workplaces and industries with no workers. Contract workers are now commonly seen in government departments, universities even, where the work is often perennial and continuous in nature.

This paper is examining judicial response to the issue in the background of two cases of the Supreme Court, the judgement in the SAIL case[3] and the judgement in State of Karnataka vs.Umadevi[4].

The SAIL Judgement:

The decision of a Constitutional Bench in this case was deciding on the validity of an earlier three judge bench decision rendered in Air India Statutory Corporation v. United Labour Union and others[5]. The case reached the Supreme Court on appeal from the decisions of various High Courts, which had given judgements based on the Air India decision.

The issue was whether the Contract Labour (Regulation and Abolition) Act, 1970 envisaged the automatic absorption of contract labourers as regular employees on issuance of a Notification prohibiting Contract Labour.

The Air India case was a decision based on a petition to enforce a notification issued in 1976 prohibiting "employment of contract labour on and from December 9, 1976 for sweeping, cleaning, dusting and watching of buildings owned or occupied by the establishments in respect of which the appropriate Government under the said Act is the Central Government". The petitioners brought to the notice of the Court the fact that the notification was not enforced till 1992 and asked for directions to enforce the notification and absorb the workers into the establishment.

---

3 *Steel Authority of India v. National Union Water Front Workers*, LLJ 2001 SC 2394. AIR 2006, SC 1806.

5. LLJ 1997 SC 1806

The Court in this case held that the term appropriate government must be understood in the light of the development of law under Article 12 of the Constitution of India and a public law interpretation is the appropriate principle of construction. Holding that the worker had a fundamental right to work, the Court held that meaningful right to life springs from continued work to earn their livelihood. In effect, the Court held that the right to employment, therefore, is an integral facet of the right to life. The contract labour once a prohibition notification was issued were entitled to be absorbed in the establishment.

While overruling this decision the constitutional bench in SAIL held

> *"We are afraid we cannot accept the contention that in construing that expression or for that matter any of the provisions of the CLRA Act, the principle of literal interpretation has to be discarded as it represents common law approach applicable only to private law field and has no relevance when tested on the anvil of Article 14, and instead the principle of public law interpretation should be adopted."*

Thus while Air India held that the CLRA must be read in the light of Fundamental Rights, Directive Principles of State Policy and particularly the Right to Equality the SAIL case proceeded almost entirely on the statute itself holding:

> *"Of course, the preamble to the Constitution is the lodestar and guides those who find themselves in a grey area while dealing with its provisions. It is now well settled that in interpreting a beneficial legislation enacted to give effect to a directive principle of the State policy, which is otherwise constitutionally valid, the consideration of the Court cannot be divorced from these objectives. In a case of ambiguity in the language of a beneficial labour legislation, the Courts have to resolve the quandary in favour of conferment of, rather than denial of, a benefit on the Labour the Legislature but without re-writing and/or doing violence to the provisions of the enactment."*

The Court then concluded that the CLRA only provided for prohibition of contract labour and not for their absorption in the establishment.

The SAIL judgement does justice to the principles of statutory interpretation and holds that violence must not be done to clear statutory provisions. The Court felt that when the legislature is totally silent on the consequences of prohibition of contract labour, solutions must not be provided for by judiciary.

The judgement if faultless in its interpretation that when statutory remedies are provided there must not be any other remedy added on however fails in another principle of statutory interpretation that the legislation must be interpreted to prevent the mischief that it was meant to address. If the CLRA was enacted to address the issue of prohibition of contract labour and the legislation is flouted by the State itself in total defiance of the Law, then must the Court interpret it to serve the needs of contract labour or interpret it in a way that no worker would want the prohibition which must entail loss of employment is one of the questions this decision raises. In order to understand the judgement a little better a brief mention of the Contract labour (Regulation and Abolition) Act, 1970 is important.

The Contract Labour (Regulation and Abolition) Act, 1970 was drafted following the decision in the case of Standard Vacuum Refining Co. of India v. its workmen and Ors[6], and by section 10 of the Act provided for prohibition of contract labour and its regulation. It does not provide specifically for the absorption of the contract labour once it has been abolished.

In the Standard Vacuum case the Court laid down the principle that

> *"In a given case, the decision should rest not merely on theoretical or abstract objections to contract labour but also on the terms and conditions on which contract labour is employed".*

Following this reasoning and finding that the workers were treated unfairly the Court upheld the tribunals order prohibiting the use of contract labour and set up a scheme for their regularization.

Thus, the three judgments in Standard Vacuum, Air India and SAIL reflect three approaches to an issue, one to judge a situation on its facts and in case it was on observable fact that there were discriminatory working conditions then contract labour would need to be interfered with by an adjudicator, without any reference to constitutional or fundamental rights. The other approach as demonstrated in Air India was to judge a situation in the light of constitutional obligations and provide remedies that were appropriate and completely within the jurisdiction of a court to do 'complete justice'. The SAIL case rejects both approaches and favours one which gives effect to the letter of the legislature.

Principles emerging from the cases:

The value emerging from the SAIL decision is that the role for judges is to interpret statutes as dealing with a given situation completely with little role

6 AIR 1960 SC 948.

for judges to be creative in dealing with disputes. The role of a judge would be a mechanical one to give effect to the law as it appears. Further, the impact of the judgement on entitlements, or on the capacity of the statute to address the situation competently seems to be beyond the role of the adjudicator.

One of the arguments made in the SAIL case is worth examining especially since it has been reflected in the following case of Umadevi. The argument made against the automatic absorption of contract workers was that such absorption would violate statutory service rules. It was argued by the Solicitor General that in every government company/establishment which is an instrumentality of the State there are service rules governing the appointment of staff providing among other things for equality of opportunity to all aspirants for posts in such establishments, calling for candidates from the employment exchange and the reservation in favour of Scheduled Castes/Scheduled Tribes/ Other Backward Classes, so a direction by the Court to absorb contract labour enbloc could be complied with only in breach of the statutory service rules. The Court agreed with and upheld this argument.

It is interesting that the Court did not consider the engagement of contract labour in the first instance to be violative of the statutory service rules depriving not only contract labour but also all others equal opportunities for employment. It may be worth examining whether the Government and its instrumentalities in engaging contract labour for several years violating the service rules by avoiding regular employment is an illegality or to direct absorption of persons who have anyway put in several years of service would be perpetuating an illegality.

It is also worth examining the role of the state in the use and the perpetuation of contract labour. The public sector, which has the obligation to provide employment on fair and decent terms to all sections of society, is the largest user of contract labour. The inequities in terms of employment of contract labour and regular labour are disturbing. It has been brought before the Hon'ble Supreme Court in several cases, of contract labour not being paid a minimum wage[7] . In cases of contract labour, there have been instances of persons working for as long as twenty years in the same establishment and the existence of a contractor is only a device to deny entitlements. In none of the cases, has a serious note been taken about the role of the state in abolishing contract labour, or on casting special obligations on a state instrumentality. The only reference to state obligation to provide equal opportunities is made in an effort to stall the absorption of contract labour. No undertaking was ever asked nor was it given that the state will ensure that contract labour would be abolished in its

7 *Catering Cleaners of Southern Railways v. UOI*

establishments, or that action would be taken to ensure that contract labour where used, will not be subjected to discriminatory conditions of employment.

Following the decision in the SAIL case, the recommendations of the Second National Commission on Labour, which submitted its report in 2002, refused to recommend the absorption of contract workers on an order of prohibition. It is important to note here that in case of statutes for other vulnerable groups like child labour, abolition of manual scavenging and bonded labour there is an obligation to rehabilitate the workers once their employment is prohibited. A legislation like the CLRA which is openly flouted must have stringent measures against its violation. The employer must not be allowed to use and disengage labour at will, without paying attention to minimum conditions of work. This is only introducing a hire and fire policy into labour law, which has never been the intention of legislation. To introduce such a measure, in a back handed way by engaging contract labour is a fraud on the Constitution.

The reasoning in the SAIL case also finds a resonance in the case of Uma Devi, which is discussed below. If the SAIL case used a private law interpretation, the Uma Devi case uses a public law interpretation to arrive at the same result.

The Uma Devi case

The case of Secretary State of Karnataka and ors v. Umadevi and ors[8] restated the law on an issue closely connected to the contract labour that is of contractual workers with the State. The petition was brought before the constitutional bench following conflicting decisions of the Supreme Court and various High Courts, on the issue of regularization of workers who had put in several years of service with the State but who were neither paid on par with regular workers nor were they receiving any benefits from the state. The petition was argued on the basis of Article 14 of the Constitution guaranteeing equal treatment and Article 16 which provides for equal opportunities in employment, alleging that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a long period.

It was also contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. In a country like India and unequal bargaining power between the workers and the employer-State, it would also be violative of A.21 to not regularize their services. The employees were relying on an earlier decision of the Supreme Court in State of Haryana v. Piara Singh[9], which had held that:

8 AIR 2006 SC 1806
9 MANU/SC/0417/1992

> *"The main concern of the Court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of A. 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer."*

The Court then proceeded to lay down that though the preferred route of recruitment was through the prescribed agency, but when exigencies of administration called for adhoc or temporary appointments, these appointments must also be made as far as possible from employment exchanges, and unqualified persons ought to be appointed only when qualified persons are not available and the case for regularization must be considered if the employee is eligible, qualified and the appointment does not run counter to the reservation policy of the State.

This position of Piara Singh was strongly disagreed with by the Court in Umadevi holding that this can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. The Court said that they would not grant a relief, which would amount to perpetuating an illegality. Going further, the Court also said that it could not impose a total embargo on such casual or temporary employment. The Court overruled the arguments on the basis of Article 14 and 21 contending that in the name of individualizing justice, the Court cannot close its eyes to the constitutional scheme and the right of the numerous as against the few who are before the Court.

Regularising workers who have put in work for several years and there is no sign that the work is at an end, does not have to be seen as a way of perpetuating an illegality but should be seen in the light of an unjust enrichment, and of the state being a responsible employer, taking responsibility for its delays that forced an employee in a temporary position without opportunities to permanent employment, neither for that particular employee nor for any other. Not to notify vacancies and using temporary workers is itself a violation of the constitutional obligation to offer equal employment opportunity. This should not be compounded with the right to summarily reject their demands without an undertaking from the State that this state of affairs will not be allowed to continue. The Court could have done complete justice by regularizing the services of workers who have put in several years of work and to warn the State that in case it in unable to notify vacancies and open recruitment opportunities, the Court is compelled to uphold

the rights of persons whom the state has taken advantage of.

It is clearly unethical to employ persons for work that is not temporary. This must be case for all establishments. There can be no justification for permanent temporary workers especially when they are discriminated against in terms of wages and benefits. The State being a model employer not oriented towards profit, must take greater responsibility of the ensuring that there is no illegality or deliberate flouting of the constitutional scheme. It cannot penalize those who are in position to set out their terms of employment. The reservation policy cannot be used to perpetuate an illegality. There must be a maximum period for which a person may be kept in a temporary position. The employee cannot be held liable for the illegal action of the appointing authority.

Role for judicial activism

A conflict of interests is a phenomena that Courts have to address all the time. The Supreme Court while evaluating interests has many choices that it may take. An interesting range of options have been set out by Prof. Srivastava which are discussed here[10] .Before an evaluation of interests is undertaken it is important to identify the interests that conflict and decisions could be taken which adopt a theory of review that make little difference to the benefits and disadvantages of statutes and could decide on a net balance of social benefits over disadvantages. Alternatively the Court could simply ask whether the government's choice is reasonable, or whether there is public benefit in the action taken. The fourth method could be for the Court to rely on some hierarchy of values or norms derived from the constitution.

These choices also represent different theories of law. The methods given above do not seem to reflect the need to judge on the basis of a vision for the law, which can transcend statutory limitations and do justice that the situation demands. The factoring in of social and lived realities of the parties before the Court must necessarily give way to a hierarchy of norms.

Vision for the law

The process of recruitment often said to be one of the indicators of the employee-employer relationship, is an indicator of the extent of democracy at the workplace. When the offering of employment is in terms of a gratuitous appointment, liable to be terminated at will, liable to be continued on terms that are non-negotiable and non amenable to the jurisdiction of any law does not hold any promise of any legal protection at the workplace.

10. Suresh Srivastava, "Constitutional Protection to weaker and disadvantaged section of Labour", JILI, 2000,Vol.42 2-4.

The decision of the appropriate government to abolish contract labour under the CLRA is also a non transparent decision, not amenable to judicial review. The fact that exploitation is not specifically factored in has made it easy to write out the discourse on discrimination and exploitation from understanding contract labour.

A Deductive method used by the Court to look at legislation or to look for legal basis for rights without any reference to the exploitative nature of the practice also means that there is no reading in of remedies. Without the general theory on rights at work clearly enunciated the location of various rights, especially conflicting rights becomes difficult.

The decisions in SAIL and Umadevi raise the question of whether remedies exist where the rights have not been specifically laid down? The use of discrimination law and fundamental rights jurisprudence has been expressly excluded in one and in the other it has been held up against the many who may have their rights upheld against the few.

The followup of the decision in SAIL has been that in decisions following it, the Courts have refused to look at facts and circumstances of such cases, or examine violation of Fundamental Rights. Judicial discipline in following precedent can result in non-enforceability of fundamental rights at work[11] .

The SAIL Case has restated the law on contact labour bringing in, ostensibly closer to the Standard Vacuum case, but with results that are quite different. Further, the decision in that case followed by the First National Commission on Labour resulted in the enactment of the CLRA. But the reverse has followed the SAIL judgement. The Second National Commission set up after this decision has proposed a major watering down of the legislation and refuses to suggest the absorption of workers on the ground that the SAIL decision has laid down that absorption is not provided for in the statute, without addressing fundamental flaws in the legislation[12] . It is surprising to note that the commission seems to be accepting the logic of globalization and is finding ways to legitimize it.

Conclusion:

The system of contract labour brings to fore the issue of "invisibilisation" of workers. Contract labour is dismissed as the responsibility of middle men and not the responsibility of the employer. This not only invisibilises workers but

11 See *Municipal Corporation of Greater Bombay v. K. V. Shramik Sangh* and ors AIR 2002 SC 1815,where in the workers claimed that they were denied minimum wages, and basic amenities and facilities required for disposal of solid wastes and the decision hinged not on violation of fundamental rights but on whether the workers were workers of contractors or of the Municipal Corporation.

12 Report of the Second National Commission on Labour, Chapter VI p.364.

the work done by them is also dismissed as peripheral, not integral or as non germane to the work of the establishment. It introduces a hierarchy of workers and work that is important, and casts the responsibility of discriminatory work conditions on the persons carrying on work designated as incidental. Denial of entitlements at work as not seen as denial of the right to life and equality or dignity but rather as a condition of employment. The judicial interpretation of the control test to identify employee-employer relationship has further perpetuated the distinctions between regular and contract workers.

The results of a particular vision for the law and the Constitution are before us. It is important to now understand the process by which the decisions are reached in order to be able to influence them to do justice. It is far easier to simply say that a particular judgement is good or bad, but much more difficult is the job of understanding the values that they seem to represent and to be able to craft a set of values that can be alternatively argued. The first step in this direction is to be able to go beyond the instant facts of the case and to see the impact that the Judgements have in the lives of the people that are affected. If Law making is seen as a social function that is responsive to the needs of different sections of society and is seen as an ameliorative act it must accept social responsibility for the failure to address issues completely.

THE PROBLEM OF CONSUMER EXPLOITATION IN INDIAN SOCIETY: NEED FOR SPREADING CONSUMER AWARENESS AND EDUCATION*

*Pooja Chugh***

INTRODUCTION

In the Indian society, consumers have been the victims of exploitation from the very beginning. And governments now and then have been passing laws for their protection. Whether we see the pre-independence period or we see the post-independence period, interests of the consumers have certainly been watched both by the law makers as well as by the policy planners. There is a long list of laws that have been enacted by the governments and that try to protect the consumers' interests. However, the main problem with all these laws is that they are either very much complicated or the procedure to get justice through the medium of these laws is too much cumbersome. The end result is that an ordinary individual either does not know the provisions of these complicated laws or he is not interested to enter into any sort of cumbersome process of litigation to seek and to get justice. Therefore, the end result is nothing except that India can boost that it has got the number of as well as some of the finest pieces of legislation. However, when the question of their applicability and application comes, we have to hang our face in shame because the ordinary consumer for whom these laws have been enacted remains oblivious of their presence, and if he is aware about these laws, he either does not have time, or money, or resources, or inclination to get the benefit of these laws. So the exploitation of consumers goes on non-stop and never ending. So in order to get the real benefit of all these pieces of legislation, consumers have to be aware of these laws, they have to be aware of their rights, they should be ready to assert their rights and above all consumer organisations should play their part in spreading consumer awareness and encourage the consumers to highlight their grievances in case they become victims of exploitation at the hands of the traders or even at the hands of the unethical professionals also.

