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Articles

Book Review

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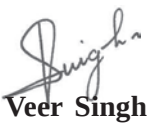
Message from the Patron

I am extremely happy to put in the hands of our readers another issue of NALSAR Law Review. I congratulate all the learned contributors who have contributed their well-researched papers for publication in the Journal. The Editorial Board deserves appreciation for bringing out the Journal well in time before the 8th NALSAR Annual Convocation, 2010. NALSAR, as one of the best National Law Universities, not only provides legal education and training of the highest order, it also undertakes high-end research in frontier areas of Law. The originality, ingenuity and innovation in order to enrich legal education to make it relevant in the new millennium come only through research.

It is also essential that social legal research should not be confined to a few scholars and students it should be disseminated widely. NALSAR Law Review serves as a right platform for dissemination of social legal research undertaken by the learned contributors of articles to the Journal. The print material in which the research articles are available in the Journal has its own advantages and internet with all its advantages cannot replace the print material. Our Journal has a large audience and I am sure all the readers will find it informative and interesting. We always look forward for the valuable feedback and suggestions and further contribution of research articles, case-comments and book-reviews from our readers.



Veer Singh
Vice-Chancellor

Editorial

The modern technology has increased the power of many to circumvent the existing laws and legal entitlements. Trust in law and legal methods is fast declining. The question is – is law the only mechanism of social control? No, there are other conflict resolution mechanisms in our society, which are informal in nature. All these systems look towards balancing the societal needs of development. But, the question is at what cost?

A close look at the provisions of Part IV of the Constitution indicates that there is Constitutional conceptualization of the inter-relationship between development and environment. The Directive Principles of State Policy as embodied in Part IV of the Indian Constitution are "fundamental in the governance of the country". They impose a Constitutional duty on the State to apply these Principles in making laws aimed at the attainment of certain social and economic developmental goals by the State. These directive Principles *inter-alia*, envisage socio-economic development of the country and the people. Thus, the State is obliged to formulate its socio-economic policies in such a way as to sub-serve the larger Constitutional environmental policy perspectives. The State is also obliged to secure a social order in which justice-social, economic and political shall inform all the institutions of national life. The State shall, in particular, direct its policy towards ensuring that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to avocations unsuited to their age or strength; and, that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that youth are protected against exploitation and against moral and material abandonment. In addition, the State is also enjoined to strive to improve public health and to raise the level of nutrition and the standard of living of its people.

The great Constitutional significance of Articles 48A and 51A(g) when read along with other provisions of Part IV of the Constitution, is that they provide the necessary Constitutional Scheme for the concept of "sustainable

development" in the country by outlining a blueprint of social and economic development. So the State is under an obligation to provide for all round development.

As individuals, we need to uphold and strengthen the institutions and agencies like family, education, religion because it is beyond the law and legal system to inculcate morality and conformity in individuals. This can be best done by social institutions like family alone. Therefore, sense of responsibility is indispensable.

The Editorial team of NALSAR Law Review is happy to hand over yet another Volume of the research review to its readers. In this Volume, the efforts have been to give importance to inter/multidisciplinary research work, as law is a product of society. We thank all the learned contributors of the research papers and book reviews for their excellent contributions.

Editorial Committee

CYBER CRIMES AND INFORMATION TECHNOLOGY

R.M. Kamble*
C.Vishwapriya**

Introduction

Information is a resource which has no value until it is extracted, processed and utilized. Information technology deals with information system, data storage, access, retrieval, analysis and intelligent decision making. Information technology refers to the creation, gathering, processing, storage, presentation and dissemination of information and also the processes and devices that enable all this to be done.

Information technology is affecting us as individual and as a society. Information technology stands firmly on hardware and software of a computer and tele-communication infrastructure. But this is only one facet of the information Technology, today the other facets are the challenges for the whole world like cyber crimes and more over cyber terrorism. When Internet was first developed, the founding fathers hardly had any inkling that internet could transform itself into an all pervading revolution which could be misused for criminal activities and which required regulations. With the emergence of the technology the misuse of the technology has also expanded to its optimum level the examples of it are:

- Cyber stalking
- Cyber harassment
- Cyber fraud
- Cyber defamation
- Spam
- Hacking
- Trafficking
- Distribution
- Posting and dissemination of obscene material including pornography,
- Indecent exposure and child pornography etc.

The misuse of the technology has created the need of the enactment and implementation of the cyber laws. As the new millennium dawned, the computer has gained popularity in every aspect of our lives. This includes the use of computers by persons involved in the commission of crimes. Today, computers play a major role in almost every crime that is committed. Every crime that is committed is not necessarily a computer crime, but it does mean that law enforcement must become much more computer literate just to be able to keep up with the criminal element. According to Donn Parker, "for the first time in

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human history, computers and automated processes make it possible to possess, not just commit, a crime. Today, criminals can pass a complete crime in software from one to another, each improving or adapting it to his or her own needs." but whether this cyber laws are capable to control the cyber crime activities, the question requires the at most attention.

Until recently, many information technology (IT) professionals lacked awareness of and interest in the cyber crime phenomenon. In many cases, law enforcement officers have lacked the tools needed to tackle the problem; old laws didn't quite fit the crimes being committed, new laws hadn't quite caught up to the reality of what was happening, and there were few court precedents to look to for guidance. Furthermore, debates over privacy issues hampered the ability of enforcement agents to gather the evidence needed to prosecute these new cases. Finally, there was a certain amount of antipathy—or at the least, distrust - between the two most important players in any effective fight against cyber crime: law enforcement agencies and computer professionals. Yet close cooperation between the two is crucial if we are to control the cyber crime problem and make the Internet a safe "place" for its users.

Law enforcement personnel understand the criminal mindset and know the basics of gathering evidence and bringing offenders to justice. IT personnel understand computers and networks, how they work, and how to track down information on them. Each has half of the key to defeating the cyber criminal. IT professionals need good definitions of cyber crime in order to know when (and what) to report to police, but law enforcement agencies must have statutory definitions of specific crimes in order to charge a criminal with an offense. The first step in specifically defining individual cyber crimes is to sort all the acts that can be considered cyber crimes into organized categories.

What is a Computer Crime?

a. Criminals Can Operate Anonymously Over the Computer Networks.

b. Hackers Invade Privacy.

c. Hackers Destroy "Property" in the Form of Computer Files or Records.

d. Hackers Injure Other Computer Users by Destroying Information Systems.

e. Computer Pirates Steal Intellectual Property.

Definition of Cyber Crime

Defining cyber crimes, as "acts that are punishable by the Information Technology Act" would be unsuitable as the Indian Penal Code also covers many cyber crimes, such as email spoofing and cyber defamation, sending threatening emails etc. A simple yet sturdy definition of cyber crime would be

"unlawful acts wherein the computer is either a tool or a target or both".

Classification of Cyber Crimes

The Information Technology Act deals with the following cyber crimes along with others:

- Tampering with computer source documents
- Hacking
- Publishing of information, which is obscene in electronic form
- Child Pornography
- Accessing protected system
- Breach of confidentiality and privacy

Cyber crimes other than those mentioned under the IT Act

- Cyber Stalking
- Cyber squatting
- Data Diddling
- Cyber Defamation
- Trojan Attack
- Forgery
- Financial crimes
- Internet time theft
- Virus/worm attack
- E-mail spoofing
- Email bombing
- Salami attack
- Web Jacking

The Concept of Cyber Terrorism

Cyber crime and cyber terrorism are both crimes of the cyber world. The difference between the two however is with regard to the motive and the intention of the perpetrator.

While a cyber crime can be described simply as an unlawful act wherein the computer is either a tool or a target or both, cyber terrorism deserves a more detailed definition. One can define cyber terrorism as a premeditated use of disruptive activities or the threat thereof, in cyber space, with the intention to further social, ideological, religious, political or similar objectives, or to intimidate any person in furtherance of such objectives.