PURPOSE OF THE PRESENT PAPER

In the present paper, I have expressed very simple ideas that if we really

---

* Paper Contributed at the 'National Seminar on Consumer Protection Through Mass Awareness - Challenges and Opportunities in the Global Era' organised by the D.A.V. College, Malout on 26-27 November 2005. The present paper has been written by me under the supervision of my esteemed teacher Dr. Gurjeet Singh, Professor and Formerly Head of Law Department, Guru Nanak Dev University. I am highly thankful to him for his valuable guidance.

** Lecturer in Law, Lyalpur Khalsa College for Women, Jalandhar.

want the consumers to get the benefit of these laws and if we really want the consumers to protect themselves in the market place against the evil and unethical practices of the traders, sellers, businessmen, and now a days, even exploiting professionals, they have to have a full knowledge of their rights and even responsibilities. Only then we can achieve the real Consumer Protection Oriented Society. More education would lead to more awareness and more awareness would lead to more assertiveness and more assertiveness would lead to more protection.

LACK OF AWARNESS AMONGST THE CONSUMERS

As a matter of fact, even the highly educated and sophisticated and well learned people are not aware of their Consumer Rights. By now, we should be fully aware of the fact that the Indian Parliament had passed the Consumer Protection Act, 1986[1] with the objective of promoting and protecting consumers' interests and to provide them the easy access to justice. With the passing of this law, there was a new phase of consumer protection that could be seen in the Indian market place. The market place, instead of being a seller's place gradually started turning into the buyers place and an era of 'Consumer Sovereignty' came to be witnessed. This was a big achievement of the consumer activists and consumer organisations who had been pleading for a separate Consumer Protection Law for the promotion and protection of consumers interests. The Consumer Protection Act worked effectively at the earlier stages, but once the lawyers started appearing before the Consumer Forums, these Forums started behaving like the civil courts where for every major and minor issue, adjournment is asked for and granted happily.

The real problem is neither the defective functioning of the Consumer Protections Forums and Commissions nor the appearance of lawyers before these Forums. The real problem is with the consumers themselves. We as consumers are absolutely not aware of our rights. The Consumer Protection Act, 1986 provides us certain rights. These included: Right to Safety; The Right to Information; The Right to be heard; The Right to be redressed; The Right to Consumer Education etc. However, how many of use are really aware of these consumer rights. Not many of us. And this is the problem why we get exploited everywhere. If we are aware of these rights, we shall not be exploited the way we have been exploited uptil now. Even if some of us are or might be aware of our rights, but we are not ready to claim those rights. So they stay on the pages of the books only. In my humble opinion, the problem of consumer exploitation in the Indian society is due to illiteracy, ignorance, lack of awareness and lastly lack of willingness to assert our rights.

1 Act No. 68 of 1986.

NEED FOR EFFECTIVE CONSUMER EDUCATION AND GREATER AWARENESS ABOUT CONSUMER RIGHTS AND FOR ASSERTIVENESS

If we go by the experience of the consumers in the developed countries of the world, we can reach the inescapable conclusion that the more the people are aware and more the people are ready to assert about their rights, the lesser is their exploitation. We have seen that with the spread of education, literacy and awareness, consumers are now gradually becoming aware. However, my personal argument is that just by becoming aware, nothing much is going to be achieved. The awareness has to be followed and rather coupled with the assertiveness. For example, if a trader exploits the consumer in the market place, and consumer argues with the trader about the excessive price charged by him or for the defective product supplied by him, nothing is going to change, unless the consumer goes and knocks at the door of the Consumer Protection Agency in case the trader does not redress his genuine grievances. It is for the promotion and protection of the genuine interests of the consumers that the Consumer Protection Act, 1986 has been passed.

When we talk about the education and awareness of the consumers, we have to highlight the role that the Consumer Voluntary Organisations can play in the society. This is absolutely true that the Consumer Protection Act, 1986 could be passed only due to the untiring efforts and strongest consumer protection crusade launched by the Consumer Protection Organisations all over the country. There may be so many consumer organisations, but the role of the organisations like the Consumer Education and Research Society, Ahmedabad, Consumer Guidance Society of India, Bombay, Consumer Action Group and Common Cause, Delhi and Consumer Unity and Trust Society, Jaipur and Calcutta has certainly been very very appreciable. They have not only been guiding the consumers about their rights, but most of these organisations are also ready to approach and litigate on behalf of the consumers where their interests as collective members of the society are affected. We as consumers must not only appreciate, but also support these organisations so that they could continue their crusade against the exploitation of the consumers interests.

CONCLUSION

If we want to attain a Consumer Protection Oriented Society, then we have to be very well aware of our rights. With the awareness about our rights, we as consumers can go ahead to assert those rights. With the passing of the Consumer Protection Act, 1986, now even the traders and businessmen have become fully conscious of their responsibilities. They have realised the a modern educated consumer is no more ready to become the victim of unending

exploitation in the market place. As many consumers have dragged businessmen to the Consumer Courts, they are now afraid in selling defective products. But yes, this is only in case of very highly educated and in fact the assertive consumers. For the rest of us, the business community is the same. Their aim is only to make money at the cost of exploitation of innocent consumers by way of providing defective and adulterated products, charging excessive prices, creating artificial scarcities, refusing to provide after-sale service and all the other thing.

REFERENCES

Avtar Singh, The Law of Consumer Protection, Eastern Book Co., Lucknow, 2004.

D.N. Saraf, The Law of Consumer Protection, First Edition, N.M. Tripathy, Bombay 1990..

Gurjeet Singh, The Law of Consumer Protection: Justice Within Reach, Deep and Deep Publications, 1996.

Gurjeet Singh, "Consumer Rights Under the Consumer Protection Act, 1986: A Critique", The Consumer Protection and Trade Practices Journal, Vol. 2, No. 6, June 1994, pp. 129-136.

THE MOTOR VEHICLES ACT 1988 AND VEHICULAR POLLUTION - NEED FOR LEGAL OVERHAUL

*Gitanjali Nain Gill**

INTRODUCTION

The pace of social and economic development of any society is dependent upon the mobility of men and materials. The transportation, therefore, assumes an important role in the development of societies. Amongst the various modes of transport, road transport has been, is and will remain vital mode as it enables access even to the remotest area.

Indian economy is heavily road dependent accounting for 55% of freight traffic and 80% of passenger traffic. These percentage are likely to increase in future. The road transport comprises of motor vehicles, which in its simplest form is a heat engine, transforming the chemical energy of fuel into thermal energy to produce mechanical work. However, just as motor vehicles, are the symbol of a modern technological society, they are major sources of air pollution during the usage phase[1]. Hence, the need to legally address the vehicular air pollution problems.

The laws in respect of mechanically propelled vehicles can be made both by the Central Government as well as the State Government under Entry 35 of the Concurrent List. Placement of the relevant entry in the Concurrent List enables the centre to established uniformity across the country and maintain free flow of traffic. At the same time, it enables the State Government to ensure better implementation and to enact laws wherever considered necessary depending on the local conditions.

In the exercise of its powers the Central Government has consolidated and amended the law relating to motor vehicles under the Motor Vehicles Act, 1988 (hereinafter referred as MV Act). The MV Act has been amended several times to keep it up to date taking into account[2] -

(i) the fast increasing number of both commercial and personal vehicles in the country;

(ii) the need for encouraging adoption of higher technology in automotive sector;

(iii) the greater flow of passenger and freight with the least impediments so

* Dr. Gitanjali Nain Gill, Campus Law Centre, Faculty of Law, University of Delhi, Delhi – 7.

1 Centre for Science and Environment, *Green Rating Project - Environmental Rating of Indian Automobile Sector* 1 (2001). Also see, Section 2(2b) Motor Vehicles Act 1988.

2 A.S. Bhatnagar, "How to claim, contest and motor accident compensation" 3 (1995).

that islands of isolation are not created leading to regional or local imbalances;

(iv) concern for road safety standards and pollution control measures, standards for transportation of hazardous and explosive materials;

(v) simplification of procedure and policy liberalization for private sector operation ion the road transport field; and

(vi) need for effective ways of tracking down traffic offenders.

Placed in nutshell, the legislative policy relating to registration, grant of driving licences, road safety, maintenance of motor vehicles, standards for pollution, control of traffic have been spelt out in the Act.

However, the scope of this paper is confined to the overall effect of vehicular emissions spewed out by the vehicles and adequacy of the existing legal provisions under the MV Act to control the same in order to protect the environment not only for the present but also future generation.

CARCINOGENIC VEHICULAR EMISSIONS - A PRICE FOR INCREASED MOTORISATION

Urbanization offers both an opportunities and challenges for national development. With such developmental pace, transport becomes an important requirement in urban centre. Higher incomes, expanding cities and the proliferation of employment centres have increased the demand for motorized transport, resulting in disproportionately high concentration of vehicles in urban centres. Motorization in turn manifests high mobility pattern chugging out toxic vehicular emission which tend to be geographically concentrated. These emissions are at street level where people live and work and are difficult to disperse.

The emissions consists mainly of carbon monoxide, hydrocarbons, oxides of nitrogen, sulphur, partial oxides of aldehyde, particulate matter which have proven to be harmful to human body[3] . Toxic effects of vehicular emission can lead to deleterious effects, for instance - respiratory and cardiac diseases, mental health problems, non-developmental and malfunctioning of nervous and reproductive systems as summarised in below mentioned Table 1[4].

Thus, the vehicles have become a licence to kill people. India is reeling under deteriorated air quality with considerable levels of mortality and morbidity[5] .

3 *Supra* note 1 at 3-4.

4 A.S. Subramanian, "Fuelled pollution-A question of quality" *Survey of the Environment, The Hindu* 123 (2000).

5 Kalpana Jain, "Dirty Delhi makes you breathless" *The Times of India New Delhi* (July 22, 1999); Radhika Srivastava, "Pollution, Population keeps TB cases on the rise" *The Times of India New Delhi* (January 13, 2001).

Table 1 : Types of Pollutants and Their Effects

Pollutant	Major source	Health effect
Carbon monoxide	All gasoline vehicles - more from those without a catalytic converter	Highest affinity exhibited by haemoglobin, reduces the oxygen carrying ability of blood and hence increases risk for people with heart disease. Affects reflexes and thinking. Serious combined effect with other pollutants.
(Unburnt or partially burnt) Hydrocarbons (HC)	Major contributors are petrol vehicles without cat. converter, two-stroke engines and fuel pump stations (Spillage)	High irritant to eyes. Affects respiratory system. Suspected carcinogenic effect depending on presence of benzene in fuel, converted aromatics and pyro-synthesis of PAH during combustion.
Nitrogen Oxides (NO2)	More from diesel vehicles and less from petrol vehicles.	Affects respiratory system due to acidic effect. Aggravates asthma and irritant to eyes. When combined with HC and other pollutants can be more harmful.
Particulate matter	Mostly from diesel fuelled vehicles and oil burning in two-stroke engines. Very fine and low in petrol fuelled vehicles.	Affects respiratory system more seriously. When combined with SO2 irritates and impairs breathing. Diesel exhaust particulate contains PHA which are likely to be carcinogenic to human beings.
Lead	Petrol vehicles- Basically from lead in fuel	Affects circulatory, reproductive and nervous system - mental functioning of children - and increases risk to people with high blood pressure. Affects respiratory system.
Sulphur di-oxide (SO2)	Both petrol and diesel-basically from the sulphur level in fuel.	Directly affects the respiratory system. Very high irritant. When combined with particulate matter, affects people with chronic bronchial and heart patients.
Benzene	Mostly from fuel directly. Occasional formation in combustion or conversion of aromatics.	Known carcinogen. Direct health effect on continued exposure. Reproductive problems and birth defects are likely.
Ozone	Mostly from HC and NOx	Irritation to respiratory organs and eyes. Decreases the resistance power to infections. Aggravates illness.

LEGISLATIVE REGIME (WEAK AND NEBULOUS)

Till 1990s, the Indian legislature remained almost blind to the air pollution for mobile sources like motor vehicles. Fragmented regulations to deal with vehicular emissions came into force only in 1990s[6] . The legislations addressing the vehicular air pollution problem are the

- Air (Prevention and Control of Pollution) Act 1981 (hereinafter referred as Air Act),
- Environment (Protection) Act 1986 (hereinafter referred as EP Act) and
- Motor Vehicles Act 1988 (hereinafter referred as MV Act).

However, the *Air Act*[7] and *EP Act*[8] are statutes only on papers as they are not strong enough to play a precautionary or a corrective role to control the problem of vehicular emission. In practice, the Pollution Control Boards or the Ministry of Environment and Forests have never notified the emission standards for vehicles. These bodies are mere advisers. It is, infact, the Ministry of Surface Transport under the MV Act which notifies the standards besides implementing the same[9]. The standards are generally re-notified under the Air Act and EP Act.

The MV Act though loosely worded, is the principal legislation that regulates emissions from vehicles. Two kinds of approaches - primary and secondary - are embodied under the Act to arrest the deteriorating air quality.

The primary approach deals with the mandatory requirements of new vehicles whereas the secondary approach concentrates on the maintenance of in-use vehicles. Rule-making power is given to Central and State Government for the new and in-use vehicles, in order to effectuate the purpose of the Act, under the Central Motor Vehicle Rules 1989 (hereinafter referred as CMV Rules). Both these approaches are dealt in detail as under-

---

6 Anil Agarwal, Anju Sharma and Anumita Roy Chowdhary, *State of India's Environment: National Overview: The Citizens' Fifth Report Part 1* 195 (1999); Shyam Divan *et al*., *Environmental Law and Policy in India* 269-271 (2001).

7 The Air Act 1981, a lex specialis, mainly deals with preventing and controlling industrial pollution. Section 20 of the Act, is the lone section, that talks of emissions from vehicles by empowering the State Government to give instructions to the concerned authority in charge of registration of motor vehicles under the MV Act 1988 for ensuring standards for emission from motor vehicles and the authority is obliged to comply with such instructions.

8 The EP Act 1986, under Sections 3 and 6 empowers the Central Government to take all such measures as are necessary for purpose of protecting and improving the quality of environment. Though, a sweeping power, it is necessary for the Central Government to take up environmental protection measures which includes laying down emission standards from new manufactured products like motor vehicles.

9 Anil Aggarwal, "Hammer of Thor" *Down to Earth* 5 (April 30, 2000).

Primary Approach

For the new vehicles, Section 110 of the MV Act empowers the Central Government to make rules with respect to –

(a) Standards for emission of air pollutants (known as the mass emission standards);
(b) Installation of catalytic converters in class of vehicles to be prescribed; and
(c) Warranty after sale of service and norms thereof.

Mass emission standards refers to gm/km of pollutants emitted by the vehicle, the composited pollutants in the emitted gases should be within the prescribed limit under the law both for petrol and diesel driven vehicles[10] . These standards are infact, technology forcing deadlines to compel the manufacturers to upgrade their technology to meet these norms by a particular date. The mass emission standards were notified under the CMV Rules by Ministry of Surface (Transport wing) for the first time in 1991[11], which were progressively revised in 1996[12] and 2000[13].

The setting of mass emission standards is not a fool proof exercise as it is a more based on relative experience and not absolute targets. Parameters such as pollution levels, availability of pollution control technology, technological capability of automobile industry and experiences with pollution control in other countries become the prime considerations for setting up emission standards[14] . The below mentioned Table 2[15] indicates the emission standards for 1991, 1996 and 2000 according to type approval test[16] and conformity of production test[17] -

In addition, the Act lays down emission norms for vehicles fitted with original equipments running on alternate clean fuels i.e. Compressed Natural Gas (CNG) and Liquefied Petroleum Gas (LPG), as a result of stringent directions by apex court in M.C. Mehta vs. Union of India[18] . The original equipment vehicles must meet the prevailing emission norms i.e. Bharat II norms.

---

10 Anil Aggarwal, Anju Sharma and Anumita Roy Chowdhary, *Slow Murder – The Deadly Story of Vehicular Pollution in India* 50 (1996).
11 CMV Rule 115(3).
12 *Id.* 115(9).
13 *Ibid.* 115(9) and (10).
14 Supra note 10 at 51.
15 *Ibid.* at 53.
16 Type approval test means where standards are set according to the make and reference weight of the vehicles for two, three and four wheeler vehicles.
17 Conformity of production test implies where a vehicle is randomly selected by the testing agency from mass scale production in factories.
18 1998(4) SCALE(SP) 7.

Table 2 : Progressive revision of emission standards for Indian vehicles (1991-2000)

Types of Vehicles and pollutants	April 1991 standard	April 1996 standard	April 2000 standard
Petrol vehicles: 2 wheelers			
CO (gm/km)	12-30	4.5	2.0
HC (gm/km)	8-12	-	-
HC + NOx (gm/km)	-	3.6	1.5
Petrol vehicles: 3 wheelers			
CO (gm/km)	12-30	6.75	4.0
HC (gm/km)	8-12	-	-
HC + NOx (gm/km)	-	5.40	1.5
Petrol vehicles: Cars			
CO (gm/km)	14.3-27.1	8.68-12.40	2.72
HC (gm/km)	2.0-2.9	-	-
HC + NOx (gm/km)	-	3.00-4.36	0.97
Diesel vehicles*			4.5
CO (gm/kmh)	14.0		1.1
HC (gm/kmh)	3.5	11.2	8.0
NOx (gm/kmh)	18.0	2.4	0.36
PM (gm/kwh)	-	14.4	
Diesel vehicles**			
CO (gm/kmh)	14.3-27.1	-	5.0-9.0
HC+NOx (gm/kmh)	2.7-6.9	-	2.0-4.0

* : gross vehicle weight > 3.5 tonnes khw = Kilowatthour
** : gross vehicle weight < 3.5 tonnes gm/km : grammes per kilometer

But with time, fixing of emission standards has been knocked out of its scientific domain and is substituted by politics of norms despite setting of high powered committees on vehicular emission[19]. Lack of transparency, political and economic considerations, no public participation and bureaucratic indifference are often cited as reasons for weak, nebulous and inadequate regulations. For instance, the most serious criticism of 2000 emission regulations was (popularly known as Bharat I and II norms) is the adoption of outdated European emission regulations [EURO1 and EURO II] which Europe had enforced way back in 1992 and 1996[20]. What is the point setting norms which do not aspire to achieve higher targets and make the air quality goal remain

19 For instance, H.B. Mathur Committee (1991); S. Raju Committee for Petrol Vehicles (1995); B.P. Pundir Committee for diesel vehicles (1995).

20 *Supra* note 6 at 194.

elusive? The government has not been proactive in setting stringent emission targets to push the industry to improve technology and as a result the vehicles manufactured emit high level of pollutants even when they are new.

While at one level, emission standards are weak, at another level, technical parameters for measuring mass emission standards have been played around to make them even weaker. Parameters such as warm and cold start emissions[21] and Indian driving cycle[22] have been complex debatable issues. Never ever these issues have been brought before the public for discussion. The automobile industry, right from the beginning, has resisted and even succeeded in delaying the adoption of all those measures which have a significant bearing on reducing actual emission levels. The attributable reason for such an attitude stems from the fact that huge investments have to be made by the concerned industry in upgrading their technology, for which they are not ready. For example, an investment of more than Rs.50,000 crore in technology had to be made by the automobile industry in order to meet the 1996 and 2000 emission norms[23]. Similarly, the recent Mashelkar Report on Auto Fuel Policy[24], while emphasising on stringent emission norms, forces the vehicle manufacturers to further upgrade their technology by making an investment of Rs.25,000 crores in order to meet the Bharat Stage III norms which would come into force in the year 2005.

Fitment of catalytic converter[25] has been made as a mandatory requirement for registration of all four wheeled petrol driven vehicles in four metro cities and other 45 cities of the country[26]. Exhaust emissions of such vehicles are substantially less than that of vehicles not fitted with catalytic converters[27]. Interestingly, the Central Government came out with the said rule only when direction were issued by Supreme Court in M.C. Mehta vs. Union of India[28].

---

21 Warm start refers to the warm conditions of the engine when started whereas cold start refers to engines condition being cold when started.

22 Indian driving cycle means driving cycle that simulates average road conditions such as acceleration, declaration, cruising, idling.

23 *Supra* note 10 at 53.

24 Chetan Chauhan, "All vehicles must meet Bharat II norms by 2003" *The Hindustan Times New Delhi* (January 13, 2002); Radhika Sachdev, "Improving City's pollution standard" *The Hindustan Times New Delhi* (February 4, 2002).

25 A catalytic converter removes the pollutants from the exhaust by reducing or oxidising them. However, in US doubts have been raised about the efficiency of these converters as studies have shown that their use is a growing cause of global warming due to emissions of nitrous oxides, a greenhouse gas, more than 300 times carcinogenic than carbon dioxide.

26 See, The Report of Ministry of Surface Transport, *Annual Report* 12 (1995-96).

27 <*www.delhigovt.nic.in/dept*>, visited on February 20, 2004.

28 1997(4) SCALE(SP) 10.

Emission warranty[29] for vehicles finds a place under section 110(p) of the MV Act. The Central Government has been given the power to make rules in this regard, but till date no rules have been made. However, for the first time, since the year 2001 the automobile industry decided to take the responsibility for emission loads through a warranty for all categories of vehicles including passenger cars, multiutility vehicles, two or three wheelers sold after July 1, 2001 and all commercial vehicles from the date of implementation of Bharat II emission norms[30]. The warranty period of each vehicle category is as follows:

2 wheeler	-	30,000 km or 3 years whichever occurs earlier.
3 wheeler	-	30,000 km or 1 year whichever occurs earlier
Passenger car	-	80,000 km or 3 years whichever occurs earlier.
MUV	-	80,000 km or 3 years whichever occurs earlier.
Commercial vehicle	-	80,000 km or 3 years whichever occurs earlier.

It is hoped that the Government would look into this matter and enact appropriate rules at the earliest.

Secondary Approach

Maintenance of in-use vehicles is the secondary approach for reducing vehicular emissions in order to have beneficial impact on the air quality. The maintenance programme is aimed to be designed to return malfunctioning high emitters to their design specifications. The effectiveness of the industry in performing the appropriate repairs, the accuracy of the test procedures in identifying the high emitters and deterioration rate after maintenance will affect the actual emission reductions[31].

Considering that a large population of vehicles belong to pre-emission control period i.e. prior to 1991 and that a large majority of these vehicles are poorly maintained, it is apparent that these vehicles are gross polluters and need to be tackled on priority for emission abatement. Unless attempts are made to reduce emissions from older vehicles, new vehicles which are only 8 percent of the total vehicular population and are going to be better designed to meet emission standards, will not make much impact[32].

---

29 Emission warranty implies that emission levels of vehicles will not drop below a specified level for certain period of vehicle life or upon certain kilometers.

30 See, The Report of EPCA *Eleventh Report* 3 (January to May 2001).

31 Institute of Public Administration and Teknektron Inc., "Evaluating transportation controls to reduce motor vehicles emissions in major metropolitan areas" quoted in Irving N. Sax, *Industrial Pollution* 345-359 (1974).

32 <*www.siamindia.com/technical/emission.htm*>, visited on September 15, 2003.

Section 109 of the MV Act[33] mandates maintenance of in-use vehicles. Rule-making power is given to Central Government under section 110 of the Act to lay down standards for maintaining the emission of smoke, vapour, sparks, ashes, grit or oil from motor vehicles and maximum allowable limits of their emission coupled with Section 111 of the Act which gives power to the State government to make rules for periodical testing and inspection of vehicles by prescribed authorities and fee to be charged for such a test. Thus, the owner is made responsible for volumetric concentration of gases in the total exhaust measurement of emission for vehicles on road by tailpipe emission tests and pollution under control certificate. The same have been notified under the CMV Rules.

A tailpipery emission test has been laid down under Rule 115(1) in order to ensure that the engine is properly tuned and is not emitting smoke, visible vapour, grit, sparks or oily substances. Every motor vehicle must comply with the following emission standards[34] -

(a) Idling CO (carbon monoxide) emission limit for all four wheeled petrol driven vehicles shall not exceed 3 percent by volume;

(b) Idling CO emission limit for all two and three wheeled petrol driven vehicles shall not exceed 4.5 percent by volume.

The smoke density for all diesel driven vehicles shall not exceed 75 Hartidge Units (full load) and 65 Hartidge units (free acceleration). The same standard have been retained for 1996 and 2000 respectively.

It is submitted that tuning of vehicles is a non-satisfactory test procedure for tailpipe emission of in-use vehicles for two reasons -

(i) Why is the test procedure restricted to CO alone and not for particulate matter or nitrous oxide? The question assumes importance in light of new range of vehicles for which the government is very firm that the new vehicles must meet stringent emission norms of CO, HC and NOx for petrol and diesel vehicles and particulate emissions for diesel vehicles;

(ii) Why is the tail pipe test dealing with pollutants at individual level? Is it not important to take all the pollutants on a comprehensive basis to solve the problem of vehicular pollution?

There is a need to plug in the loophole by amending the law on above-mentioned lines, considering the situation in entirety.

---

33 Section 109: Every motor vehicle shall be … so maintained as to be at all times under the effective control of the person driving the vehicle.

34 CMV Rule 115(2).

Rule 115(7) mandates every motor vehicle to obtain Pollution Under Control Certificate (hereinafter referred as PUC Certificate) for periodical tailpipe testing and inspection of vehicles. After the expiry of a period of one year from the date on which the motor vehicle was first registered, every vehicle shall carry PUC certificate issued by an agency authorized for this purpose by the State Government. The validity of the certificate shall be for six months or any lesser period as may be specified by the State Government from time to time and the certificate shall always be carried in the vehicle and produced on demand by an officer not below the rank of sub-inspector of police or inspector of motor vehicles. A penalty of Rs.1000/- for the first offence and Rs.2000/- for every subsequent offence of violation may be imposed on the owner of motor vehicle found to be not in possession of a valid PUC certificate[35].

The PUC certificate being a statutory and potentially powerful instrument in checking emission levels, no doubt is a good step, but in reality it has failed to make an impact on controlling vehicular pollution due to extremely poor enforcement. The vehicle owners themselves are responsible for such a sorry state of affairs in addition to the enforcing authorities. Getting PUCs by hook or crook has become the aim of vehicle owners, who merely want to avoid paying Rs.1000/- as five. Adjustments are made to the carburetor which regulates the flow of fuel to the engine and makes it difficult to accelerate beyond a point. However, after getting the certificate, vehicle owners can easily change the carburetor settings to the original, which would result in vehicle polluting, just as much as before the check[36].

Many a times several complaints are made that fake certificates are being issued by checking centres on payment of extra money or genuine tests are not carried out. The skepticism expressed in a report prepared by Automobile Association of Upper India (AAIU)[37] , based on its campaign about genuineness of PUCs test in many centres is an eye-opener. AAUI estimated that any pollution test would take at least 2-3 minutes for parking and positioning of the vehicles and another 6 to 8 minutes for testing and adjusting of carburetor. Thus, on an average, each vehicle would take a minimum of 10 minute for the test. Accordingly, only six vehicles could be tested properly per hour. Based on this estimate, the AAUI report commented: "It, therefore, raises doubts about the genuineness of the testing, when more than 100 vehicles are tested by any service station in one day, assuming eight hours of work."

35 *Ibid* 116.

36 *Supra* note 6 at 2000; Saurabh Sinha, "Who Cares about PUC?" *The Times of India New Delhi* (April 4, 2002).

37 Automobile Association of Upper India (AAUI), *Analysis of Random check of vehicles for air pollution* 20 (1995).

Even the enthusiasm of enforcers to check PUC certificate has fizzled out. Infact, checking for seatbelts, number plates and red light violations are the in-things - pollution does not matter any more. Ironically, a report by Delhi Transport Department found out that the number of vehicles checked by pollution team was very poor as it ranged between 2.57 to 5.67 percent between 1994-2001[38].

The general feeling among the public is that these checks are fake, cause harassment and that the difference these checks would make to air pollution would be negligible. In order to make this statutory requirement an effective tool to combat pollution, it is necessary that random checking of PUC certificates should be done by the transport department on regular basis.

Besides this, the MV Act nowhere lays down any other criteria for maintaining the vehicles for cleaner combustion. To that extent, the Act is inadequate and insufficient and needs to be amended in order to include vehicular inspection and maintenance scheme, with written procedures in proper manner. A well-maintained vehicle not only pollutes less but also gives better fuel mileage. Rules relating to proper tuning of the carburetor and lean mixture setting, regular cleaning of air filter, regular checking of ignition system (with special attention to spark plug, plug gap, ignition coil, condenser, leads ignition timing and battery voltage), proper valve tappet clearance, steering and wheel alignment, tyre pressure and wear must be framed for lower pollution levels from the vehicles[39].

Even the supplemental maintenance control strategies in the form of netrofitment[40] or conversion[41] must be a prime parameter for effective inspection and maintenance programme under the Act to arrest vehicular pollution. However, any consideration of the feasibility of a specific retrofit or conversion system must includes a determination of the emission control potential, the population of vehicles to be controlled, installation requirements, system reliability, cost of implementation and cost of vehicle owner[42].

In the year 2000-01 to fulfil its constitutional commitment of improving air quality, the government notified rules relating to emission standards for the

38 Chetan Chauhan, "Vehicular Pollution unabated despite CNG: A Report" *The Hindustan Times, New Delhi* (December 26, 2001).

39 *Supra* notes 27 and 31.

40 A retrofit method can be defined as an application of a device or system that may be added to a motor vehicle. For instance, fitting of CNG conversion kit on existing in-use gasoline and diesel vehicles.

41 Conversion implies any modification or adjustment to be made to the engine of motor vehicle. For instance, exchange of old diesel engine for a new CNG engine on existing in-use diesel vehicles.

42 *Supra* note 31.

retrofitted and converted in use vehicles running on alternate clean fuels i.e. CNG[43] and LPG[44]. The rules provide that the in-use retrofitted and converted vehicles (gasoline and diesel) with CNG kit and retrofitted vehicles (gasoline) with LPG kit must meet the emission norms as applicable to the prevailing norms corresponding to the year of manufacture of vehicles.

Here is the catch The CNG/LPG norms are fundamentally flawed and complete eye wash as they dilute the very purpose of curbing vehicular pollution. The rule states that emission standards should correspond to the year of manufacture (emphasis added). Take for instance a situation where vehicle was manufactured in 1991. If the vehicle is changed to CNG/LPG kit in today's date, it would mean that it should meet the 1991 standard, which by all parameters was very inadequate and weak. Another situation may be if the vehicle was manufactured in 1985 and is changed to alternate clean fuel kits in today's time. A plausible question may come up as to which standard becomes applicable? The question assumes importance as prior to 1991 there were no emission standards laid down for the vehicles. In order to find solutions to these kind of situations, there is a need to change the rule by inserting the clause that emission standards must correspond to the year of retrofitment/conversion or the prevailing norms, whichever is later considering the fact that India has a legacy of grossly polluted personalized vintage vehicles.

CONCLUSION

Against this backdrop, the legislative measures in the form of command and control approach for combating vehicular pollution under the MV Act have been circumvented and completely ignored leading to deterioration of air quality in the last decade. A few fragmented laws cannot help to make the air any cleaner. There is an urgent need to plug in the shortcomings in law by adopting an integrated and holistic approach encompassing both short and long term measures to improve the air quality.

For new vehicles, the government should be proactive in setting stringent emission targets in a transparent manner by allowing a public debate to asses their adequacy for protecting and improving the atmosphere. The automobile industry must be pushed to improve their technology for different models of vehicles, instead of buying time and delaying the deadlines of emission standards. Similarly, the rules relating to emission warranty for longer period and mileage must be seriously taken up by the government, thereby placing responsibility on the vehicle manufacturer to control emissions for major period of vehicle life.

---

43 CMV Rule 115B (The Central Motor Vehicles (4th Amendment) Rules, 2000).

44 *Ibid*. 115C (The Central Motor Vehicles (3rd Amendment) Rules, 2001).

For the in-use vehicles, regular and proper vehicular maintenance programme is the need of hour. It is recognised that emissions performance of vehicles can quickly deteriorate if vehicles are not properly maintained. The legislative regime is scattered, loosely worded and sometimes silent on this aspect and hence a need to update and enact laws. The tailpipery requirement must be amended to include all the carcinogenic pollutants on a comprehensive level and strict emission norms for alternate clean fuel be revamped. The PUC certificate must be implemented in the right earnest in order to solve the problem of vehicular pollution. Even the rules relating to cleaning of engine for cleaner combustion, supplemental strategies must be introduced under the MV Act as mentioned earlier.

No doubt all these measures could mean a higher cost of transportation to individuals and the economy as a whole. But the choice is ours - whether we want to spend more to get clean air or spend still more to fight the illness due to air pollution?

THE MASHELKAR REPORT: A TRAGEDY OF THE COMMONS

Srividhya Ragavan[1]

The end of the year 2005 proved to be disastrous for several Asian countries including India due to the huge impact of the Tsunami. The Mashelkar report, which was released at the end of 2006, makes the Tsunami of the year. When champions of social engineering like Dr. Madhava Menon sign a report that lacks in proper legal analysis and fails to balance legal with social issues, it is time for the red flag to go up. It is what we call as the *Tragedy of the Commons.*

I would like to criticize the report for two main reasons: First, the report lacks appropriate legal analysis or scholarship the superimposing social issues that it sets out to balance with the legal issues. Thus, my criticism is not necessarily because of the report's conclusions. Instead, this paper concludes that the conclusions of the report are negligible because of its lack of proper analysis. The report's conclusion seems to be pre-drawn and merely pasted onto the report. In short, the report is fitting from a law student, a wanna-be-lawyer, but, is a Christmas surprise when released from scholars of Mashelkar and Menon's status.

Question taken by the report: The Report analyzes two narrow question under the Patent Act, 2005.

The first question addressed by the report is, whether granting of patent protection can be limited to a new chemical or medical entity that embodies an inventive step.

The second question is whether microorganisms should be 'granted patent protection.

Considering that the Patent Act, 1970 was amended in order to fulfill India's TRIPS obligations[2], the larger question is whether excluding one or more of the above would violate the terms of the TRIPS agreement.