Cyber Criminals

Any person who commits an illegal act with a guilty intention or commits a crime is called an offender or a criminal. In this context, any person who commits a Cyber Crime is known as a Cyber Criminal. The Cyber Criminals may be children and adolescents aged b/w 6-18 years, they may be organized hackers, may be professional hackers or crackers, discontented employees, cheaters or even psychic persons.

a. Kids and Teenagers (Age Group 9-16)

This is really difficult to believe but it is true. Most amateur hackers and cyber criminals are teenagers. To them, who have just begun to understand what appears to be a lot about computers, it is a matter of pride to have hacked into a computer system or a website. There is also that little issue of appearing really smart among friends. These young rebels may also commit cyber crimes without really knowing that they are doing anything wrong.

According to the BBC, Teen hackers have gone from simply trying to make a name for them selves to actually working their way into a life of crime from the computer angle. According to Kevin Hogan, One of the biggest changes of 2004 was the waning influence of the boy hackers keen to make a name by writing a fast-spreading virus. Although teenage virus writers will still play around with malicious code, 2004 saw a significant rise in criminal use of malicious programs. The financial incentives were driving criminal use of technology.

Another reason for the increase in number of teenage offenders in cyber crimes are that many of the offenders who are mainly young college students are unaware of its seriousness. Recently the Chennai city police have arrested an engineering college student from Tamil Nadu for sending unsolicited message to a chartered accountant. The boy is now released on bail. So, counseling sessions for college students have to be launched to educate them on the gravity and consequences emanating from such crimes.

In September, 2005, A Massachusetts teenager pleaded guilty in federal court in Boston for a string of hacking crimes reported to include the February compromise of online information broker Lexis Nexis and socialite Paris Hilton's T-Mobile cellular phone account. The US Court noted that the number of teenage hackers is on the rise and only the lowest 1 percent of hackers is caught.

In the above instance, the judge imposed a sentence of 11 months' detention in a juvenile facility. If he had been an adult, he would have faced charges of three counts of making bomb threats against a person or property, three counts of causing damage to a protected computer system, two counts of wire fraud, one count of aggravated identity theft and one count of obtaining

information from a protected computer in furtherance of a criminal act. This is clearly a deviation from the traditional principles of criminal law.

b. Organized hacktivists

Hacktivists are hackers with a particular (mostly political) motive. In other cases this reason can be social activism, religious activism, etc. The attacks on approximately 200 prominent Indian websites by a group of hackers known as Pakistani Cyber Warriors are a good example of political hacktivists at work.

c. Disgruntled employees

One can hardly believe how spiteful displeased employees can become. Till now they had the option of going on strike against their bosses. Now, with the increase independence on computers and the automation of processes, it is easier for disgruntled employees to do more harm to their employers by committing computer related crimes, which can bring entire systems down.

d. Professional hackers (Corporate espionage)

Extensive computerization has resulted in business organizations storing all their information in electronic form. Rival organizations employ hackers to steal industrial secrets and other information that could be beneficial to them. The temptation to use professional hackers for industrial espionage also stems from the fact that physical presence required to gain access to important documents is rendered needless if hacking can retrieve those.

Criminal Law – General Principles

According to criminal law, certain persons are excluded from criminal liability for their actions, if at the relevant time; they had not reached an age of criminal responsibility. After reaching the initial age, there may be levels of responsibility dictated by age and the type of offense allegedly committed.

Governments enact laws to label certain types of activity as wrongful or illegal. Behavior of a more antisocial nature can be stigmatized in a more positive way to show society's disapproval through the use of the word criminal. In this context, laws tend to use the phrase, "age of criminal responsibility" in two different ways:

1. As a definition of the process for dealing with alleged offenders, the range of ages specifies the exemption of a child from the adult system of prosecution and punishment. Most states develop special juvenile justice systems in parallel to the adult criminal justice system. Children are diverted into this system when they have committed what would have been an offense in an adult.

2. As the physical capacity of a child to commit a crime. Hence, children are deemed incapable of committing some sexual or other acts requiring abilities of a more mature quality.

The age of majority is the threshold of adulthood as it is conceptualized in law. It is the chronological moment when children legally assume majority control over their persons and their actions and decisions, thereby terminating the legal control and legal responsibilities of their parents over and for them. But in the cyber world it is not possible to follow these traditional principles of criminal law to fix liability. Statistics reveal that in the cyber world, most of the offenders are those who are under the age of majority. Therefore, some other mechanism has to be evolved to deal with cyber criminals.

Ethics and morality in different circumstances connotes varied and complex meanings. Each and everything which is opposed to public policy, against public welfare and which may disturb public tranquility may be termed to be immoral and unethical. In the past terms such as imperialism, colonialism, apartheid, which were burning issues have given way to cyber crime, hacking, 'cyber-ethics' etc.

Positive Aspects of the IT Act, 2000

1. Prior to the enactment of the IT Act, 2000 even an e-mail was not accepted under the prevailing statutes of India as an accepted legal form of communication and as evidence in a court of law. But the IT Act, 2000 changed this scenario by legal recognition of the electronic format. Indeed, the IT Act, 2000 is a step forward.

2. From the perspective of the corporate sector, companies shall be able to carry out electronic commerce using the legal infrastructure provided by the IT Act, 2000. Till the coming into effect of the Indian Cyber law, the growth of electronic commerce was impeded in our country basically because there was no legal infrastructure to regulate commercial transactions online.

3. Corporate will now be able to use digital signatures to carry out their transactions online. These digital signatures have been given legal validity and sanction under the IT Act, 2000.

4. In today's scenario, information is stored by the companies on their respective computer system, apart from maintaining a back up. Under the IT Act, 2000, it shall now be possible for corporate to have a statutory remedy if any one breaks into their computer systems or networks and causes damages or copies data. The remedy provided by the IT Act, 2000 is in the form of monetary damages, by the way of compensation, not exceeding Rs. 1, 00, 00,000.

5. IT Act, 2000 has defined various cyber crimes which includes hacking and damage to the computer code. Prior to the coming into effect of the Indian Cyber law, the corporate were helpless as there was no legal redress for such issues. But the IT Act, 2000 changes the scene altogether.

The Grey Areas of the IT Act, 2000

1. The IT Act, 2000 is likely to cause a conflict of jurisdiction.
2. Electronic commerce is based on the system of domain names. The IT Act, 2000 does not even touch the issues relating to domain names. Even domain names have not been defined and the rights and liabilities of domain name owners do not find any mention in the law.
3. The IT Act, 2000 does not deal with any issues concerning the protection of Intellectual Property Rights I the context of the online environment. Contentious yet very important issues concerning online copyrights, trademarks and patents have been left untouched by the law, thereby leaving many loopholes.
4. As the cyber law is growing, so are the new forms and manifestations of cyber crimes. The offences defined in the IT Act, 2000 are by no means exhaustive. However, the drafting of the relevant provisions of the IT Act, 2000 makes it appear as if the offences detailed therein are the only cyber offences possible and existing. The IT Act, 2000 does not cove various kinds of cyber crimes and Internet related crimes. These Include:-
   a) Theft of Internet hours
   b) Cyber theft
   c) Cyber stalking
   d) Cyber harassment
   e) Cyber defamation
   f) Cyber fraud
   g) Misuse of credit card numbers
   h) Chat room abuse
5. The IT Act, 2000 has not tackled several vital issues pertaining to e-commerce sphere like privacy and content regulation to name a few. Privacy issues have not been touched at all.
6. Another grey area of the IT Act is that the same does not touch upon any anti- trust issues.
7. The most serious concern about the Indian Cyber law relates to its implementation. The IT Act, 2000 does not lay down parameters for its implementation. Also, when internet penetration in India is extremely

low and government and police officials, in general are not very computer savvy, the new Indian cyber law raises more questions than it answers. It seems that the Parliament would be required to amend the IT Act, 2000 to remove the grey areas mentioned above.