---

1. Associate Professor of Law, University of Oklahoma Law Center teaching patent law, intellectual property law and related courses. The author is a graduate of the National Law School of India University. The author's publications on patents can be found in www.law.ou.edu/faculty/ragavan.shtml. The phrase Tragedy of the Commons was first used by William Foster Lloyd in his 1833 book and later popularized, according to the Wikipedia, by Garrett Hardin in a Science Eassay with a similar title. The term Mashelkar report refers to the Report of the Technical Expert Group on Patent Law Issues.
2. These refer to the obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights which was signed in 1993 as part of the Agreement Establishing the World Trade Organization (WTO).

The first question implicates issues of patentability and the second implicates issues of patent eligibility. The term patent eligibility (a term of art, which is unfortunately never used in the report), refers to the question of whether the subject matter (area of science) is patent eligible. That is, assuming the invention in question is in the area of bio-genetics. The question would be whether all bio-genetics is excluded from patent protection.

This question is different from the issue of is patentable - the question of patentability is determined by whether a particular invention can be patentable. A particular invention would not be patentable, even if it falls within a patent eligible subject matter, if it does not fulfill tests of utility, novelty and nonobviousness (inventive step).

In essence, the first question is framed to state that while new chemical and medical entities are patent eligible subject matters, the question is whether India can limit the grant of patent for substances embodying such patents with a view to balance social with legal issues (or trade with welfare issues).

The second question is meant to analyze whether microorganisms can be fully excluded from patent eligible subject matters.

DISCUSSIONS ON NEW CHEMICAL ENTITY

The report highlights that patent protection cannot be limited to "new chemical entities.:" Basically, the report states that ALL chemical entities are entitled to patent protection. The breadth of the statement signifies, perhaps, a flawed understanding of patent law.

Any invention has to fulfill three important criteria before it becomes eligible for patent protection. These criterions are utility, novelty and nonobviousness (inventive step). An invention that does not fulfill even one of these criteria would be refused patents even in the United States.

Article 27(1) of TRIPS requires the following :

> ... patents shall be available for any inventions, whether products or processes in all fields of technology, provided that are new, involve an inventive step and are capable of industrial application."

Thus, patent protection for all inventions (leave alone new chemical or medical entities) requires the invention to be new, useful and embody an inventive step. Novelty and nonobviousness along with utility are threshold requirements for patenting.

1. The report concludes that chemical entities that are not NEW, can still be eligible for patent protection. "Granting patents only to New Chemical

and Medical entities and thereby excluding other categories of pharmaceutical inventions is likely to contravene the mandate under Article 27 to grant patents to all inventions." Unfortunately, in order to qualify as invention, among other things, the invention has to be *new.*

Generally, what is "new" is defined by national statutes. There is nothing in TRIPS that necessitates a definition of novelty. For instance, the United States defines what is new under 35 USC $ 102. The definition excludes matters that the United States Congress (and not the TRIPS agreement or the WTO) believes is not new. For instance, &102 treats matters that are publicly used in other countries but unknown in the US as being new. That is why Indian turmeric and neem were not barred as lacking novelty. Europe also does not allow patent protection for matters that are not novel. Novelty is a threshold requirement for protection in the United Kingdom, Germany and in all other western European Countries. There is no compulsion or requirement under the TRIPS to define novelty one way or the other.

Considering the above, the report's statement that all chemical entities, new or otherwise are entitled to patent protection is clearly and dangerously erroneous.

Notably, if a chemical is not new, (that is, the product is a known product) it can also not pass the test of inventive step. Thus, a product that fails the novelty test will also fail the inventive test. In order to pass that of inventiveness, the invention has to embody something inventive when compared with the existing state of knowledge. Thus, for known products, the simple question is whether a new use of a known product is patentable, which is what, I suspect, the Report probably set out to find in a clumsy manner.

2. As for the question of whether a new use of a known product is patentable, the question boils down to what India believes qualifies as an *invention*. If India believes that the same known substance for which a new use is discovered should be eligible for another patent, then it should widen the definition. TRIPS does not concern itself with the narrow issue of defining the scope of an invention. As a mark of the flexibility, members of World Trade Organization approach the question differently. For instance, the United States does not allow patenting of new uses of known substances. Hence, protection is in fact limited in the United States to chemicals that are new, embodies an inventive step and has commercial utility. It is almost funny to note that report quotes several

countries without actually stating this important factum of the United States.

Similarly, the European Union also limits protection for new chemical entities. Under the European Paten Office Guidelines ("EPO Guidelines"), a allowed provided a *new use* of the product is disclosed. In Europe such patents are titled " use innovations" and can be protected using "purpose-limited-product claims." These claims limit the scope of patent protection to the particular purpose or use of the product. Thus, Europe actually goes one step further than the United States to provide patent protection for identical products, subject to claiming a new use (and not on inventive steps). The European practice arose from a 1979 application for pyrrolidine derivatives. The patent application contained active therapeutic substances to reduce cerebral insufficiency. The derivatives destroyed novelty even though the pharmaceutical use of the derivatives was unknown. ([1984] E.P.O.R.591). Generally, the purpose- limited-product claims are used only when the application materials is already known and patented but the application claims a new use.

In 1984, the European Patent Board in EISAI (1984]E.P.O.R.241) reiterated that claims directed to the use of a known substance or composition of the manufacture of a pharmaceutical preparation for a specified new and inventive therapeutic application will be eligible for European patent protection. Thus in Europe, the first new use (usually medical) of a known product (protected by a product patent) is patentable by the use of a purpose-limited-product claim. The second and further use of the same substance or composition for the manufacture of the specific inventive application (usually therapeutic). Known as "Swiss claims," the claim format protects the *new* use of the known compound or composition.

The bottom line is that the patent provision of TRIPS does not dictate how a country has to define invention and whether the definition of invention should vest patent protection over known products with new use or improvements.

The Report unfortunately cites Article 39.3 of the TRIPS agreement in support of its conclusion that patent protection need not be limited to new chemical entities. The most interesting part of Article 39 is that it does not deal with patent protection. It deals with undisclosed information (generally known as trade secretes). The article itself states that,

"Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products

> which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use."

It is mere condition of marketing. The articles limited requirement is directed at the agency approving the marketing of pharmaceuticals chemicals. The article mandates the agency to ensure that is designated by the applicant as a trade secret should be disclosed, either to the public or as part of the marketing label of the invention. Even this disclosure can be done away with for reasons of public interest.

It is most depressing to note that the members ignored the public interest exception that is a part of that section itself.

In essence, assuming a known product is being marketed on account of a new use. The marketing has to be approved by an agency that is equivalent of the FDA (Food and Drug Administration) in the United States. In India, such an agency would fall within the realm of the Narcotic Drugs and Psychtropic Substances Act, 1985. Assuming that Researcher Rani makes an application to market a known product but embodying a new use. Rani wants to ensure that her test data remains a secret. It is a TRIPS imposed duty of the authority to ensure that her test data is treated as a secret. However, if the authority determines that the test data is treated is required to protect public interest, then the authority can basically state that the information is not eligible for being treated as undisclosed information.

If TRIPS wanted the information to be protected by patents, it would clearly be within the patent provision of TRIPS. Surely, the members of the Msahelkar Committee did not think that the drafters of the TRIPS agreement meant to treat undisclosed information (that may or may not be eligible for patent protection) as patentable but decided to include it as part of the section on Undisclosed Information.

Discussions on New Medical Entity

The report does not clarify what is a new medical entity. Is it the process of medical treatment or is it a product of medical treatment or is it a known compound that exhibits pharmaceutical properties. All western countries treat each of these questions separately for the purposes of patent protection.

Method of Medical Treatment

Should a new method say, of cutting the body open for a surgery, or doing a cataract surgery be entitled to a separate patent. For example, assuming Dr. Sita discovers that for C-section deliveries of babies, making an incision curved at a particular angle allows quicker delivery while at the same time facilitating a faster recovery. Allowing it to be patented would necessitate that anytime any doctor uses that curved incision to deliver a baby, Dr. Sita would make royalties over it for the next twenty years. It also means that patients who cannot afford that royalty would not benefit from deliveries that necessitate a curved incision. The question is whether such methods of medical treatment ought to be patented.

Several countries exclude methods of medical treatment from patenting and on grounds of public interest. The United States allows such patents but eliminates all remedies for infringement against medical practitioners or a related health care entity for the use of the patented technique under § 287(c) of Title 35. In essence, while the method is patentable, it is also freely available for others to copy (for public interest purposes).

New Product or composition used for medical treatment: A new product that involves an inventive step for medical treatment has to go through the same steps for patentability as any other invention. Thus, a new product for medical treatment should be new, nonobvious (inventive step) and have commercial utility in order to be patentable. Patent protection for such products can be exempted under the terms of the Doha Declaration read with the relevant provisions of the TRIPS agreement.

Know Product used for Medical Treatment : If a product is known, naturally it simply cannot pass the test of inventive step. Hence, it boils down to the question to vesting patent protection to a known product with a new use, which in turn goes back to the issue of whether it would fall within the definition of the term invention. Again, the United States does not allow patenting of new uses of known medical products. Either the process of making the product has to be novel or the product has to embody something new before it can pass the test of patenting.

Notwithstanding all of the above, as a matter of general interest, it might be interesting for India to know that one of the biggest debates currently raging in the United States is against patent eligibility. Even big businesses corporations (the IBM and pharmaceutical giant *Eli Lilly* being the newest members) have opined that the expanding scope of patent protection has actually led to a decrease in innovation.

Public Interest Exceptions for Known Chemical and Medical Entities that Embodies a New Utility

The Meshelkar report cites Article 7 and 8 of TRIPS read with the Dohas Declaration to determine that patent protection cannot be limited to new and nonobvious chemical or medical entities.

In reality, TRIPS does not concern itself with the narrow question what would amount to an invention as long as novelty, utility and nonbviousness are the three broad criterion under which the inventiveness is determined. That is, TRIPS does not state how the term invention has to be defined. India is well within its rights, under the TRIPS agreement, to define inventions to limit protection to new chemical and medical products embodying an inventive step. There is nothing in the patent provision of the TRIPS that forces India, or any member for that matter, to define inventions as embodying known products with just new uses.

Finally, as a lip service to the social issues, the Mashelkar report distinguishes "ever greening" from protecting incremental innovation. To that extent, the objective of the report is very respectable. But the report moves on to state that "restricting patentability just to new chemical and medical entities" could be in violation of TRIPS. In effect, the report basically suggests that all chemical entities and medical entities should be patented - even those that are not new and already in the public domain. Yes, let us go ahead and take from the public domain and move it to the private domain. Even the champions of patenting like the United States would find that statement unacceptable. Surely, though, this is the best way to get Big Pharma to scout for 'social engineers' from the National University of Juridical Sciences. It is a classic case of Robin Hood on the reverse.

Patent Eligibility of Microorganisms

The last question the report examines relates to the question of whether microorganisms are patentable. The roots of the issue can be traced back to Article 27.3 of the TRIPS agreement.

Article 27 (1) of TRIPS states that ..... "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application." Further, Article 27(3) (b) highlights that members may exclude from patentability ... plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

TRIPS, therefore mandates that microorganism should be protected. But, when read with Article 27(1), TRIPS requires only microbiological organisms that qualify as an invention to be protected. In order to qualify as an invention, it is not enough that the microorganism has a utility, it should also be *new* (genetically engineered/not known before) and embodies an inventive step.

The report concludes that new microorganisms isolated for the first time from natural surroundings can only be patented if they differ in characters and find new or improved uses. Even countries like the United States (known for overreaching when it comes to protection of genes and microorganisms) do not allow patenting of all microorganisms. The Manual for Patent Examination Procedure has outlined criterion that has be cleared before microorganisms can protected.

Even the case that established worldwide protection for microorganism being *Diamond v. Chakrabarthy,*(447 U.S. 303(1980)), specifically outlines that anything "made under the sun by the hands of man" is patentable. Thus, even microorganisms have to be made *by the hands of man in order* in order to be patentable. It is not enough if is simply newly discovered. The United States Supreme Court established the proposition in the case of *Funk Brothers,*(333 U.S.127(1948)) where protection was denied to a bacterium that furthered the breaking down of nitrogen in leguminous plants on the grounds that the bacterium was merely discovered as against invented.

The answer to the question of whether microorganisms should be patent eligible is easy to answer in the context of TRIPS. The larger question of patentability of microorganisms deserves an in-depth and closer study. For instance, is a newly genetically engineered microorganism protectable because it is potentially useful for further research or it is protectable because in some tests the new organism seems to exhibit properties that shows its potential use against certain diseases or is it protectable because research has conclusively proved that the microorganism is a cure against a specific disease. The answer to this question is purely a matter sovereign determination. Basically, it is upto India and the government to determine when the utility requirement would be considered fulfilled.

That is, assuming that Researcher Raman derives a genetically engineered microorganism MX. Now, nobody, including Raman, knows what MX is useful for. But everyone knows that MX can be researched upon further to determine its real use. The question is whether we grant protection to Raman just because MX can be used as a tool for research. Even developed nations like the United States require that a proper use has to be determined before the microorganism

becomes patentable. For instance, the Supreme Court of the United States in *Brenner v. Mansom* (383 U.S. 519) in 1966, held that a patent is not a hunting license in the context of a biotechnological invention whose biggest use was only as a tool for further research. The court highlighted that a patent is not a reward "for the search but a compensation for successful completion." Moreover, in the United States, the Patent and Trademarks office also acts as gatekeepers by requiring substantial and specific utility of the microorganisms to fulfill the utility requirement. Furthermore, the patent office also embodies a heightened standard of written description and enablement for biotechnology patent applications. Basically, it requires applications for biotechnology inventions to specify how to make and how to use the invention clearly in order for the invention to be considered completed.

The Mashelkar report should have deliberated on what amounts to successful completion of research to determine the threshold requirements for microbiological innovations. As such, the conclusion of the Mashelkar report gives the impression that all microorganisms -even those that are merely research tools-are eligible for patent protection.

The danger of allowing patent protection for inventions on microorganisms whose use is merely as a research tool is that it would block competition and further research. In the example above, for instance, if a patent is awarded to Raman for MX and if he assigns it to Company A, only Company A can research on the microorganism MX. Other companies like Company B, for instance,

that wants to research on MX would be required to pay a royalty to Company A to even do research on that microorganism. Consequently, the following happens:

1. The ultimate cost of a drug when one is fully invented using MX as a research tool, will involve cost of the royalty to get the permission to work on MX and the cost of the research of Company B.

2. The more such tools of research are pantented, soon the industry finds itself having to license several research tools which in itself becomes cost prohibitive. Ultimately, that cost if borne by the consumer.

3. Naturally, as more research tools are protected by patents, the incentive to actually conclude a research is gone. If Raman can become a millionaire by just inventing a microorganism without telling the world what it is useful for, Ramsn would not wait to determine the ultimate use. Companies also start making money by just creating research tools rather than research itself.

4. Research becomes procedurally cumbersome because it involves a lot of paper work and litigation.

5. It would increase the burden of the courts and would lead to more unnecessary cases on whether a research tool was used without proper licensing. Basically, it would elevate the importance of licensing lawyers.

6. Naturally, all of these slows and stifles research.

In a paper titled "The Tragedy of the Anti-commons: Property in the Transition from Marx to Markets" Professors Michael Heller and Rebecca Eisenberg outline how competing patent rights on research tool prevent useful and affordable products from reaching the marketplace.

It is important for a country like India to determine at what stage and when a genetically modified microorganism becomes patentable. That is what was perhaps expected from the report-a careful consideration of the various ramifications and to ultimately suggest the boundaries for patent protection for patent protection for micro-organism. The report unfortunately concludes before for patent protection for micro-organism. The report unfortunately concludes before grasping the question.

The other interesting feature that report does not highlight is that the fact the US Patent and Trademarks Office has been under huge criticism for allowing biotechnology patents on research tools. Currently, a part of the academic and business community of the United States strongly opines that both business methods patents (which Europe has not yet adopted) and biotechnology patents have stifled rather than furthered research by vesting patents on research tools. In fact, the Federal Circuit on Feb 8, 2007 heard oral arguments on the issues relating to patentability of physical signals *(In Re Nuijten).* Another important case on the same issue *In Re Fisher & Lalgudi* 421F. 3d 1365 (2005) relates to a patent application for an expressed sequence tags (ESTs which is a gene fragment) of maize which the Patent office dismissed as unpatentable on account of patent community that the case would, on appeal, result in the Supreme Court setting adequate boundaries of patent eligibility

CONCLUSION

In short the Mashelkar report is an insult to the Incredible India that the Government has promoted in every airport across the country. Perhaps it is time for the Indian Government to establish a committee involving experts a) in patent law, b) with knowledge of social realities and c) members who can be potentially impartial to external pressures. After all, when TRIPS itself allows flexibilities and when even nations like the United States exploits the TRIPS,

India's stregth would lie in fully utilizing them. Understanding this new area of law and working it to the benefit of Indian national objectives is the key to future success. *Benefit* to the nation accrues when innovation is promoted while balancing trade obligations. After all, if notwithstanding, the resulting loss of productivity would eat into the frruits of globalization.

CUSTOM : A TRANSEDENT LAW WITH SPECIAL REFERENCE TO HINDU LAW & MUSLIM LAW

*Dr. Manju Koolwal**

Custom:

When human beings came to live in groups, it was but natural that they should, for harmonious group-life, conform to certain patterns of human behaviour. By experience man learnt that a particular mode of behaviour or conduct was conducive to collective living. In course of time a pattern of behaviour emerged, and by consistent adherence to it, it achieved spontaneous and conscious following by the members of the group. When this stage is reached, the pattern of human behaviour is called usages. As Many puts it, "A belief in the propriety of the imperative nature of a particular course of conduct, produces a uniformity of behaviour in following it; and a uniformity of behaviour in following a particular, course of conduct produces a belief that it is imperative or property to do so. When from either cause or from both cause, a uniform and persistent usages has moulded the life and regulated the dealing of a particular class of community, it becomes a custom.

In all societies whether of the west or east, developed or undeveloping, primitive or modern custom has enjoyed a respectable place in varying degree in the regulation of human conduct. It has been considered as the outward expression of latent principles of justice, social values and fundamental.

In Sanskrit there are three terms Achara (rules relating religious observances) Vyavahara (the rules of civil law) and Sadachara (the usage of virtuous men). The word Sadachara[1] therefore, has been used for custom, which means the custom, handed down in regular succession from times immemorial among the four chief castes (Varna) and mixed races of the country. Accordingly Sadachara or approved usage only means that it should not be contrary to Dharma. According to Webster[2] 'Long established practice considered as unwritten law and resetting for authority on long content; a usage that has by long continuance acquired a legally binding force'. As such 'custom' is not to be understood in the sense of 'usage' which is also based on long practice but has not acquired binding or obligatory character. Nor a usage can be exercised as of right inhering in one individual and binding on the other against whom such usage is claimed. Salmond says 'Customary law is that which constituted by those customs which fulfil the requirements laid down by law as the condition of their recognition as obligatory

* LL.M. Ph.D., Asst Professor, Department of Law, University of Rajasthan, Jaipur

1 Quotted by Mayne on his classic work on Hindu Law and Usage 61 (Ed. Aiyer (1953).

2 New International Dictionary 650 (1957).

rules of conduct'. Hence a legal custom can be easily distinguished from social customs and general user in the sense the former is obligatory, binding accompanied with sanction while the latter ones are merely the norms of social conduct without being legally binding or enforceable.

In England the entire English, law including the law of merchants; in Germany the codification of German Civil Code in 1901 is based on German customs. In India the Hindu and Muslim personal laws have been mostly based on customs. In ancient India Manu declared that it is the duty of the king to decide all cases according to principles drawn from local[3] usages. Narada also says custom decides everything and overrules the sacred law. Likewise Asahaya - one of earliest writers says 'immemorial usage of every country (or province) handed down from generation to generation can never be overruled on the strength of the Sastras. Thus all the ancient Hindu jurists Manu, Narada, Brihaspati, Katyayana and Yajnavalkya gave to custom a high place which even was obligatory on the monarch in administration of justice. The Muslim law equally recognised customs ruffs, which have accepted to suit the needs of different classes of people who embraced Islam. Hedaya says 'custom does not command any spiritual authority like Irma of the learned, but a transaction sanctioned by custom is legally operative, even if it be in violation of a rule of law derived from analogy. It must not, however, be opposed[4] to a clear test of Koran or of an authentic tradition. In modern India[5] in the face of march of legislation over other souces custom has not altogether been abrogated by legislation. Articles 25, 26 and 28 of the Constitution indirectly guanarnees the protection of such customary practices of a community which of course are not contrary to the concept of securlarism and democratic socialism.

In his Ancient Law, Maine says :

> *"Custom is a conception posterior to that of Themsiies (judgments). However, strongly we, with our modern associations, may be inclined to lay down, a priori that the notion of custom must precede that of a judicial sentence and that a judgement must affirm a custom or punish its breach, it seems quite certain that the historical order of ideas is that in which I have placed them."*

Puchta observed[6] that custom is independent and self sufficient having legislative authority but was a condition precedent of all sound legislation. Sir

3 Manu VIII, 3.
4 *Jowla v. Dharum Singh*, 10. I.A. 511
5 Jain M.P. Custom As a Source, (1963).
6 Quoted by Jain, 3 JLJ 98 (1943).

Henery Maine, Hegel, Darwin and Diamond who enunciated the theory of evolution consider custom important source of law.

Sir John Salmond has attempted to define relationship between custom and society. According to him[7] custom is to society what law is to State. Each is the expression and realisation, to the measure of men's insight and ability, of principles of right and justice. The law embodies those principles a they commend themselves to the incorporate community in the exercise of its sovereign power. Custom embodies as acknowledged and approved, not by the power of State, but by the public opinion of the society at large. According to modern political thinkers the concept of 'law' and 'State' are of modern origin. Before the emergence of modern politically organized States, societies existed which were established on the basis of religion or blood e.g. the Hindu, Muslim, Semitic and Hebrew societies. In such societies customary law was the main vehicle of social control of human conduct which was mostly unwritten. All legal relationships between people whether personal or proprietary was regulated by customs. For instance in the Hindu society, all legal relationship regarding marriage, inheritance, succession, adoption were governed by the customary law in each caste, group or tribe. In England also the 'common law' embodies the features of customary practices. It was orginally in the form of tribal usages. The wisemen whether judges or administrators were only to declare the law by discovering the customs of the people. Common has itself is known as the 'custom of the realm'. Indeed Munroe Smith has asked 'If the English common law is not general English custom, what is it.' In the Roman legal system also the Corpus Juris Civilis was supposed to embody 'the unwritten law which usage has approved. Even the international law itself is customary in character. This all goes to prove the fact that in the absence of politically organized State custom was the main instrument between people and society which served as a matric for control of human behaviour.

However, in modern times with establishment of independent and Sovereign State the old medieval or feudal concept of society has come to an end. The State has assumed the role of not only law administrator and dispensator of justice but also of law creator. The laws have been codified or changed through legislation. Now as in modern State law can be defined generally in terms of State similarly in primitive societies it has been defined and understood in terms of customs. Of course custom has not altogether been replaced yet it has ceased to be the one the major instrument of social change or social welfare.

Place of custom in the Hindu Law and the Muslim Law :

The Hindu jurists always accorded a place of great importance to custom

7 Salmond, 232 at 234-35 (1957).

as a source of law[8]. It was regarded as coming after Sruit and Smriti. The process of integrating custom with the law was, however, continuously carried on in ancient society and thus were born the various Dharmasastras. When the Smritis fell out of data in relation to the needs of the contemporary society, the commentors adapted the Smriti-law, by the process of interpretation, to bring it in accord with customs which had taken roots in the then society. What the commentators did was to take up an old text of the Dharmasastra and interpret it in such a manner as to bring it in harmony with the social mores and customs of the people. This process has been recognised by the Privy Council in the following words : "The Digest (Mitakshara) subordinates in more than one place the language of texts to custom and approved usages[9]." According to Derreit, "The Smiritis had been enlivended by commentators who introduced customary elements into their exposition[10]." It is how, starting from the same base, two major Schools, Mitakshara and Dayabhaga, grew in the country and the Mitakshara even came to have four sub-schools, viz., Dravida, Mithila, Bombay and Benaras. On the other hand, the attitude of the Muslim jurists to custom -was somewhat different from that of the Hindu jurists. The source of Muslim law are Koran as containing the word of God ; hadis or traditions being the inspired utterances of the Prophet and precedents derived from his acts ; ijma, the consensus of opinion among the learned ; urf or custom and kiyas, the analogical deductions from the first three. Urf or custom thus assumes a somewhat subordinate position in the scheme of Muslim law[11].

During the British administration, the question of the place of custom in the personal laws of the Hindus and the Muslims assumed a great significance. In this respect, a distinction may be drawn between the Presidency towns, on the one hand, and the mofussil, on the other. The Act of Settlement, 1781, provided for the application of the 'laws and usages' of the Hindus and the Muslims to matters of inheritance and contract. Thus 'usages' were specifically recognised. The question was authoritatively decided in Hirabase v. Sonabae by the Supreme Court of Bombay, where a similar provision operated. The question for the consideration of the court was whether Khojas and Cutchi Memons, who were Muslim by religion but who followed the Hindu customs of inheritance, should be governed by their customs or by the orthodox Muslim law. The court refused to accept the thesis that this provision meant the application of the Koran only, and that it excluded customs set up in conflict with the text of the Koran as regards the Muslims. The court held that the provision was framed

8 M.P. Jain, Custom as a Source of Law in India, 3 Jaipur L.J., 96 (1963).
9 *Bhyah Ram Singh v. Bhyah Ugur Singh*, 13 M.L.A. 373, 390.
10 Administration of Hindu Law, op.cit., 40.
11 Tahir Mahmood, Customs as Source of Law in Islam, 7 J.I.L.I., 102-6.

solely on political grounds, and without any reference to orthodoxy, or the purity of any particular religious belief. The purpose of the provision was to retain the laws and uages of the Hindus and the Muslims. The policy which led to the making of the provision proceeded upon the broad and easily recognisable basis of allowing the newly-conquered people to retain their domestic usages. The provision did not, therefore, adopt the text of Koran as law any further than it had been adopted in the laws and usages of the Mohammedans, and any class of Mohammedan dissenters found to be in possession of any usage which was otherwise valid as a legal custom, and did not conflict with any express law of the English Government, would be entitled to the protection of the provision to the same extent as the most orthodox Sunny, it was thus clearly established that in the presidency towns, a custom would be applied even though at variance with a religious text.

The position in the mofussil was somewhat different. Neither the rule of 1772. Nor that of 1793, referred to custom as a source of law. It was only in Bomay in 1827 through S. 26 of Regulation IV, that custom was given a preferential place to the law of the defendant. Thus, there was doubt whether a custom in conflict with the written text of law would be followed or not. Perhaps, in the beginning the tendency was to ignore custom and apply the law of the books rather rigidly. This was mostly because the early British administrators were ignorant that custom played a momentous role in the lives of the people, and they wrongly supposed that the Hindus and Muslims were governed only by their sacred religious textual law. It has been asserted by some that the insistence of the court that the advice must be based on the original sources and commentaries, led to the application of rules which were either obsolete or which had never been observed. In the case of Hindu law, more specifically, it has been stated that to take the law from the Pandit meant the elimination from the court's horizon of much of the customs and usages which in the past had kept the law growing. But, this was not all, and the fact remains that "The British judges themselves were more royalist than the King in their devotion to Sanskritic learning," and even when a pandit attempted to counter a text with the customary practice the judges would notice the variance and ascribe deviation from the text to the corruption of the pandit and, consequently, customary law was at a discout. The result of this approach was that at times some norms contained in the religious texts were applied which had become obsolete in practice, in course of time. But then the realization dawned, and custom came to be accorded an important place in the scheme of things. As reards the Hindus, the position was settled rather early as the Privy Council, taking note of the great importance accorded to custom in the traditional Hindu Jurisprudence, ruled in 1868 : "Under the Hindu system of law, clear

proof of usage will outweigh the written text of the law[12]." The point was settled, still more specifically somewhat later when it was stated that where custom was proved to exist it would oust the general law, which, however, would regulate all outside the custom[13]. As regard the Muslims in the mofussil, the place of custom remained doubtful for some more time[14]. As late as 1904, the Allahabad High Court held in Jowala Bukhsh V. Dharum Singh[15] that a family custom among the Muslims excluding the daughter from inheritance could not be applied. This attitude of the courts was due to the low place allotted to custom traditionally by the Muslim jurists[16]. But then the Privy Council conferred a favoured position on custom in Mohd[17]. Custom now got precedence over, and was made legally enforceable even when in derogation to, the traditional and orthodox Muslim law. In Md. Ibrahim v. Shaik Ibrahim[18], the Privy Council stated that in India "custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Mohammedan Law, governing the succession in a particular community of Mohammedans[19]." But then the Shariat Act, 1937, abrogated custom to a large extent as regards the Muslims[20].

Then there were certain territories in India, like Punjab, Oudh, Kumaon Hills, where the sacred books of the Hindus or the Muslims had not penetrated and had not had much impact, and which were areas predominantly of customary law. In these areas, custom was specifically made the first rule of decision. It was only when no custom was proved that the personal law was applied[21].

Thus, the courts gave the utmost scope to custom in administering justice to the Hindus and Muslims. All types of customs were applied, e.g. tribal, communal, sectarian, local, family etc. For example, the Supreme Court sustained a custom among the Jains under which a widow can adopt without the consent of her husband[22]. But while recognising custom on one hand, the courts were, on the other hand, making it more formal or rigid. A custom to be enforceable, it was held, must be ancient, certain and reasonable. A general rule accepted

12 Rudolph and Rudolph, Barristers and Brahmans in India: Legal Cultures and Social Change, VIII. Comparative Studies in Society and History (Hauge, 1965), 24-49.
13 *Collector of Madura v. Mootoo Ramalinga*, 12 M.I.A. 397, 436 (1868).
14 *Neelkisto Deb v. Beerchunder*, 12 M.I.A. 523 (1869).
15 *Jowala Bukhsh v. Dharum Singh* (1866) 10 M.I.A. 511.
16 (1901) I.L.R. 23 AII. 20.
17 *Sulmankha v. Kadir Dad Khan* 18.
18 17 C.W.N. 97.
19 A.I.R. 1922 P.C. 59.
20 *Ali Asghar v. Collector, Bulandshr* (1917) I.L.R. 39 AII, 574.
21 *Abdul Hussain v. Sona Dero*, 45 I.A. 331 (1917).
22 *Shiba Prasad Singh v. Prayag Kumari*, 59 I.A. 331 (1932).

was that a custom prevalent in 1773 or 1793 A.D. was ancient and enforceable[23] . These dates were selected because in 1773, the Supreme Court was established in Calcutta and in 1793, the Cornwallis scheme was introduced in the mofusil of Bengal, Bihar and Orissa and also a system of registration of Regulations was introduced at that time. Thus, during the British Administration, custom came to be given a place of honour in the administration of justice. It became an important source of law and a large volume of case-law arose around the various customs. Custom was given preference over the religious law of the parties. This was a just and reasonable approach for, in practice, the law of the Shastra or the Shara was not observed by the people in all its pristine purity and all kinds of customs had ingrained themselves into the scheme of things. It was just and equitable that the law which the people observed in practice be enforced rather than the theoretical law contained in the religious books. It would have been harsh on the people to force them to fore-go their customs which constituted the living law in favour of the orthodox system of law. The courts adopted a kind of tolerant attitude towards the customary law of the people, and did not adopt a very scrutinising attitude in the formative stages of the law in India with the result that most of the customary law of the people could be preserved. This was good in the days when the legislature was not an active as a law-maker. It also came to be ruled that a custom against public policy, or against justice, equity and good conscience, or an immoral custom could not be enforced by the courts[24] . This leds to the non-recognition of many custom. Thus, the courts came to exercise a kind of censorial power on customs. But, it may be remembered that in course of time, proving a custom in court in derogation to Shastric law became an extremely onerous exercise, and thus many existing customs which could not be proved satisfactorily could not be judicially recognized. In course of time, proving a custom in the court in derogation to Shastric law became an extremely onerous and hazardous exercise, and thus many existing customs ceased to be recognised by the courts as they could not be proved satisfactorily. Before the advent of the British rule, customs were enshrined in the unexpressed consciousness of the people and were enforced by village panchayats. They were unwritten and unrecorded. Till this happened, customary law retained elements of flexibility and growth. But the British courts began to insist on formal methods of proof. The onus to prove a custom was laid on the party asserting its existence by clear and unambiguous proof, by cogent and satisfactory evidence. There was no presumption that a custom existed. To facilitate proof of custom, records of customs came to be prepared in wajib-ul-arz or riwazi-am which could be received in evidence in the courts.

23 *Abdul Hussain v. Sona Dero*, 45 I.A. 331 (1917).
24 *Shiba Prasad Singh v. Pravaq Kumari* 59 I.A. 331 (1932).

Entries in these documents were held to constitute a prima facie evidence of customs were not regarded as conclusive and could be rebutted by other reliable evidence[25] . In addition, some official and private attempts also came to be made to record customary law in some regions, and, thus, a few collections customary law appeared during the British period[26] . Also, in course of time, new customs ceased to be recognised by the courts. The courts began to insist that only ancient customs could be recognized by them. .Custom then ceased to contribute much to the growth of law and the legal system tended to become rigid and fossilized.

It may, however, be noted that too much dependence on custom has its own disadvantages. Custom tends to make law very much less uniform as the law could vary from family to family, community to community and region to region in certain respects. Ascertainment of a custom places a heavy load on the judiciary for it must take evidence to find out what the custom is and whether it is ancient or not so as to be enforceable. With the development of society, with the increasing mobility of the people, with the maturity of the legal system, a time come when uniformity of law becomes a great desideration. So longs as tribal, sectarian or communal customs survive, the class distinctions among the people also continue. It is only through the evolution of uniform law that the Indian society may become more closely knit and integrated.