Statistics relating to cyber crime

As per the report of National Crime Records Bureau, in 2005, a total 179 cases were registered under IT Act 2000, of which about 50 percent (88 cases) were related to Obscene Publications / Transmission in electronic form, normally known as cyber pornography. 125 persons were arrested for committing such offences during 2005. There were 74 cases of Hacking of computer systems during the year wherein 41 persons were arrested. Out of the total (74) Hacking cases, those relating to Loss/Damage of computer resource/utility under Sec 66(1) of the IT Act were 44.6 percent (33 cases) whereas the cases related to Hacking under Section 66(2) of IT Act were 55.4 percent (41 cases). Tamil Nadu (15) and Delhi (4) registered maximum cases under Sec 66(1) of the IT Act out of total 33 such cases at the National level. Out of the total 41 cases relating to Hacking under Sec. 66(2), most of the cases (24 cases) were reported from Karnataka followed by Andhra Pradesh (9) and Maharashtra (8).

During the year, a total of 302 cases were registered under IPC Sections as compared to 279 such cases during 2004 thereby reporting an increase of 8.2 percent in 2005 over 2004. Gujarat reported maximum number of such cases, nearly 50.6 percent of total cases (153 out of 302) like in previous year 2004 followed by Andhra Pradesh 22.5 percent (68 cases). Out of total 302 cases registered under IPC, majority of the crimes fall under 2 categories viz. Criminal Breach of Trust or Fraud (186) and Counterfeiting of Currency/Stamps (59). Though, these offences fall under the traditional IPC crimes, the cases had the cyber tone wherein computer, Internet or its related aspects were present in the crime and hence they were categorized as Cyber Crimes under IPC. Out of the 53,625 cases reported under head Cheating during 2005, the Cyber Forgery (48 cases) accounted for 0.09 percent. The Cyber frauds (186) accounted for 1.4 percent out of the total Criminal Breach of Trust cases (13,572).

The Forgery (Cyber) cases were highest in Andhra Pradesh (28) followed by Punjab (12). The cases of Cyber Fraud were highest in Gujarat (118) followed by Punjab (28) and Andhra Pradesh (20). A total of 377 persons were arrested in the country for Cyber Crimes under IPC during 2005. Of these, 57.0 percent (215) of total such offenders (377) were taken into custody for offences under 'Criminal Breach of Trust/Fraud (Cyber)', 22.0 percent (83) for 'Counterfeiting of Currency/Stamps' and 18.8 percent (71) for offences under 'Cyber Forgery'. The States such as Gujarat (159), Andhra Pradesh (110), Chhattisgarh and

Punjab (51 each) have reported higher arrests for Cyber Crimes registered under IPC. Bangalore (38), Chennai (20) and Delhi (10) cities have reported high incidence of such cases (68 out of 94 cases) accounting for more than half of the cases (72.3%) reported under IT Act, 2000. Surat city has reported the highest incidence (146 out of 163 cases) of cases reported under IPC sections accounting for more than 89.6 percent.

The latest statistics show that cyber crime is actually on the rise. However, it is true that in India, cyber crime is not reported too much about. Consequently there is a false sense of complacency that cyber crime does not exist and that society is safe from cyber crime. This is not the correct picture. The fact is that people in our country do not report cyber crimes for many reasons. Many do not want to face harassment by the police. There is also the fear of bad publicity in the media, which could hurt their reputation and standing in society. Also, it becomes extremely difficult to convince the police to register any cyber crime, because of lack of orientation and awareness about cyber crimes and their registration and handling by the police.

A recent survey indicates that for every 500 cyber crime incidents that take place, only 50 are reported to the police and out of that only one is actually registered. These figures indicate how difficult it is to convince the police to register a cyber crime. The establishment of cyber crime cells in different parts of the country was expected to boost cyber crime reporting and prosecution. However, these cells haven't quite kept up with expectations.

Citizens should not be under the impression that cyber crime is vanishing and they must realize that with each passing day, cyberspace becomes a more dangerous place to be in, where criminals roam freely to execute their criminals intentions encouraged by the so-called anonymity that internet provides.

The absolutely poor rate of cyber crime conviction in the country has also not helped the cause of regulating cyber crime. There have only been few cyber crime convictions in the whole country, which can be counted on fingers. We need to ensure that we have specialized procedures for prosecution of cyber crime cases so as to tackle them on a priority basis. This is necessary so as to win the faith of the people in the ability of the system to tackle cyber crime. We must ensure that our system provides for stringent punishment of cyber crimes and cyber criminals so that the same acts as a deterrent for others.

Conclusion

The new legislation which can cover all the aspects of the Cyber Crimes should be passed so the grey areas of the law can be removed. The recent

blasts in Ahmedabad, Bangalore and Delhi reflects the threat to the mankind by the cyber space activities against this I personally believes that only the technology and its wide expansion can give strong fight to the problems. The software's are easily available for download should be restricted by the Government by appropriate actions. New amendment should be including to the IT Act, 2000 to make it efficient and active against the crimes. The training and public awareness programs should be organized in the Companies as well as in common sectors. The number of the cyber cops in India should be increased. The jurisdiction problem is there in the implementation part which should be removed because the cyber criminals does not have any jurisdiction limit then why do the laws have, after all they laws are there, to punish the criminal but present scenario gives them the chance to escape

Today in the present era there is a need to evolve a 'cyber-jurisprudence' based on which 'cyber-ethics' can be evaluated and criticized. Further there is a dire need for evolving a code of Ethics on the Cyber-Space and discipline

The Information Technology Act 2000 was passed when the country was facing the problem of growing cyber crimes. Since the Internet is the medium for huge information and a large base of communications around the world, it is necessary to take certain precautions while operating it. Therefore, in order to prevent cyber crime it is important to educate everyone and practice safe computing.

Following Frank William Abagnale and Robert Morris, many other hackers are intending to make use of their skills for better purposes. This trend continues even now where companies as their security analysts hire the brilliant hackers. Also, there is a dire need for evolving a code of Ethics on the Cyber-Space and discipline. In the cyberspace, following traditional principles of criminal law to fix liability is not possible. Since most of the cyber criminals are those who are under the age of majority, some other legal framework has to be evolved to deal with them. Since cyber world has no boundaries, it is a Herculean task to frame laws to cover each and every aspect. But, however a balance has to be maintained and laws be evolved so as to keep a check on cyber crimes.

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TACKLING ELECTRONIC WASTE: NEED OF THE HOUR!

P. Sree Sudha*

Introduction

The information and communication technology (ICT) sector in the last twenty years or so in India has revolutionized life of one and all, ratcheting a viral effect on electronic manufacturing industries leading to phenomenal growth in terms of both, volume and applications. Digital development has become the new mantra having its all engulfing footprints every where. The booming usage of electronic and electrical equipments has created a new but very dangerous stream of waste, called "electronic-waste", or simply known as e-waste.[1] With the presence of deadly chemicals and toxic substances in the electronic gadgets, disposal of e-waste is becoming an environmental and health nightmare. E-waste is now one of the fastest growing waste streams. Every year, hundreds of thousands of old computers, mobile phones, television sets and radio equipment are discarded, most of which either end up in landfills or unauthorized recycling yards.[2] E-waste is defined as "a generic term encompassing various forms of electrical and electronic equipment (EEE) that are old, end-of-life (EOL) electronic appliances and have ceased to be of any value to their owner".