Modern legislation has abrogated custom to a large extent and the value of custom as a source of law has thus been reduced, for example, S.4(a) of the Hindu Marriage Act, 1955, gives overriding effect to the Act, and abrogates custom with respect to any matter for which the act makes a provision, except for certain matters for which custom has been preserved. These matters are: recognition of marriage between parties within prohibited degrees and sapindas; rites and ceremonies regarding celebration of marriages; divorce. Thus a customary divorce is not abrogated. The Hindu Adoptions Act, 1956, abrogates custom except on two matters : adoption of a married person, or of a person over 15 years of age. Similarly, the Hindu Succession Act, 1956, abrogates all custom. This has introduced by and large uniformity and certainty in law.

For Muslims, as early as 1937, the customory law was abrogated by the Muslim Shariat Law Act. This law vitality affected such communities as Khojas, Memons, Vohras, who were converts from Hinduism and containued to follow the Hindu customs in the matter of inheritance and succession. The Shariat Act abrogated these customs. Except three matters, viz., wills, adoption and legacies, where a Muslim can adopt Muslim law, in all other matters Muslim law was

25 *Fateh Ali Shah v. Muhammad Baksh*, A.I.R. 1928 Cal. 216.
26 *Balgobind v. Badri Prasad*, 50 I.A. 196 (1923).

Muslim were uncertainty, expense of ascertaining custom and inadequate rights granted to women under customary law as compared to Muslim law as such. The truth however is that the main agitation for abrogation of customs among the Muslims was carried on by orthodox Muslim religious bodies who did not relish that Muslims continue to follow customs having links with their previous Hindu culture.

Position of Custom in India

Before the advent of independence the British always tried to follow a policy of non-intervention in personal matters of the Hindus and Muslims, therefore became an important sources of law. The rules of 1772 and 1793 laid down that the court shall apply the personal law of the Hindus in case of Hindus and Muslims law in case of Muslims. The Act of Settlement 1781 also provided for the application of the "laws and usage' of usages' of Hindus and Muslims in matters of inheritance and contract. The courts in India before independence upheld custom, which came in conflict with the ordinary law. The privy Council observed[27] that 'custom plays a large part in modifying the ordinary law, and it is now established that there may be custom at variance even with the rules of Mohammadan law governing the succession in a particular community of Mohammendans. Similarly there are certain areas in India like Punjab, Oudh, Kumaon Hills where the sacred books of the Hindus or the Muslims had not much impact and the people were largely governed by customs and usages.

The ascertainment of custom placed a heavy burden upon the courts to discover and to satisfy itself about the existence of customs. In some cases customs were so much at variance with each other that they acted as a brake in the integration of various communities, which still stand divided on various grounds. Customs could not bring about unity - social, cultural, political or legal -'nor uniformity as the customary law differed from family to family place to place. However, there was a wind of change immediately before 1947. Social reformers and political leaders wanted to codify the customary Hindu law in order to bring uniformity within diversity and at the same were determined to eliminate injustice and evils caused by old, inconvenient and unnecessary customs and usages which were standing in the way of regeneration of Hindu women and untouchables. Hence a strong urge for State interference in the personal matters of the Hindus became indispensable in order to adjust and even abolish old customs in accordance with the changing needs of Hindu society[28]. The Hindu widows' Remarriage Act, 1856, the Child Marriage Restraint Act, 1929, the Hindu Women's Rights to Property Act, 1937, and the Hindu Married

27 *Mohammad Ibrahim v. Shaik Ibrahim*, AIR 1922 PC 59.
28 *Krishna Singh, v. Mathura Ahir*, AIR 1980 SC p. 707.

Women's Rights to Separate Residence and Maintenance Act, 1946 were the most significant statutes passed before 1947 to improve the social and economic position of Hindu women by annulling the age-old dying concepts.

After 1947 the Parliament has taken a more progressive and secular attitude in changing the customary laws of the Hindus concerning marriage, succession, adoption etc. The Hindu Marriage Validity Act, 1949 and the Civil Marriages Act, 1954 were a great step forward which validated the inter - caste marriage. These enactments usher the foundation of a casteless society in India. In 1950 the Constitution of India was promulgated. The Constitution aims at the establishment of an egalitarian society without distinction as to sex, religion, caste or social and economic position. In pursuance of tire social and constitutional set objectives the Indian Parliament has enacted the Hindu Marriage Act, 1955; the Hindu Adoptions and Maintenance Act 1956, the Dowry Prohibition Act, 1961 etc. which have greatly altered the existence and extent of customary law of the Hindus in India.

As regards the customary law of the Mohammedans the position is different today. The first significant measures to abrogate the customary law of some Muslim communities was the Shariat Act, 1937 which brought about uniformity of law among the Muslims by annulling the old customary law of the Muslims who had been converted to Islam from Hinduism yet retained same old customary Hindu Law. The Dissolution of Muslims Marriage Act, 1939 was another landmark which gave a Muslim wife the right of judicial separation from her husband. However, the large area of Muslim law is still governed by old customary practices. Muslim Public opinion is being created in India for modification of old Muslim customary law[29]. The Constitution of India also aims at the uniform civil code for all citizens irrespective of religion. The codification of the Muslim law would greatly increase the possibility of a uniform civil code as envisaged in Article 44 of the Constitution of India.

29 *Mohd. Ahamad Khan v. Shah Bano*, AIR 1985 SC 945.

THE INTERNATIONAL CRIMINAL COURT – LET'S MAKE IT A REALITY

Ruhi Paul*

The International Military Tribunals at Nuremberg opened its doors 61 years ago. No one then imagined that the use of criminal trials to respond to mass atrocity would become a familiar and even expected feature of international relations. Yet trials at the International Criminal Tribunals for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Courts for Sierra Leone are underway, and the International Criminal Court (ICC) recently issued its first arrest warrants for senior leaders of the Lord's Resistance Party in Uganda.

The ICC is the first ever permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished. The ICC was established by the Rome Statute of the International Criminal Court on 17th July, 1998, when 120 states participating in the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" adopted the statute.[1] The Statute sets out the Court's jurisdiction, structure and functions and it provides for its entry into force 60 days after 60 states have ratified or acceded to it. The 60th instrument of ratification was deposited with the Secretary General on 11th April, 2002, when 10 Countries simultaneously deposited their instruments of ratification.[2] It was established in March, 2003 in the Hague (Netherlands) and is initially composed of 18 Justices and the Argentine attorney Luis Moreno Ocampo was the first Chief Prosecutor of the Court.

Till October, 2005, only 100 countries have ratified or acceded to the ICC statute.[3] India, US and China have not even signed the treaty. Though the establishment of ICC is quite an achievement but the creation and existence of the Court has been controversial with a number of states. The largest disagreement continues to surround the source and nature of the Court's jurisdiction. Against this backdrop, this paper seeks to analyze certain questions, like, do we actually need an ICC and why? What is the future of ICC? Second section of the paper deals with the ever expanding dimensions of the crime of terrorism and the ICC's jurisdiction regarding terrorism.

---

* Lecturer, Dept. of Laws, G.N.D.U. Regional Campus, Jalandhar

1 Historical Introduction of the ICC, available at http.//www.icc-cpiint/about/ataglance/history.html.

2 Ratification list of the Rome Statute of the ICC, available at http://untreaty.un.org/ENGLISH/bible/englishinternet bible/partI/chapterxviii/treaty10.asp.#N6.

3 available at,www.iccnow.org.

SECTION A

Necessity of The International Criminal Court

The development of the ICC followed the creation of several ad hoc tribunals to try war crimes in the former Yugoslavia and Rwanda. Subsequently, it was desired to create a permanent tribunal, so that an ad hoc tribunal would not have to be created after each occurrence of these crimes. An international criminal court has been called the missing link in the International Legal System. The International Court of Justice (ICJ) at The Hague handles only cases between states, not individuals. It was thought that without an International Criminal Court for dealing with individual responsibility as an enforcement mechanism, acts of genocide and egregious violations of human rights often go unpunished. In the last 50 years, there have been many instances of crimes against humanity and war crimes for which no individual have been held accountable. Where as one of the purposes of the Nuremberg and Tokyo trial was to warn those who might commit such acts in the future that they would be held accountable and punished by International Law. Yet Dusan Tadic[4] was the first person to be prosecuted by an International Court in almost 50 years. This raises certain questions: why haven't there been other war crime trials? Do we need a permanent International Criminal Court? In view of the opposition to the ICC, are there any other alternatives?

Why do we need an International Criminal Court?

a. to end impunity

> "*A person stands a better chance of being tried and judged for killing one human being than for killing 100,000.*"[5]
>
> The judgment of the Nuremberg Tribunal stated that "crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced,"[6] thereby establishing the principle of individual criminal accountability. This principle applies equally and without exception to any individual throughout the governmental hierarchy or military chain of command.[7]

---

4 Prosecutor V. Dusan Tadic, Case No. IT-94-I-T before International Criminal Tribunal for Former Yugoslavia.

5 Jose Ayala Lasso, former United Nations High Commissioner for Human Rights on the ICC, available at http.//www.legal.coe.int/criminal/icc/Default.asp.

6 Martha Minow and Margot Stern Strom, "The Lessons of Nuremberg", available at boston.com.

7 Draft Code of Crimes against the Peace and Security of Mankind, International Law Commission (1996), available at http://www.ilc.org.

b. to take over when national criminal justice institutions are unwilling or unable to act.[8]

"*Crimes under International Law by their very nature often require the direct or indirect participation of a number of individuals of least some of whom are in positions of governmental authority or military command*."[9]

In times of internal or international conflict, government often lack the political will to prosecute their own citizens, or even high-level officials (Milosevic), as was the case in the former Yugoslavia, or national institutions may has collapsed, as in the case of Rwanda.

c. to deter future war criminals.

Inspite of the military tribunals following the Second World War and the two recent ad hoc international criminal tribunals, most perpetrators of war crimes and crimes against humanity have gone unpunished. Hence effective deterrence is a primary objective of the ICC. Once it is clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment to the criminals irrespective of their status, it is hoped that those who indulge in these criminal activities will no longer find willing helpers.

d. to help and conflicts

"*There can be no peace without justice, no justice without law and no meaning of law without a Court to decide what is just and lawful under any given circumstances*."[10]

The guarantee that at least some perpetuators of war crimes or genocide may be brought to justice acts as a deterrent and enhances the possibility of bringing a conflict to an end.

e. to remedy the deficiencies of ad hoc tribunals

The establishment of an ad hoc tribunal is criticized as an example of "selective justice". "Tribunal fatigue" is another problem which can have serious consequences like crucial evidence can be destroyed, perpetrators can disappear, and witness can relocate or be intimidated. Investigations become increasingly expensive, and the tremendous expense of ad hoc tribunals may soften the political will required to mandate them.[11] Apart from these, ad hoc tribunals are

8 Also provided under Art.17 of the Rome Statute.

9 Report of the International Law Commission (1996), available at http://www.ilc.org.

10 Benjamin B. Ferencz, a former Nuremberg prosecutor, available at http.//www.legal.coe.int/criminal/icc/Default.asp.

11 Why do we Need an International Criminal Court?, available at http.//www.legal.coe.int/criminal/icc/Default.asp.

subject to limits of time or place. Thousands of refugees continued to be murdered in Rwanda, but the mandate of that Tribunal was limited to events that occurred in 1994.[12] Crimes committed since that time are not covered.

Opposition to the International Criminal Court

The ICC has jurisdiction to prosecute individuals responsible for the most serious crimes of international concern, like genocide, crimes against humanity and war crimes.[13] The jurisdiction of the ICC is complementary to national Courts, which means that the Court will only act when countries themselves are unable or unwilling to investigate or prosecute.[14] The Rome Statute also has strong protections for due process, procedural safeguards to protect it from abuse, and further victim's rights and gender justice under International law. Irrespective of these safeguards to protect national sovereignty, rights of accused and the cherished ideals and purposes enshrined in the Rome Statute, there is a widespread opposition against the implications of the operation of the ICC and its universal jurisdiction and the legal effect of the Statute even in case of non-member countries.[15]

Some countries object to the Court, saying that there is very little legal supervision of the Court's apparatus, and that the Court's verdict may become subject to political motives. They argue that the Court's mandate was already excessively wide (and would be even more so if the Crime of Aggression[16] was defined in its Statute), meaning the Court could (perhaps) unwillingly become a tool for barratry and pointless legal hassle.[17] Supporters counter that the ICC's definitions are very similar to those of the Nuremberg Trials. Although supporters say that the checks and balances in the ICC made this an unlikely possibility opponents argue that giving even a temporary member of the Security Council, the power to veto any objections of prosecutorial bias gave the ICC no accountability whatsoever.[18] Supporters of the ICC argue that the States which object to the ICC are those which regularly carry out War Crimes and Crimes Against Humanity in order to promote their political or economic interests.[19]

United State's Objection

l The US fears that American soldiers and political leaders may be subject to "frivolous or politically motivated prosecutions," because many countries

12 Paul Travernier, "The Experience of the International Criminal Tribunals for the former Yugoslavia and Rwanda", available at http://www.icr.org/review/articles.
13 Art. 5, the Rome Statute, available at http.//www.un.org/law/icc/statute/romefra.htm.
14 Art. 17 of the Rome Statute.
15 For e.g. under Art. 4 & 87 of the Rome Statute.
16 Art. 5(2) of the Rome Statute.
17 Opposition to the ICC, available at http.//www.globalissues.org./geopolitics/icc/us.asp.
18 *id.*
19 *ibid*, *supra* note 17.

in the world have an anti-American agenda, and may constantly charge American politicians or military officials with war-crime charges, simply to cause embarrassment and bad publicity for the United States. For e.g., opponents of the ICC cite that in the past, when the US failed to act quickly enough to prevent disaster (e.g. Rwanda), it is criticized for allowing genocide to occur; yet in cases where the US has acted quickly (e.g. Yugoslavia, Somalia) they are still criticized and even accused of war crimes.[20]

- Many in the US believe that the US has a history of supporting human rights also believe that the US is more qualified to move against war criminals then many of the signatories of the ICC.[21]
- Opponents, further, contend that neither the ICC nor the United Nations has any real power to enforce the extradition of war criminals from signatory states. Therefore any kind of military action to force compliance would have to be undertaken largely by the US.
- Opponents contend that prosecution of a US national would not lead to the obligation of the US to cooperate or assist the Court in any way and would therefore not create any 'obligation for a non-state party'.[22] Supporters of the Court further argue that under International Law states have the right to try foreign nationals for crimes committed on their territory anyway; and if a state has the right to exercise jurisdiction in this case, that state can request an international organization to exercise that jurisdiction on its behalf by means of the treaty establishing that organization,[23] as traditionally in International Law, international organizations are considered to be instrument through which their member states act. Providing the ICC with jurisdiction over US nationals in this case would not interfere with the US sovereignty. Some have, however, argued that their territorial jurisdiction is non-delegable.[24]

In view of these oppositions, the United States adopted a number of measures to exempt US nationals from the Court's jurisdiction. In August 2002, the US passed the American Service Member's Protection Act, promising military action to prevent the trial of any US troops or nationals by the Court. The Act also cuts military assistance to countries that refuse to sign Bilateral Immunity

20 US Objections to the ICC, available at http.//www.globalissues.org./geopolitics/icc/us.asp.
21 *id.*
22 *id.*
23 S.K. Kapoor, *International Law*, Central Law Agency, 13th Ed. (2000)
24 Medaline Morris, *High Crimes and Misconceptions: the ICC and non-party States, Law and Contemporary Problems*, 2001. Vol. 64 No.1, p. 13ff.

Agreements (BIAs) with the US, which immunize Americans from ICC prosecution. In addition, the Nethercutt Amendment to the Foreign Appropriations Bill signed by President Bush on 7 Dec. 2004, suspends economic support fund assistance to ICC state parties who have not signed BIAs with the US.

The persistent opposition of the ICC from the world's only superpower and most prominent member of Security Council force us to think that whether there can be an alternative to the ICC.

Are there any alternatives to the ICC?

According to the Report of the International Commission of Inquiry on Darfur,[25] the ICC is the only credible way of bringing alleged perpetrators to justice. It strongly advises against other measures. The following paragraphs (573-582) discuss the Commission's finding with regard to the inadvisability of mechanisms other than the ICC to bring justice for crimes in Darfur.

a. The inadvisability of setting up an ad hoc International Criminal Tribunal

In view of the need of urgent action, some suggest establishment of another ad hoc criminal tribunal. But according to the Commission, there are two problems firstly, these tribunals, however meritorious, are very expensive, secondly, at least so far, on a number of grounds they have been rather show in the prosecution and punishment of the indicated persons.

b. The inadvisability to expand mandate of one of the existing ad hoc criminal tribunals.

According to the Commission, the same reasons hold true against possible expansion: first, this expansion would be time-consuming. It would require, after a decision of the Security Council, the election of new judges and new prosecutors as well as the appointment of Registry staff. Indeed at present the Tribunals are overstretched and working very hard to implement "completion strategy" elaborated and approved by the Security Council. In addition, the allocation of new tasks and the election or appointment of new staff would obviously require new financing. Thus, the second disadvantage of this option is that it would be very expensive. Thirdly, this expansion could end up creating great confusion in the Tribunal, which all of sudden would have to redesign its priorities and reconvert its tasks so as to accommodate the new functions.