A recent survey reveals the fact that nearly 8,00,000 tones of e-waste is generated in India by the end of year 2012.[3] E- Waste is made up of multiple components; some contains toxic substances that have an adverse impact on human health and environment if not handled properly. Often these problems arise due to improper recycling and disposal methods.[4] It will have a drastic impact on the people who are associated with recycling of e-waste. Waste from the white and brown goods if less toxic compared to grey good. A cell phone contains highly toxic chemicals like lead, cadmium, mercury, BFR, beryllium, poly vinyl chloride and phosphor components.[5] These elements cause following health hazards.

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1 MAIT-GTZ study on Assessment of e-waste in India, Business Standard (2008), India.

2 Ramesh Babu, Parande A.K., Ahmad Basha on *"Electrical and Electronic Waste, A Growing Environmental Problem"*, Waste Management Review, Vol.No.27, 2007, pp. 307-318.

3 http://*www.environment.gov.au,* last visited on April 4, 2010.

4 Recycling of electronic waste in China and India: Workplace and Environmental contamination, Bridgen, K., Labunska, I., Santillo, D. & Allsopp, M. (2005), http://www.greenpeace.org/india/press/reports/recycling-of-electronic-waste,, last visited on April 15, 2009.

5 Harrington JM AW TC Baker EL, Occupational and Environmental Health and Safety, In David AW Timothy MC John DM Edward Editions, Oxford Text Boom of Medicine, 4th ed., Vol1, Chap. 8.4.1, 2003, pp. 956-60.

At this scenario the aim of this article is to discuss the menace of e-waste, particularly its effects on human health, further section will throw some light on main sources of e-waste, next section describes existing legal regime and its aims at tackling e-waste and finally ends with conclusion and suggestions.

Health and Environmental Impact of E-Waste

E-waste is made of a multitude of components, some containing toxic substances that have adverse impact on human health and environment if not handled properly. Often these hazards arise due to the improper recycling and disposal processes used. It can have serious repercussions for those in proximity to places where e-waste recycled or burnt. Waste from brown and white goods is less toxic as compared with grey goods. A computer contains highly toxic chemicals like lead,[6] cadmium,[7] mercury,[8] beryllium, BFR, polyvinyl chloride and phosphor compounds.[9]

Main sources of E –waste

The main sources of electronic waste in India are the government, public and private (industrial) sector discards, which account for almost 70% of the total waste generation. The growth in the government sector alone has been a staggering 126% over the last year; the Government emerges as one of the largest generators of this waste.[10] The contribution of individual households is relatively small at about 15 % the rest being contributed by manufacturers. Though individual households are not large contributors to waste generated by computers, they certainly consume large quantities of consumer durables and are potential creators of waste thereof. [11]

Another major source of e-waste is the import of such material being brought in illegally.[12] This adds to the volume of waste being generated within

6 Exerts toxic effects on various systems in body such as the central (organic affective syndrome) and peripheral nervous system (motor neuropathy) homoeopathic system (anemia), the genitourinary system (capable of causing harm to all parts of nephron) and reproductive systems (male and female).

7 It is potentially long term cumulative poison. Toxic cadmium components accumulate in the human body especially in kidneys. There is an evidence of the role of cadmium and beryllium in carcinogenicity.

8 Causes damage to the genitourinary system (tubular dysfunction) the central peripheral nervous system as well as the fetus. When inorganic mercury spreads out in the water it is transformed into methylated mercury, which bio-accumulates in living organisms and concentrates through the food chain, particularly by fish.

9 It affects lungs skin and bladder. Epidemiological studies in the past on occupational exposure to PAH provide sufficient evidence of role of PAH in the induction of skin and lung cancers.

10 *http://www.basel.int/industry/mppiwp/guid-info/index.html*, last visited on April 3, 2010.

11 See Sunita Narayanan on "Different Waste Model", *Down to Earth*, accessed from the web site: www.downtoearth.org, last visited on March 12, 2010.

12 Harder B on "Toxic E-Waste gets cashed poor nations", National Geographic News Nov. 8, 2005, http://news.nationalgeographic.com, last visited on May 4, 2010.

the country. The accurate data on such imports is not available largely owing to the nature of the trade. However, estimates suggest that imports accounts for an almost equal amount to what is being generated in the country.

Globalization has added another dimension to waste trade and E waste occupies center stage of this trade. Large volumes of E waste are being traded globally though in many cases illegally, and India is viewed as one of the most preferred destinations for outsourcing for the reverse manufacturing process of E waste.[13] Availability of cheap labour and weak environmental laws are largely responsible for the promotion of such illegal trade. Subsequent to the WEEE Directive in the EU and the State laws in five States of US, India receives large amount of electronic waste for recycling and treatment from these countries. Lack of understanding of national policies on import export and porous ports at both the points of origin and the final destination also add to the volumes being traded. As the trade opportunities grow the traders and recyclers resort to newer methods and approaches in import-export of such materials. It is very unfortunate that the burden of such hazard processing is passed on from the most developed world to the most marginalized communities of developing countries.[14]

On tracking some of the consignments and scrutinizing trade documents it becomes amply clear that most of these consignments are from Western countries and the rationale for such imports is mainly economic. As per available data, it costs $ 20 to recycle a single computer in the United States while the same could be recycled in India for only $2, a saving of $18 if the computer is exported to India.[15] Cathode Ray Tubes (CRT) a Basel listed waste is being openly traded between US and India as CRT monitors become obsolete with the advent of flat screen monitors. Large quantities of CRTs are now finding their way into India for being recycled. This trade though flourishing is illegal and contravenes the international Basel treaty which prohibits trans-boundary movement of hazardous goods; India is a signatory to this treaty.[16]

Existing Legal Framework on Electronic Waste

Most countries that have drafted regulation on E-waste have sought participation and involvement of producers, as they are best equipped to address both upstream and downstream solutions in view of complex material composition

13 Kukaday K. "Making Profit from Mining E-Waste", http://www.timesofindia.com/articlesshow/2107581.cms, last visited on April 12, 2010.

14 Wankhende K.K. Britan's Environmental Agency confirms that huge e-waste outflow to India, Published in toxics link, http://www.toxicslink.org, last visited on May 4, 2010.

15 Sinha on "The Down Side of Digital Revolution", Published in toxic Link, http://www.toxicslink.org/a, last visited on April 1, 2010.

16 Violet N. Pinto on "E-Waste Hazard : The Impeding Challenge", http://www. Ijoem.com, last visited on May 7, 2010.

of such products. The issue of cleaner production and use of cleaner materials can also be best understood and implemented with active involvement of producers.[17] This is largely not addressed in the current draft regulation and the issue of waste trade has also been left to market forces. Below section will throw some light on existing International and National legal regimes relevant to e-waste.

International Legal Regimes relevant to E-waste Basel Convention

The Basel Convention on Trans-boundary Movements of Hazardous Waste addresses the issue of import of such waste. Lists A and B of the Convention list such waste and the imports of these are regulated. The Convention also prohibits the import/ trans- boundary movement of such waste from an OECD to a non-OECD country. Those rules are explained in detailed in the following section.

This Convention is the world's most comprehensive environmental agreement on hazardous and other wastes. Governments are expected to minimize the generation of hazardous wastes, treat and dispose of wastes as close as possible to their place of generation and reduce the quantities transported.[18] The proper implementation of the Basel Convention ensures that hazardous e-waste be managed in an environmentally sound manner as it provides the tools for the transparency and traceability of e-wastes destined for recycling or recovery. The development of international resource recycling systems would have to be combined with a mechanism capable of monitoring such systems to ensure their accountability. That could not be achieved, however, without intensified international efforts to help developing countries strengthen their capacity to implement the Convention.[19]

Basel Convention covers all discarded/disposed materials that possess hazardous characteristics as well as all wastes considered hazardous on a national basis. Annex VIII, refers to e-waste, which is considered hazardous[20] under the Convention Waste electrical and electronic assemblies or scrap containing components such as accumulators and other batteries included on list A, mercury switches, glass from cathode-rat tubes and other activated glass and PCB-capacitors, or contaminated[21] with constituents (e.g., cadmium, mercury, lead, polychlorinated biphenyl) to an extent that they possess any of the characteristics contained in Annex III. Annex IX, contains the mirror entry, B1110 Electrical and Electronic assemblies given below.