25 U.N. Commission of Inquiry on why Alternatives to the ICC are Inadvisable for Darfur, available at http://hrw.org/campaign/icc/us.htm.

c. The inadvisability of establishing Mixed Courts

One option was to establish Courts that are mixed in their composition, which is consisting of both international judges and prosecutors and of judges and prosecutors having the nationality of the state where the trials are held. The Mixed Courts established in other conflicts have followed two models. First, the Mixed Courts can be organs of the relevant state, being part of its judiciary, as in Kosovo, East Timor, Bosnia and Cambodia. Alternatively, the Courts may be international in nature, that is, freestanding tribunals not part of the national judiciary, as in Sierra Leone. According the Report of the International Commission of Inquiry, this option has several drawbacks: firstly, financial implications. The Special Court for Sierra Leone, with its voluntary contributions, is hardly coping with the demands of justice there. Secondly, the time-consuming process for establishing these Courts by means of an agreement with the United Nations. The ICC offers the advantage, as the ICC is funded by the state parties and is immediately available. Thirdly, the investigation and prosecution would relate to persons enjoying authority and prestige in the country and wielding control over the state apparatus. Fourthly, many of the Sudanese Laws are grossly incompatible with international norms. In contrast, the ICC constitutes a self-contained regime, with a set of detailed rules on both substantive and procedural law that are fully attuned to respect for the fundamental human rights of all those involved in criminal proceeding before the Court. Finally, and importantly, the situation of Sudan is distinguishable in at least one respect from most situations where a special Court has been created in the past. The impugned crimes are within the jurisdiction of the ICC i.e. the crimes committed in Darfur were committed after 1st July 2002.

Thus the Commission strongly holds the view that resort to the ICC, the only truly international criminal institution, is the single best mechanism to allow justice to be made for the crimes committed in Darfur. The same holds true for any future scene of crime.

Future of the International Criminal Court

In future, the ICC will extend the rule of law internationally, impelling national systems to investigate and prosecute these crimes themselves – thus strengthening those systems – while ensuring that where they fail, an international court is ready to act. But in order to make it a reality, a lot of groundwork is required to be done both by the member states and the international community. To be effective the ICC will depend not only on widespread ratification of the

Rome Statute but also on States Parties complying fully with their treaty obligations. For almost every state this will require some changes in national laws. This paper recommends that states should incorporate all the ICC crimes into national law to ensure that they can prosecute the crimes enumerated in the Rome Statute in their own courts as both international and national crimes. This paper also recommends that states should enact law to allow for the prosecution of the ICC crimes under universal jurisdiction so that their Courts can prosecute them no matter where they are committed and regardless of the nationality of the perpetrator and victims. This paper further recommends that States should take the opportunity, as implementing the Rome statute provides to strengthen their own criminal justice systems so they can prosecute the ICC crimes themselves and, in this way, fully contribute to an effective International Criminal Justice System in which there is no safe haven for those who commit the worst international crimes. Regarding the implementation of ICC crimes, Human Rights Watch recommends that states must adopt the most progressive formulations of these crimes,[26] whether found in the Rome Statute or elsewhere, to ensure that their national law is consistent with the current state of International Law.

Apart from this, the ICC need cooperation of the member states at all the stages of trial, prosecution and for the execution of the sentence. All the member states must assist the ICC both financially as well as for other purposes.

Need to remove obstacles to the International Criminal Court

There are certain obstacles which are required to be removed to ensure effective functioning of the ICC. The first is the UN Security Council Resolution 1422/1487 adopted as Resolution 1422 in July 2002, and renewed as Resolution 1487 in June 2003, this UN Resolution requests that the ICC not proceed with investigations or prosecutions of officials participating in UN Peacekeeping or authorized missions who are from countries that have not yet ratified the Rome Statute (Under Art. 16 of the Rome Statute). This Resolution should not allow to be automatically renewed so as to prevent it from becoming customary International Law. The resolution was originally designed to apply to exceptional and very specific situations, in which the Court's action could interfere with the efforts of the Security Council to maintain international peace and security. A further intention was to prevent politicization of the Tribunal's international jurisdiction. However, it was not the intention of the framers to transform the Resolution into a general Article that would be forever transitory, creating the suspicion of hidden immunity that would alter the spirit of the Rome Statute. At

26 Making the International Criminal Court Work : A Handbook for Implementing the Rome Statute (2001), available at http://www.hrw.org.

the time of the 2003 renewal of Resolution 1487, the UN Secretary General also expressed his concern, saying, "*Allow me to express the hope that this does not become an annual routine. […] If that were to happen, it would undermine not only the authority of the ICC, but also the authority of the Council and the Legitimacy of the United Nations Peacekeeping*."[27]

Another obstacle to the universal jurisdiction of the ICC is the Bilateral Immunity Agreements (BIAs) which the US has promoted and obtained with a number of countries in terms of Art. 98 of the Rome Statute, with the objectivity of achieving Reciprocal Immunity for its troops (as discussed earlier in this paper). Legal experts from around the world have condemned the BIAs as illegal because they are contrary to International Law and the ICC treaty.[28] In this respect, Kenya's on-going resistance to the US-ICC Immunity Agreement deserves special mention, given the enormous pressure exerted on Kenya by the Bush Administration since 2003 to sign, pressure that has included the threatened loss of millions of dollars of both military and governance aid. The Coalition for the ICC (CICC) also praised Kenya's commitment to the ICC treaty and to the concept of equality of all before the Law.[29] Criticism of the US' BIA policy, however, is not coming solely from the human rights community. The US's strategy has recently received strong criticism from a much more unlikely source General Bantz Craddock, Commander of US Southern Command. In a statement delivered before the US House Armed Services Committee on March 9, 2005, General Craddock declared, *"[US BIA Policy] … in my judgment, has the main tended consequence of restricting our access to and interaction with many important partner nations … [it] hamper [s] the engagement and professional contact that is an essential element of our regional security cooperation strategy … and may have negative effects on long term US Security interests in the Western Hemisphere.*" Craddock later declared that China is building up its military ties with Latin America, partly as a result of the US' BIA policy.[30] Apart from this, the Amnesty International, FIDH and the Human Rights watch has also criticized the US administration's continued failure to comprehend the pivotal notion of complementarity regarding the ICC's jurisdiction. "*These immunity agreements not only undermine the integrity of the Rome Statute of the ICC, they also disregard the clear safeguards already built into the ICC's mandate*," said,

27 U.S. Requests Renewal of Security Council Resolution 1487 seeking ICC Immunity for U.S. Military Personnel (May 19, 2004), available at http://www.iccnow.org./documents

28 U.S. "Nethercutt Amendment" threaten Overseas Aid to Allies that have joined the ICC (Dec. 7, 2004), available at http:/www.iccnow.org./pressroom

29 Global Coalition Voices support for Kenya's on' going Resistance to U.S. ICC Immunity Agreement (July 20, 2005), available at http://www.iccnow.org./documents

30 *id.*

African Coordinator of the CICC.[31]

Inspite of all these obstacles, on October 4, 2004, United Nations Secretary General Kofi Anan and H.E. Judge Phillipe Kirsch, President of the ICC, signed an agreement that established a legal foundation for cooperation between the UN and the ICC within their respective mandates. This agreement includes important provisions regarding the exchange of information between the two organizations, judicial assistance and intra-institutional co-operating, apart from granting Observer status to the ICC at the UN General Assembly. This is a historic agreement which allow vital support of Court's work.[32] Another fillip to the Court's worldwide acceptance was provided by the first UN Security Council referral for Darfur, Sudan in March, 2005. These positive developments in the international scenario reflect the determination of the international community to make the ICC an effective and functional unit. However, still there is a long way to go if one look at the substantive provisions of the Rome Statute. More teeth are required to be given to the ICC which now appears only to be a paper-tiger. For the ICC to be effective, more powers should be given to it, like for e.g.

a. The power to try suspected war criminals in absentia

Art. 63(1) of the Rome Statute requires the presence of accused at the time of the trial. The same provision was there in the Statute of both ad hoc tribunals. Paul Tavernier, a Professor at the University of Paris-XI and Director of CREDHO, observes that the absence of provision for trial in absentia in the Statute of a criminal Tribunal reflects the wishes of countries of the Common Law tradition, which refers, on account of their requirements in this regard (fair trial, due process of law), whereas the possibility of holding this type of trial would have guaranteed the Tribunal a certain degree of efficiency, even in the event of lack of cooperation on the part of the states.[33]

b. The power to arrest suspects anywhere in the world and bring them before ICC.

Respect for law starts with fear of the policeman. It is largely admitted that most people are largely motivated by fear of the punishment they may incur. Moreover, there is no international "policy" to capture violators. Under the various provision of the Rome Statute (Art. 59, 87, 91, 92), the ICC can only request the state parties for arrest and surrender of the suspected persons. The Statute under Art. 87 (7) simply provide that if a state party fails to comply with a request to co-operate by the Court, the Court may refer the matter to the

31 *ibid, supra note* 29.

32 International Criminal Court and US to sign Historic Agreement (Oct. 4, 2004), available at http://www.hrw.org.

33 *ibid, supra note* 12.

Assembly of State Parties or, where the Security Council referred the matter to the Court, to the Security Council. The same was the situation with the earlier ad hoc tribunals. The Security Council thus appears to be, the "punch" of the International Criminal Tribunals, but actually the Council's action, when solicited, has never gone further than a simple reminder to States of their obligations by means of new Resolutions or Declarations by the President. The measures taken have hardly ever extended beyond the very limited practice observed in connection with Art. 94 of the United Nation Charter, and the execution of orders of the ICJ.[34] Apart from this, the most important function of UN Security Council is maintaining peace and security which obviously take precedence over those of law and justice. Hence, there is a need to give more coercive powers regarding arrest to the ICC as the most essential element of criminal law are the presence of coercive sanction, which cannot be altogether eliminated from the International Criminal Law.

c. The power to force any government to turn over evidence to the ICC.

Gathering and presentation of evidence is essential to establish guilt, so the ICC should be given more power to force any government to turn over evidence irrespective of the fact that the country is a non-member State and the presence of any BIAs under Art. 98 of the Rome Statute. This will not be demanding too much in view of the safeguards provided regarding fair means of gathering evidence under Art. 69 (7) and the protection of national security information under Art. 72. Accordingly, the researcher is of the view that Art. 73, which allow the refusal to disclose the content of a document by the originator the document, should be modified.

Apart from these powers, there is also a need to modify the Rome Statute in view of the seriousness of the offences with which it deals. **The pro-accused spirit, which is prevalent in the Rome Statute, requires reconsideration.** The rules included in the Statute were developed with a view to their national application to all kinds of offences, and are not necessarily adapted to repression at the international level. Moreover, the principles of criminal law like presumption of innocence, mens rea etc have already being modified in respect of certain serious offences, worldwide, like socio-economic offences, in view of the damage caused to the society by this new form of criminality. Therefore, the fundamental principles of criminal law are no more sacrosanct and deviation is being accepted by the society in exceptional circumstance. Similarly the researcher is of view, that the Roman Statute consists of sufficient safeguards for the protecting the

34 *ibid, supra note* 12.

rights of the accused both during the investigation (Art. 55) and during the trial (Art. 67), so there is no need to adhere to the principle of presumption of innocence as is provided under Art. 66 and also modification is required in the Rules of Procedure and Evidence to the ICC, thereby raising certain presumption against the accused on the same line as in the Indian Evidence Act, 1872. Hence, in order to make the ICC functional there is a need of gradual convergence between the opposing systems of Common Law and Civil Law. In view of the 'complimentarity' principle recognized under Art. 17 of the Statute, member states should not fear giving coercive powers to the ICC.

SECTION-B

In this section, the researcher seeks to analyze the relation between the ICC and international terrorism. Presently, the ICC does not have the authority to judge cases of international terrorism. Terrorist activity has gained in frequency within the last few decades. The dreadful terrorist attacks against The United States on September 11, 2001, made it clear than ever that the international community needs to cooperate and take actions against terrorism on an international level. Terrorism no longer is a domestic problem. Fast emerging dimensions of terrorism raises certain questions. Is it not high time for the global community to re-examine the existing regulatory regime on international terrorism? Can't we consider international terrorist attack as a crime against humanity? And finally how can international terrorism be included as a crime coming under the jurisdiction of the ICC? The researcher is of the opinion that the case against international terrorism can be used to highlight the need to have an effective and functional ICC.

International Terrorism

Terrorism is generally considered as a system of coercive intimidation brought about by the infliction of terror or fear.[35] In other words, it is terror inspired by violence committed by individuals or groups against non-combatants, civilians, states, or internationally protected persons or entities in order to achieve political ends. International Terrorism includes those acts where two or more states are involved, i.e., where the perpetrators and victims are citizens of different states, or where the act is performed in whole or in part in more than one state. International terrorism assumes various forms which include: aircraft hijacking, bombing, kidnapping of diplomatic personnel and other persons, attack on diplomatic missions, taking hostages, terrorism in war of national liberation, terrorism in armed conflicts and nuclear terrorism.[36]

35 Malcolm N. Shaw, *International Law*, Cambridge, Cambridge University Press (1997)

36 Balakista Reddy, Terrorism, Counter Terrorism and International Law in *Human Rights Education, Law and Society* edited by Ranbir Singh & Ghanshyam Singh, NALSAR University (2004)

The international terrorism has been and continues to be regulated by several international treaties, depending on its nature and the means used in committing it. However, the crime has never been defined on the basis of a widespread consensus. The debate on the nature of the crime places many countries in a difficult position, because there is no definition of terrorism that is completely free from political consideration. Many national liberation movements, when confronting colonizing powers in their struggle for freedom and other movements that have and continue to use force to defend their right to the self-determination of peoples have been accused of being terrorists but have later become governing parties or participants in national or international political negotiations (The Africa National Congress in Sough Africa, the PLO, the IRA, the East Timor Liberation Front, etc.).[37]

Defining terrorism should be at the top of the agenda and is the first step towards successful elimination of terrorism. The thematic approach as well as regional agreements which worked best in the past will not be good enough for future international law enforcement, because of two reasons, first being globalization and modern technology that have broadened the terrorist range of action and secondly, terrorism is not a domestic or regional problem any longer.[38] Unless there is an accepted definition we will always find ourselves preoccupied with dealing with the differences of who is a terrorist, a freedom fighter or a guerrilla. Though it is not easy to define terrorism, but the world body has to overcome its political reasons and excuses.

Definition of Terrorism

Statements like "one man's terrorist is another man's freedom fighter" hinder the accomplishment of reaching a useful, and much needed, definition of terrorism. They have become a cliché and an obstacle to efforts to deal successfully with terrorism. If nothing else, these statements lead to the questionable assumption that the ends justify the means. The statements approach to terrorism is particularly problematic because it privileges the perspective and world view of the person defining the term.[39] Such a culturally relativist approach, however, should not be accepted as it may sanction all causes, and create more terrorism. In order to achieve a universally accepted definition, we have to rely on objective and authoritative principles. The definition must be founded on a system of principles and Laws of War, legislated and ratified in many countries.[40]

37 The International Criminal Court and Terrorism, available at http://www.dgroups.org/gtroups/fipa/public/docs/doc_Marcelo_Stubrin_Corte_Penal-Eng.pdf.

38 Mira Banhchik, The International Criminal Court & Terrorism, , available at http://www.peacestudiesjournal.org.uk/docs/icc./.20and%20terrorism.pdf.

39 Boaz Ganor, Defining Terrorism : Is One Man's Terrorist Another Man's Freedom Fighter? (Sept. 24, 1998), available at http://www.ict.org.ii.

40 *id.*

International Terrorism and the Jurisdiction of the International Criminal Court

Before suggesting that international terrorism should be made a subject-matter of jurisdiction of the ICC, it is important to weigh the pro and cons of including Crimes of Terrorism in the Rome Statute and also the best way how we can extend the subject matter jurisdiction of the ICC. The ICC's subject matter jurisdiction encompasses the most serious crimes of international concern. According to the analysis developed thus far, terrorism certainly falls within that category.[41] The phenomena of 'leaderless resistance', networks that are difficult to detect, and the availability of technology including weapons of mass destruction – that can be used against large numbers of civilizations highlights the changing nature of terrorism, and its heightened (global) threat in the current era.[42] Various advantages of extending the subject matter jurisdiction of the ICC are:[43]

1. Smaller states will particularly benefit from including crimes of terrorism in the ICC Statute. As compared to the US, countries such as Egypt, Algeria, the Philippines or the Russian Federation, just to mention a few, that have serious problems with terrorists, often lack the ability to put them on trial. If the ICC could exercise jurisdiction over crimes of terrorism, a large economic burden could be lifted off of smaller states.