17 http://www.cpcb.nic.in/electronic%waste/chapter1, last visited on April 3, 2010.
18 http://www.basel.int, last visited on March 12, 2010.
19 http://www.basel.int/industry/mppiwp/guid-info/index.html, last visited on May 3, 2010.
20 Article 1, par. 1(a) of the Basel Convention: A1180.
21 For details see Annex I of Basel Convention.

- Electronic assemblies consisting only of metals or alloys.
- Waste electrical and electronic assemblies or scrap (including printed circuit boards) not containing components such as accumulators and other batteries included on List A, mercury-switches, glass from cathode-ray tubes and other activated glass and PCB-capacitors, or not contaminated with Annex 1.

OECD (2001)

WEEE / E-waste have been defined as "any appliance using an electric power supply that has reached its end-of-life."

Other Countries

European Union (EU)

Definition as per EU directive has been described below. Countries, which have transposed this definition into their national legislations, are Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland and United Kingdom.

WEEE Directive (EU, 2002a)

"Electrical or electronic equipment which is waste including all components, subassemblies and consumables, which are part of the product at the time of discarding."[22] Further it defines "waste" as "any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force."

(a) 'electrical and electronic equipment' or 'EEE' means equipment which is dependent on electrical currents or electromagnetic fields in order to work properly and equipment for the generation, transfer and measurement of such current and fields falling under the categories set out in Annex IA to Directive[23] designed for use with a voltage rating not exceeding 1000 volts for alternating current and 1500 volts for direct current.

Further EU Directives[24] speaks about the restriction of the use of certain hazardous substances in electrical and electronic equipments have also come into force w.e.f January 2007. These directives provide for the reduction and elimination of hazardous substances used in electrical and electronic equipments.

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22 WEE Directive 75/442/EEC, Article 1(a).
23 For details see EU Directive - 2002/96/EC (WEEE).
24 For details see EU Directive - 002/95/EC, January 27, 2003.

Nairobi Declaration

In this the recent declaration aims at suggesting some viable solutions for tackling e-waste.[25] Its major proposals are:

Mobile Phone Partnership Initiative (MPPI)

The focus of the programme is on disseminating information on the technical guidelines to the countries that can use it and to test the guidelines by launching pilot projects with industry partners. The pilot projects will be very instrumental in raising awareness on environmentally sound management of used and end-of-life mobile phones.[26]

Potential advisory body

Following the direction of paragraph 162 of the Report of the Open-ended Working Group of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal on the work of its sixth session[27] and additional discussions in the Contact Group on Technical Matters, the concept of an e-waste forum (or body) to be established to undertake proposed activities on e-waste was of general interest. Nonetheless, further information was requested on proposals and options for such a body were needed before this concept could be considered by the Conference of the Parties at its ninth meeting.[28]

Global partnership on computing equipment

The mission of the partnership[29] is to increase environmentally sound management of used and end-of-life computing equipment, taking into account social responsibility, the concept of sustainable development and promoting information sharing of life cycle thinking.

Besides this a programme of action in the Asia-Pacific region to dispose of electrical and electronic waste in an environmentally sound way and stop its illegal trafficking was also launched with the support of the United Nations Environmental Programme's (UNEP) Basel Convention Regional Centres in China, Indonesia and Samoa. Due to rapid industrialization, several developing countries in the Asia-Pacific region need to access large quantities of secondary raw materials. As a result, large amounts of used and end-of-life electronic

25 It is on the environmentally sound management of electrical and electronic wastes and decision VIII/2, UNEP/CHW.9/1.

26 Document UNEP/CHW.9/12 for further details on activities.

27 For details see:UNEP/CHW/OEWG/6/29.

28 Information on such a body can be found in document UNEP/CHW.9/INF/11.

29 This partnership was started in the year 2007, more detailed information on the Partnership for Action on Computing Equipment is provided in documents UNEP/CHW.9/13 and UNEP/CHW.9/INF/12.

wastes are being sent to them for recycling, recovery and refurbishment of non-ferrous and precious metals at facilities which do not always meet high environmental standards.[30]

National Legal Regimes Relevant to E-Waste:

In order to tackle the issue of e-waste Government of India has enacted following legislations. They are:

- The Municipal Solid Wastes (Management and Handling) Rules, 2000
- The Hazardous Wastes (Management and Handling) Rules, 2003
- E-Waste Management and Handling Rules, 2010 by MOEF (Draft).

Above legislations covers generation, storage, transportation and disposal of hazardous waste. But they do not propose streamlined collection mechanism for hazardous waste- especially wastes like E-Waste. Their provisions are well explained in the following section.

The Municipal Solid Wastes (Management and Handling) Rules, 2000

"Municipal Solid Waste" includes commercial and residential wastes generated in municipal or notified areas in either solid or semi-solid form excluding industrial hazardous wastes but including treated bio-medical wastes.

"Disposal" means final disposal of municipal solid wastes in terms of the specified measures to prevent contamination of ground-water, surface water and ambient air quality.

"Processing" means the process by which solid wastes are transformed into new or recycled products;

"Recycling" means the process of transforming segregated solid wastes into raw materials for producing new products, which may or may not be similar to the original products.

"Storage" means the temporary containment of municipal solid wastes in a manner so as to prevent littering, attraction to vectors, stray animals and excessive foul odour.

Above rules are failed to address the issue of e-waste, in order to address these following rules was formulated, they are:

The Hazardous Wastes (Management and Handling) Rules, 2003

The Hazardous Waste (Management and handling) Rule, 2003, defines "hazardous waste" as any waste which by reason of any of its physical, chemical,

30 http://www.un.org/apps/news/story.asp?NewsID=16690&Cr=electronic&Cr1=; last visited on April 12, 2010.

reactive, toxic, flammable, explosive or corrosive characteristics causes danger or likely to cause danger to health or environment, whether alone or when on contact with other wastes or substances, and shall include:

- Waste substances that are generated in the 36 processes indicated in column 2 of Schedule I and consist of wholly or partly of the waste substances referred to in column 3 of same schedule.
- Waste substances that consist wholly or partly of substances indicated in five risks class (A, B, C, D, E) mentioned in Schedule 2, unless the concentration of substances is less than the limit indicated in the same Schedule.
- Waste substances that are indicated in Lists A and B of Schedule 3 (Part A) applicable only in cases of import and export of hazardous wastes in accordance with rules 12, 13 and 14 if they possess any of the hazardous characteristics listed in Part B of schedule 3.

"Disposal" means deposit, treatment, recycling and recovery of any hazardous wastes. Important features of Schedule 1, 2 and 3, which may cover E-waste, are given below.

Schedule 1

Although, there is no direct reference of electronic waste in any column of Schedule 1 (which defines hazardous waste generated through different industrial processes), the "disposal process" of e-waste could be characterized as hazardous processes.

Above Rules[31] cover the generation, storage, transportation and disposal of hazardous waste. This is more aimed at the issue of large industrial houses generating waste, traders of these hazardous waste and the facility mangers of such waste. The existing Hazardous Waste rules have been found to have many shortcomings and are but in the interim, the situation remains very fluid for E waste processing. Lack of clarity on the issue of electronic waste and the inability of the current hazardous waste rules to govern and effectively monitor the e-waste recycling are some of the prime reasons for experts and members of civil society demanding a separate set of rules to guide and control these processes.