2. Unstable and weak governments are also faced with difficulties. In these states prosecution or extradition efforts can easily be thwarted by threatening the government with adverse political consequences or even more violent repercussions. If these criminal forces are more powerful than the government forces, then the state will not be able to act in a controlling manner. Colombia, for example, has been faced with this dilemma time and again, so instead of complying with legal rules and procedures, weak governments sometimes find themselves compelled to resort to illegal methods, like assassination, for example.

3. Neutrality of the ICC: The ICC is a neutral forum for prosecution on the international level. In accordance with Art. 36(3) (a), judges working at the ICC "shall be chosen from among persons of high moral character, impartiality and integrity". Among many other criteria ensuring neutrality, Art. 36(8) (a) (ii) guarantees that the panel of judges be selected according to an equitable geographical representation. The neutrality of the ICC would contribute to a more effective prosecution of terrorists. It would

41 *ibid, supra note* 38.
42 *ibid, supra note* 38.
43 *ibid, supra note* 38.

help avoid the possibility that terrorist seek safe haven in states that distrust the judicial system of the victimized state, do not want to extradite for political reasons or are simply unwilling to prosecutes and it would potentially minimize the risk of states acting in violation of international law and against international concerns by referring to extradite or prosecute (for e.g. the Libya refused to handover alleged suspect of Pan Am Flight 103 bombing for a long time to U.S.A.).

Extension of the ICC's Subject Matter Jurisdiction for Crimes of Terrorism

There are basically two schools of thoughts regarding how the ICC's subject matter jurisdiction should be extended to includes Crimes of Terrorism: one school of thought contend that terrorism is nothing but crime against humanity and so can be prosecute as such, the other school of thought suggest that there should be a separate provision in the ICC statute for crimes of terrorism. There is, however, a third point of view which consider terrorist act as war crimes, which is not considered in the present paper as the scholars are still debating this question.

Terrorism as Crime Against Humanity

The concept 'Crimes Against Humanity' evolved under the rules of customary international law and was proclaimed for the first time in the Charter of the International Military Tribunal of Nuremberg. It is a serious crime of international concern because its acts are so abhorrent that they shock our sense of human dignity. Murder, extermination, enslavement, deportation, torture and other acts amount to crimes against humanity, if the offense was part of a widespread or systematic practice, which must at least be tolerated by a state, government, or entity holding de facto authority over a territory, be state-sponsored, or else, be part of a governmental policy: systematic practice is at hand if acts are carried out pursuant to an explicit or implicit plan or policy. Such a policy can be deduced from the manner in which an act occurs. Namely, it suffices that a single act, committed within the framework of a systematic or widespread attack, has the potential to demonstrate such a policy. If a multiplicity of victims is targeted, we talk about a widespread attack. As far as the mens rea is required, the perpetrator has to have knowledge of the wider context in which his acts occur. However, he does not need to have a concrete idea of the consequences of his acts.[44]

The provisions concerning Crimes against Humanity in the ICC statute is not identical with previous provisions of Crimes against Humanity. While

44 Prosecutor V. Dusko Tadic, Case No.IT-94-1-AR72.

some of its aspects are construed more narrowly, others are broader. Art. 7(1) of the ICC statute condemns widespread or systematic attacks targeted at any civilian population. Art. 7(2) describes such an attack as a "worse of conduct involving the multiple commission of acts […] pursuant to or in furtherance of a State or organizational policy to commit such an attack." The perpetrator must be aware that his act built part of an overall widespread or systematic attack. This connection between the single act and the widespread attack is the central element. It raises an ordinary crime to one of the most serious crimes. However, the offender must be aware of this central and essential connection.[45] Art. 7 (2) (a) refers to the possibility of crimes against humanity occurring in the context of an organizational policy. Customary international law has developed with respect to the policy argument and today also includes non-state actors such as terrorist organizations.[46] The September 11 attacks could be theoretically viewed as crimes against humanity. It was not the first time Al Qaeda had attacked American facilities and there is more than ample ground for putting September 11 in the context of previous Al Qaeda strikes. Still Art. 7 would not be adequate to prosecute all terrorist.

The concept of 'systematic' was defined by the International Criminal Tribunal for Rwanda (ICTR) as follows: "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources."[47] It implies that there is no need to adopt a formal policy but there must be a preconceived plan or policy. Hence, all Al Qaeda attacks considered indicate a systematic policy which aims to target and destroy American symbols or facilities, like the World Trade Centre or America Lives. But certain questions like what about the previous attacks? How many such single attacks have to occur in order to meet 'systematic' criteria? Even if all these attacks are carried out by the same group, one could argue that the intervals in which they occurred are much too broad to reveal a regular pattern.[48] It follows that one needs several attacks in order to prove a regular pattern and the first few attacks could not be tried as crimes against humanity, unless they meet the widespread criteria. The Trial Chamber of the ICTR in Akayesu held that "Widespread criteria may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against

45 Darryl Robinson, "Developments in International Criminal Law. Defining "Crimes Against Humanity" at the Rome Conference (1999), available at http://www.icc-cpi-int.

46 Michael Whine, The New Terrorism, (2001), available at http://www.fau.ac.ii/anti-semitism/asw2000-1/whine.htm.

47 Prosecutor V. Jean Paul Akayesu, Case No. ICTR-96-4-T.

48 *ibid, supra note* 38.

a multiplicity of victim."[49] Because a single attack causing a large number of victims could also be described as widespread, the September 11 attacks can be viewed as a crime against humanity. But what about smaller terrorist attacks? Does the bombing in Saudi Arabia in 1995 constitute a crime against humanity? Only seven people were killed then.[50] Similarly the bombing of the USS Cole in October 2000, when seventeen were killed and thirty-nine injured.[51] Both these cases could not be tried as crimes against humanity. Consequently, number of terrorist would escape ICC prosecution. There need to be an opportunity to prosecute terrorists without having to prove that terrorist acts are part of systematic or wide-spread attack. Therefore, other approaches need to be available to bring terrorists to justice on an international level.

Crimes of Terrorism as separate provisions in the Rome Statute

The inclusion of terrorism in the jurisdiction of the ICC was dealt unsuccessfully at the Preparatory Commission (PREPCOM) that drafted the Rome Statute during the period 1996-98 and in the Preparatory Commission (Resolution F) of the ICC, which operated from 1999 to 2003[52] for number of reasons like that there was no generally acceptable definition of terrorism, inclusion will cause overburdening of the ICC and risk of jeopardizing the general acceptance of ICC. In 2009, the first Review Conference will take place to determine whether any amendments to the Rome Statute are appropriate. According to Art. 123(1) the review will not only be limited to the list of crimes mentioned in Art. 5. As a matter of fact, the plenipotentiaries for the establishment of an ICC adopted a resolution for this purpose recommending to consider the inclusion of crimes of terrorism in the jurisdiction of the ICC.[53] The resolution recognizes terrorism as a serious crime of concern to the international community and consequently serious threat to international peace and security. Similar conclusions were drawn at the fifty-seventh session of the UN General Assembly. The report of the Policy Working Group on the UN and terrorism also stated that international terrorism would be decreased, if the ICC would try the most serious crimes committed by terrorists.[54]

---

49 *ibid, supra note* 47.

50 CNN, Bombing probe goes at possible tie to 1995 terrorist attack (July 28, 1996), available at http://www.cnn.com/world/9606/28/saudi.probe.pm/index.html.

51 CNN, US officials see similarities between USS Cole blast and embassy attacks (Oct. 23, 2000), available at http://www.cnn.com/2000/us/10/23/uss.cole.01/.

52 *ibid, supra note* 37.

53 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court (July 17, 1998), available at http://www.un.org/law/icc/statute/finalfra.htm.

54. Report of the Policy Working Group on the United Nations and Terrorism, U.N. Gaor 57th sess. Annex to UN Doc.A/57/273(2002), available at http://www.un.org/terrorism/a57273.htm.

Regarding limited financial and personnel resources and so overburdening of the ICC, there is no need to worry. By virtue of the complementarity principle the ICC will exercise jurisdiction only if a state is not doing so. It is expected that state will choose to prosecute offenders in their national courts whenever they will have an opportunity. This state's struggle to preserve some sort of sovereignty will keep the ICC from being overburdened. Certain states also contend against granting the ICC jurisdiction over crimes of existing treaties as it will interfere with state's sovereignty. Again, this is not a persuasive agreement. The ICC will not seize jurisdiction in situations in which states exercise jurisdiction appropriately, be it on the basic of a treaty or otherwise.[55] Most of the existing treaties dealing with terrorism could be easily incorporated into the ICC statute and some are actually included in the preparatory committee's proposal.[56] Even if the international community does not succeed in agreeing on a definition of terrorism before the Review Conference in 2009, at least the International Anti-Terrorist Conventions could be incorporated in a separate provision constituting crimes of terrorism. States, which have ratified those treaties, operate on a "prosecute or extradite" basis, she only difference by including these treaties in the Rome Statute would be that a third actor would come into play in cases where states are unwilling or unable to prosecute terrorists. It will imply fill an existing gap. Therefore, the researcher suggests that terrorism should be treated as a separate category and hence deserve separate contemplation and prosecution so that certain terrorist could not escape the ICC jurisdiction.

Thus, we can conclude that terrorism is considered as one of the most reprehensible forms of international crime, on account of its massive and that total violation of fundamental human rights with no respect for borders. It is an aberrant crime that represents a true challenge for all humanity. Therefore, the fight against international terrorism should be a multilateral undertaking, in the hands of the countries but coordinated by international organizations, not just general ones such as the UN, but special ones such as specialized UN agencies or regional bodies. The diversity and complexity of criminal behaviour makes a strategy of this kind indispensable to achieve the hoped for result. In this sense, the role that can be played by the ICC is extremely important, owing to its nature as an international judicial body with universal jurisdiction and a specialized area of action i.e. international crimes.

55. *ibid, supra note* 38.

56. AIMCC: Terrorism and the International Criminal Court, available at http://www.avrice.org.docs terrorism.pdf.

Book Review

INTELLECTUAL PROPERTY MANUAL*

*Dr. Anita Rao***

Intellectual Property Rights have received special attention since the Uruguay Round of Negotiations. These are said to be "the creations of human mind, may be an inventive work, or even distinctive signs or marks". These creations, however, must have a commercial value. The growth engines in the 21st century's boast, namely the Knowledge Economy, are purely knowledge-driven, and are supposed to be neither landed property nor gold, the eternal temptation of mankind. The focus today is on creation/innovation of knowledge and application of knowledge and adding value to this knowledge.

The phenomenal growth of science and technology during the latter half of the 20th century has led to demands for a newer form of IPRs. The protection, IP-related information and the increasing dominance of the new knowledge economy are highly complex issues that need to be tackled in a professional way. Another matter of recent concern has to do with the so-called traditional knowledge, protection of which, hitherto, had never been considered an issue, but is now causing ripples in the information highway, thanks to multinationals actively engaging in capturing and patenting such traditional knowledge they come across in the course of their business. The community property of common concern to all had never faced the threat of invasion. The best examples to mention include the revocation of US patent for turmeric powder for wound healing, supported by evidence that information relating to his invention was in public dominion; which was actually the result of CSIR's efforts. The nations with advanced technologies have a major role to play in the emerging knowledge economy. Building the capabilities by fostering through dissemination and transfer of technologies, collaborations and supportive programs would narrow down the gap between developed and developing countries.

The major concern for India is the process of globalization that threatens the appropriation of the collective knowledge of societies into property knowledge for the commercial benefit of all of us. The need of the hour is to protect the fragile knowledge system through conducive domestic policies and link it to international conventions of IPRs. These threats can be overcome by enhancing

---

* Author Avinash Shivade published by Butterworths India, New Delhi, Price Rs 895/-

** Associate Professor at Gitam Institute of Foreign Trade, Visakhapatnam.

capabilities in building good infrastructure, greater awareness of issues and solid competency on IPR issues.

Against this backdrop, the book written by Avinash Shivade, himself an eminent and well known advocate known to have wide exposure in IPR cases, copy right and trademark infringements, is a timely and valuable addition to the existing literature on IPRs. This manual is highly relevant to those who seek benefit and take advantage of the knowledge economy which is the chief trend of the present century. The book is a good compilation of various IPR legislations at the national level with a useful annexure. The introductory chapter is quite lucid and the author ably conveys the stark fact that there has been a dearth of material on IPRs since 1980 in India. The spate of literary work on IPR may be said to have started from 1995 with Trips agreement as mandatory provisions for the WTO member countries. A very pertinent observation made by the author is that though the Indian constitution has made freedom of speech a fundamental right of every citizen, not much space has been allocated in the Indian constitution to the matter of protection of IPRs. Comparison is made with the U.S. Where the focus is more on IPR protection. Case law and commentaries on the articles of various legislations go a long way in providing for better clarity and understanding of thoughts.

The chapter relating to Patent Act 1970 as amended in 2002 deals with the subject quite extensively with in-depthy explanations and case discussions on Patent Law infringements. The author mentions which cases of IPR violations will be filed only at high courts or which in district courts. The author has evidently taken great pains to incorporate landmark cases on infringements of trademarks the cases of *N.R Dongr v Whirpool* and *Win Medicin v Somacere* laboratories are of particular interest to the reader.

The unique feature of the manual is the literature regarding PCT filling, an important procedure that is to be learn for entering into multilateral trade agreements Through the PCT filing, it is possible to apply for patent in more than one country The procedural aspects are well covered in the relevant chapter. The recent legislations on geographical indications and plant varieties and farmers' rights are value additions to the commercial reader. This enactment lays down a detailed procedure regarding registration of geographical indications and for better protection to related goods. This is the first legislation enacted within India A detailed procedure regarding registration, penalties, jurisdiction limitations, are all well discussed.

In sum, a comprehensive picture to the reader emerges. Information regarding the fees applicable and the annexure at the end of each chapter gives ready-made information to the advocates and should make their job easy and comfortable indeed. This manual is fit to be recommended as a study book for L.L.B students an a reference copy to the advocates, dealing with patent cases and most emphatically must find a shelf space in all reputed libraries in the country.

ENVIRONMENTAL LAW IN INDIA*

Dr. K. Vidyullatha Reddy**

Prof. Gurdip Singh book on Environmntal Law in India, is one among the fe environment law books, aim to provide comprehensive understanding of the subject. The challenge that authors of environmental law have to encounter will be toincorporate the latest developments while providing the framework that is necessary to understand the existing law and the course of development. The subject is growing at such a speed that to encompass everything will make the book a compilation while explaining everything may make it a treatise. In such a si8tuation the efforts of the author to bring forth a book that addresses the needs of the student community alongside others is commendable.

The conceptual clarity and the style in which the concepts were introduced is very apt and reader friendly. The conplexity that arises due to intertwining of concepts with issues has been dealt with in a very precise manner. The Environment Impact Assessment has been explained well as a concept thought the author chooses not to discuss the Impact Assessment Notification and the subsequent amendments issued by the Central Government. The author shares similar views as the Law Commission of India as far as the constitution of environment court is concemed.

The book is unique to the extent that though it discusses the Supreme Court casses under one head mostly, unlike topic wise, tries to explain the stand and the development in a very usual style which generally other law books does as opposed to environmental law books. The chapters on water pollution,air pollution and others explain thelegislation so well that the distinction that exists between conservation law, pollution law and land use law do not act as a hindrance in understanding the subject. The book though covered most of the existing law in the subject it would have been complete inall aspects if the author covered all the Rules and the Coastal Zone Regulation alongside Impact Assessment Notification issued by Cintral Government under the Environment Protection Act.

---

* Author Prof. Gurdip Singh - Published by Macmillan India Limited, 2005.

** Asst. Professor, NALSAR University of Law, Hyderabad, India.

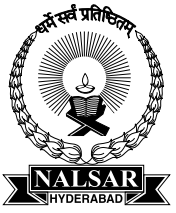
FORM IV

Statement of ownership and other particulars about the ***NALSAR Law Review***

Place of Publication	3-4-761, Barkatpura, Hyderabad - 500 027
Language	English
Periodicity	Half Yearly
Printer's Name, Nationality and Address	Prof. (Dr.) Ranbir Singh, Indian Vice-Chancellor NALSAR University of Law 3-4-761, Barkatpura, Hyderabad - 500 027
Publisher's Name, Nationality and Address	Prof. (Dr.) Ranbir Singh, Indian Vice-Chancellor NALSAR University of Law 3-4-761, Barkatpura, Hyderabad - 500 027
Editor's Name, Nationality and Address	Prof. (Dr.) Ranbir Singh, Indian Vice-Chancellor NALSAR University of Law 3-4-761, Barkatpura, Hyderabad - 500 027
Owner's Name	NALSAR University of Law, Hyderabad

I, Prof. (Dr.) Ranbir Singh hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
Prof. (Dr.) Ranbir Singh
Vice-Chancellor



For subscription enquiries write to :
The Registrar
NALSAR University of Law
3-4-761, Barkatpura,
Hyderabad - 500 027
Tel : +91 40 2756 7955 / 60
Fax : +91 40 2756 7310

Campus Address :
NALSAR University of Law
Justice City, Shameerpet,
R. R. Dist., Hyderabad - 500 078
Tel :+91 40 2349 8104
E-mail : registrar@nalsar.ac.in
Website : www.nalsar.ac.in