Recently in May, 2010 The Ministry of Environment and Forest (MoEF) has issued E-waste rules which have been notified by the Ministry of Environment and Forests, Government of India.[32] These rules shall apply to every producer(s),

31 Hazardous Wastes (Management and Handling) Rules, 1989 as amended in 2003.
32 http:// www.environment.gov.au, last visited on May 2, 2010.

dealer(s), collection centre(s), refurbisher(s), dismantler(s), recycler(s), auctioneer(s) consumer(s) or bulk consumer(s) involved in the manufacture, processing, sale, purchase of electrical and electronic equipment or component.

This is the first draft to address most issues related to safer handling, health and environmental concerns. The current Rules have been largely to address the technological gap, which perhaps is not so difficult. What it fails to address is putting in place a sound collection mechanism, which will eventually assure regular and uninterrupted supply to the technologically better equipped facilities.

Before Parting

In view of the magnitude of the problem of e-waste and the situation that emerges from it, there is an urgent need to bring together all stakeholders and engage them in the debate to find sustainable solutions to this issue of electronic waste. It also emerges that one of the foremost requirement is to have suitable legislation on e-waste. The legislation should address the problems of imports as well as domestic generation of waste.

The solution to the impending e-waste crisis lies in prevention rather than its management. Recycling of e-waste is beyond the means of a consumer or local government, given its toxic nature. The solution lies with the brand owners or manufacturers of electronic products, which need to bear responsibility for financing the treatment of the own-branded e-waste, discarded by their customers. This is known as the principle of Individual Producer Responsibility (IPR).[33] The rationale for IPR is that by making producers responsible for the end-of-life costs of their products, a feedback loop is created to product developers and designers to design out end-of-life costs, e.g. by making the product less toxic and more amenable to material recycling.

Legislation embracing Producer Responsibility for e-waste is already in force in the EU, Japan, Korea, Taiwan and some US states. Greenpeace expects responsible companies to treat all their customers globally in the same way and offer take back and recycling services wherever their products are sold - not just in countries where this is a legal requirement. Greenpeace requires manufacturers to offer free, easy take back of their products once discarded by their customers and ensure responsible recycling and disposal wherever their products reach their end-of-life phase. In India some brands have initiated take-back programmes but these are not working as well as they should. Moreover, brand owners should also work towards establishing a robust system of e-waste collection and treatment infrastructure so that e-waste can be collected and recycled in a safe manner.

33 http://www.unep.ch/ozone/index.shtml, last visited on March 12, 2010.

Finally it is suggested that major Municipal Corporations of our country should take responsibility of collecting of e-waste directly from consumers and handed over them to a recycler. The reason behind is 80% of cell phone parts are recyclable, if they are recycled in a scientific manner environmental pollution will be reduced. But the irony is that in India informal sector is handling recycling process which should be banned. Because people are unaware of the hazardous nature of e- waste. Corporations should treat e-waste differently like bio-medical waste. At present 3% e-waste is reached to the recycler.[34] They should put separate collection banks of e –waste, in every nuke end corner of the cities. So it is convenient for public to drop unused cell phones and other electronic gadgets in that basket. It is the hope of the author of this article is that in future we can see green cell phones which are 100% safer and environmental friendly.[35]

The need of the hour is to have stringent implementation of the Existing Rules, which will lead to proper collection mechanism, sound recycling technologies, adequate and scientifically designed disposal sites. Sustainable Development concerns or enabling recovery and reuse of useful material from hazardous waste and thereby reducing the waste for final disposal is certainly a welcome thought. But the steps taken to achieve these in the draft Rule do seem ineffectual. The steps, in fact, seem to be more favourable towards making India a 'Dumping Destination' in garb of 'Recycling Destination'.[36]

Further it is important that proper waste management systems be put up for E-waste. However the issue of collection (as is in the case of lead acid battery) is key. Proper recycling facilities with appropriate technologies can only be set up if they are ensured that the collected waste will reach them.

34 http://www.ewasteguide.info, last visited on March 17, 2010.

35 See Dr. P. Sree Sudha on "Tackling E-Waste" – The Hindu, open page, Vol.132, No.26, dated 28-6-2009, p. 14.

36 These comments are based on the study of www.toxiclink.org, last visited on March 12, 2010.

COPARCENARY UNDER HINDU LAW : BOUNDARIES REDEFINED

Vijender Kumar*

Introduction

> In Hindu social system, *Dharmasastras* do not separate the spiritual from the secular, therefore, in the *grasthasrama* a person is given the training to lead a complete and meaningful life for the benefit and welfare of those who left and those who are present and those who will be born. It is a unique phenomenon of Hindu philosophy that the Hindu family has been thought of as one of the most important institutions because all other institutions like *brahmacharya*, *vanaprastha* and *sanyasha* depend on it. Hence, the importance of the family is advocated in the *Dharmasastras*.

The coparcenary as understood in Hindu law has its origin in the concept of *Daya* as explained by Vijnaneshwara while commenting on Yajnavalkyasmriti in the *Daya vibhaga prakranam vayavahara adhaya*. Here, Vijnaneshwara discussed that *Daya* is only that property which becomes the property of another person, solely by reason of relation to the owner. The words solely by reason of relation exclude any other cause, such as purchase or the like.[1]

Narada also approves the meaning of the *Daya* which is a coparcenary property because according to him, sons can divide only father's property which has been approved by the learned (*Svatvanimitasambandhopalashanam*).

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1 Solely by reason of relation: "solely" excludes any other cause, such as purchase or the like. "Relation", or the relative condition of parent and offspring and so forth, must be understood of that other person, a son or kinsman, with reference to the owner of the wealth. (Balam Bhatta). The meaning is this: wealth, which becomes the property of another, (as a son or other person bearing relation,) in right of the relation of offspring and parent or the like, which he bears to his father or other relative who is owner of that wealth, is signified by the term heritage. (Subodhini). In right of their being his sons or grandsons: a son and a grandson have property in the wealth of a father and of a paternal grandfather, without supposition of any other cause but themselves. Theirs consequently is inheritance not subject to obstruction. (Subodhini). Property devolves on parents: Visweswara Bhatta reads "parents, "brothers, and the rest", (*pitri-bhratradinam*), and expounds it 'both parents, as well as brothers and so forth'. Balam Bhatta writes and interprets an 'uncle and a brother or the like', (*pitrivya-bhratradinam*), but notices the other reading. Both are countenanced by different copies of the text. The same holds good in respect of their sons: here the sons or other descendants of the son and grandson are intended. The meaning is this: if relatives of the owner be forthcoming, the succession of one, whose relation to the owner was immediate, is inheritance not liable to obstruction, but the succession of one, whose relation to the owner was mediate or remote, is inheritance subject to obstruction, if immediate relatives exist. (Subodhini). In respect of their sons: meaning sons and other descendants of sons and grandsons, as well as of uncles and the rest. If relatives of the owner be forthcoming, the succession of one, whose relation was immediate, comes under the first sort; or mediate, under the second. (Balam Bhatta); H.T.Colebrooke, *Daya-Bhaga and Mitaksara*, 1984, pp. 242-243.

Therefore, the unique concept of coparcenary is the product of ancient Hindu jurisprudence which later on became the essential feature of Hindu law in general and Mitakshara School of Hindu law in particular.

The concept of coparcenary as understood in the general sense under English law has different meaning in India or Hindu legal system. In English law, coparcenary is the creation of act of parties or creation of law. In Hindu law, coparcenary cannot be created by acts of parties, however, it can be terminated by acts of parties. The coparcenary in Hindu law was limited only to male members who descended from the same male ancestors within three degrees. These coparceners have important rights as regards to property of the coparcenary but so long the coparcenary remains intact no member can claim any specific interest in any part of the property of the coparcenary because of the specific nature of coparcenary in the Mitakshara School of Hindu law.

However, under Hindu law, the coparcenary in the Mitakshara and the Dayabhaga Schools of Hindu law have different meanings with the result that this difference in the concepts of coparcenary of the Mitakshara and the Dayabhaga Schools of Hindu Law resulted in the difference of definition of partition and the duty of the son to pay the debt of his father. Therefore, the deviation in the original concept of coparcenary is the result of social and proprietary influence. Hence, when females are made entitled to become coparceners it does not militate against the nature and concept of coparcenary because it is the social and proprietary aspect which prominently make it necessary that females should be included in the concept of coparcenary. However, the term *Apatya* (child) is a coparcener because according to Nirukta, *Apatya* means child which includes both son and daughter. Therefore, when a female is made a coparcener, it is only the recognition of the meaning of child in its true sense without making any distinction between a son and a daughter.

Now, a question which may arise in the case of a daughter is how the coparcenary interest will be determined at the time of her marriage. In fact, it would pose no problem because the male members of a coparcenary can determine the coparcenary interest any time at their will so why should there be any difficulty in the case of daughters. In fact, the main emphasis is on granting the proprietary rights to female children equal to the proprietary rights of male children. Therefore, the marriage of a daughter may or may not have any impact on the proprietary interest rather it will depend upon the will of the female herself. The division of property of a coparcenary will depend on the nature of the property whether the property which is in the hands of the coparceners is ancestral property or it is the self acquired property of the coparceners. This problem has already been in existence both in the Mitakshara and the Dayabhaga Schools of Hindu law and the solution of the problem of division or partition of

coparcenary property may follow either the pattern followed in Hindu law or statutory provisions may be made in this behalf. But, in any case inclusion of a female child in coparcenary is not against the letter and spirit of Hindu law.

Concept of Coparcenary: Historical Perspective

Coparcenary is "unity of title, possession and interest". To clarify the term further, a Hindu Coparcenary is a much narrower body than a Hindu joint family, it includes only those persons who acquire by birth an interest in the coparcenary property, they being the sons, grandsons, and great-grandsons of the holders of the property for the time being.

The Black's law dictionary gives a more comprehensive explanation of the term coparcenary. It says, "such estate arises where several take by descent from same ancestor as one heir, all coparceners constituting but one heir and having but one estate and being connected by unity of interest and of title. A species of estate, or tenancy, which exists where lands of inheritance descend from the ancestor to two or more persons. It arose in England either by common law or particular custom. By common law, as where a person, seised in fee-simple or fee-tail, dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they all inherit, and these coheirs, are then called "coparceners", or, for brevity "parceners" only. By particular custom, as where lands descend, as in gavelkind, to all the mates in equal degree, as sons, brothers, uncles etc…An estate which several persons hold as one heir, whether male or female. This estate has the three unities of time, title and possession; but the interests of the coparceners may be unequal."[2]

In *Dharmasastra* coparceners are referred to as *Sahadaee*. The term coparceners came to be used as a result of influence of Western Jurisprudence. Therefore, the present concept is not very difficult from the earlier one. The justification of coparcenary according to the Mitakshara School is that those who can offer funeral oblations (*Pindh-daan*) are entitled to the property. The concept of *Pindh-daan* is that the person who offers funeral oblations share the same blood with the person to whom he is offering a *Pindh*.

A coparcenary is purely a creation of law; it cannot be created by act of parties, except by adoption. In order to be able to claim a partition, it does not matter how remote from the common ancestor a person may be, provided he is not more than four degrees removed from the last male owner who has himself taken an interest by birth.[3]

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2 Joseph R. Nolan et al., *Black's Law Dictionary*, 6th ed. 1990, p. 335.

3 P.V.Kane, *History of Dharmasastra*, Vol. III, 3rd ed. 1993, p. 591. Vide *Moro* v. *Ganesh*, 10 Bm. HCR, p. 444, pp. 461-468 where Mr. Justice Nanbhai Haridas very lucidly explains by several diagrams the limits of a coparcenary and what persons are entitled to demand a partition and from whom.

In Hindu law of succession the coparcenary is still not codified. There are two Schools, *viz*., the Mitakshara and the Dayabhaga. According to the Mitakshara School, there is unity of ownership - the whole body of coparceners is the owner and no individual can say, while the family is undivided that he has a definite share as his interest is always fluctuating being liable to be enlarged by deaths and diminished by birth in the family. There is also unity of possession and enjoyment. Further, while the family is joint and some coparceners have children and others have few or none or some are absent, they cannot complain at the time of partition about some coparceners having exhausted the whole income and cannot ask for an account of past income and expenditure. Katyayana expressly states that the joint family property devolves by survivorship that is on the death of a coparcener his interest lapses and goes to the other coparceners. The conception of coparcenary under the Dayabhaga School is entirely different from that of the Mitakshara School. Under the Dayabhaga School, sons do not acquire any interest by birth in ancestral property, but the son's right arises only on the father's death and the sons take property as heirs and not as survivors.

However, the coparcenary in Hindu law is not identical to the coparcenary as understood in English law. Thus, in the case of death of a member of coparcenary under the Mitakshara law, his interest devolves on the other members by survivorship while under English law, if one of the co-heirs jointly inheriting properties dies, his or her right goes to his or her legal heirs.

Mitakshara School of Hindu Law

It is important to note the distinction between ancestral property and separate property. Property inherited by a Hindu from his father, father's father, or father's father's father, is ancestral property. Property inherited by him from other relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grandsons, or great grandsons, they become coparceners with him and become entitled to it by reason of their birth. Thus, if A, who has a son B, inherits property from his father, it becomes ancestral in his hands, and though A, the head of the family, is entitled to hold and manage the property, B is entitled to an equal interest in the property with his father, A and to enjoy it in common with him, B can, therefore, restrain his father from alienating it except in the exceptional circumstances, *viz*., *apatkale, kutumbharte, dharmarte* or legal necessity. Such alienation is allowed by law and he can enforce partition of it against his father. On his father's death, he takes the property by survivorship and not by succession.[4] However, as to

4 Section 6 of the Hindu Succession Act, 1956: When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

separate property, a man is the absolute owner of the property inherited by him from his brother, uncle, etc. His son does not acquire an interest in it by birth and on his death, it passes to the son not by survivorship but by succession[5]. Thus, if A inherits from his brother, it is his separate property and it is absolutely at his disposal. His son B acquires no interest in it by birth and he cannot claim partition of it nor can he restrain A from alienating it. The same rule applies to the self acquired property of a male Hindu. But it is of the utmost importance to remember that separate or self-acquired property, once it descends to the male issue of the owner becomes ancestral property in the hands of the male issue who inherits it. Thus, if A owns separate or self-acquired property it will pass on his death to his son B as his heir. But in the hands of B it is ancestral property as regards his sons. The result is that if B has a son C, C takes an interest in it by reason of his birth and he can restrain B from alienating it, and can enforce a partition of it as against B.

Ancestral property is species of coparcenary property. As stated before, if a Hindu inherits property from his father, it becomes ancestral in his hands as regards his son. In such a case, it is said that the son becomes a coparcener with his father as regards the property so inherited and the coparcenary consists of the father and the son. But this does not mean that a coparcenary can consist only of a father and his sons. It is not only the sons but also the grandsons and great grandsons who acquire an interest by birth in the coparcenary property. Thus, if A inherits property from his father and he has two sons B and C, they both become coparceners with him as regards the ancestral property. A, as the head of the family, is entitled to hold the property and to manage it and hence is called the manager of the property. If B has a son D and C has a son E, the coparcenary will consist of the father, sons and grandsons, namely, A,B,C,D, and E. Further, if D has a son F, and E has a son G, the coparcenary will consist of the father, sons, grandsons, and great grandsons, in all, it will consist of seven members. But if F has a son H, H does not become a coparcener, for a coparcenary which is limited to the head of each stock and his sons, grandsons, and great grandsons. H being the great great-grandson of A cannot be a member of the coparcenary so long A is alive.

Genesis of Coparcenary

A coparcenary is created when, for example, a Hindu male A, who has

5 Section 8 of the Hindu Succession Act, 1956: The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter -
(a) Firstly, upon the heirs, being the relatives specified in Class I of the Schedule;
(b) Secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule;
(c) Thirdly, if there is no heir of any of the two Classes, then upon the agnates of the deceased; and
(d) Lastly, if there is no agnate, then upon the cognates of the deceased.

inherited no property at all from his father, grandfather or great grandfather, acquires property by his own exertion. A has a son B, B does not take any vested interest in self-acquired property of A during A's life time, but on A's death he inherits the self-acquired property of A. If B has a son C, C takes a vested interest in the property by reason of his birth and the property inherited by B from his father A becomes ancestral property in B's hands, and B and C are coparceners as regards this property. If B and C continue joint and a son D is born to C, he enters into the coparcenary by the mere fact of his birth. And if a son E is subsequently born to D, he too becomes a coparcener with his father and grandfather.

Though a coparcenary must have a common ancestor to start with, it is not to be supposed that at every extent coparcenary is limited to four degrees from the common ancestor. A member of a joint family may be removed more than four degrees from the common ancestor (original holder of coparcenary property) and yet he may be a coparcener. Whether he is so or not depends on the answer to the question whether he can demand partition of the coparcenary property. If he can, he is a coparcener but not otherwise. The rule is that partition can be demanded by any member of a joint family who is not removed more than four degrees from the last holder, however, remote he may be from the common ancestor or original holder of the property.

When a member of a joint family is removed more than four degrees from the last holder he cannot demand partition, and therefore, he is not a coparcener. On the death, however, of the last holder, he would be entitled to a share on partition, unless his father, grandfather and great grandfather had all predeceased last holder. The reason is that whenever a break of more than three degree occurs between the holders of property the coparcenary comes to an end.

Another important element of a coparcenary under the Mitakshara law is unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. According to the rule, the notion of an undivided family governed by the Mitakshara law, no individual member of that family whilst it remains undivided can predicate of the joint and undivided property that he, that particular member has a definite share, one third or one fourth. His interest is a fluctuating interest, capable of being enlarged by deaths in the family and liable to be diminished by births in the family. It is only on partition that he becomes entitled to a definite share. The most appropriate term to describe the interest of a coparcener in coparcenary property is "undivided coparcenary interest". The rights of each coparcener until a partition takes place consist in a common possession and common enjoyment of the coparcenary property. As observed by the Privy Council in *Katama Natchiar* v. *The Rajah*

of Shivaganga,[6] there is community of interest and unity of possession between all the members of coparcenary, and upon the death of any one of them, the others will take by survivorship in which they had during the deceased's life time a common interest and a common possession.

The Supreme Court has summarised the position and has observed that the coparcenary property is held in collective ownership by all the coparceners in a quasi corporate capacity. The incidents of coparcenary are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, till partition each member has ownership extending over the entire property jointly with the rest; fourthly, as a result of such co-ownership, the possession and enjoyment of the properties is common; fifthly, no alienation of the property is possible unless it is for necessity, without the concurrence of the coparceners; and lastly, the interest of a deceased member passes on his death to the surviving coparceners.

Dayabhaga School of Hindu Law

The conception of coparcenary and coparcenary property according to the Dayabhaga School is entirely distinct from that of the Mitakshara School. According to Mitakshara School, a son acquires at birth an interest with his father in ancestral property held by the father and on the death of the father the son takes the property, not as his heir, but by survivorship. According to Dayabhaga School, the son does not acquire an interest by birth in ancestral property. Son's right arises only on the death of his father. On the death of the father he takes such property as is left by him whether separate or ancestral, as heir and not by survivorship.

According to the Mitakshara School, the foundation of coparcenary is first laid on the birth of a son. The son's birth is the starting point of a coparcenary according to Mitakshara School. Thus, if a Hindu governed by the Mitakshara School has a son born to him, the father and the son at once become coparceners.

According to Dayabhaga School, the foundation of a coparcenary is laid on the death of the father. So long as the father is alive, there is no coparcenary in its strict sense of the word between him and his male issue. It is only on his death leaving two or more male issues that a coparcenary is first formed. Thus, it would be correct to say that the formation of a coparcenary does not depend upon any act of the parties. It is a creation of the law. It is formed spontaneously on the death of the ancestor. It may be dissolved immediately afterwards by

6 (1863) 9 MIA 539.

partition but until then the heirs hold the property as coparceners. These observations must obviously be read in the context of a father dying leaving two or more male issues who would constitute a coparcenary, though of course, in their case, there would be only unity of possession and not unity of ownership. Thus, till a partition by metes and bounds, that is, actual and final distribution of properties takes place, each coparcener can say what his share will be. In other words, none of them can say such and such property will fall to his share. Each coparcener is in possession of the entire property, even if he has no actual possession, as possession of one is possession of all. No one can claim any exclusive possession of property unless agreed upon by coparceners.

In *Sudarsana Maistri* v. *Narasimhulu*,[7] it was held that a joint family and its coparcenary with all its incidents are purely a creature of Hindu law and cannot be created by act of parties, as the fundamental principle of the joint family is the tie of *sapindaship* arising by birth, marriage and adoption.

Andhra Pradesh Module: Step towards Proprietary Equality

The Hindu Succession Act, 1956 has conferred rights of succession on Hindu females as provided in Section 6 of the Act, relating to succession to an undivided interest in a joint family property when a coparcener dies intestate. But a male was free to dispose of *inter vivos* or by will, his interest in the joint family property which meant the female could still be deprived of proprietary right. Considering it unfair to exclude a daughter from participation in the ownership of coparcenary property, and in order to confer the right to property by birth on a Hindu female and assimilate her to the position of a male member of a coparcenary, a Bill, L.A. Bill 12 of 1983 was introduced in the Andhra Pradesh Legislative Assembly. The Bill was enacted by the Andhra Pradesh State Assembly on September 25, 1985 and received the assent of the President and came into force on September 5, 1985.

The Hindu Succession Act, 1956 was amended by introducing a new Chapter, Chapter II-A consisting of Sections 29-A, 29-B and 29-C. Section 29-A provides that the daughter becomes a coparcener by birth along with other male members and has a right to obtain partition having the equal share with son. Section 29-B provides that a daughter's interest in the joint family property would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Hindu Succession Act. The Hindu Succession (Andhra Pradesh Amendment) Act, 1986 was extended to the whole of the State of Andhra Pradesh.

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7 (1902) 25 Mad. 149.

This was a very progressive measure and removed to a large extent the inequality between males and females among Hindus with regard to property under Hindu law. The example set by Andhra Pradesh has been followed by other States, *viz*., the Hindu Succession (Tamil Nadu Amendment) Act, 1989, the Hindu Succession (Maharashtra Amendment) Act, 1994, and the Hindu Succession (Karnataka Amendment) Act, 1994. In order to have a uniform law for the whole of India it was hoped that all other States would follow this example or the Union Legislature would amend the Principle Act of 1956 on the above lines.

In *Narayan Reddy* v. *Sai Reddi*,[8] where in a suit for partition of joint family properties, a preliminary decree was passed ascertaining the share of the parties, it was held that it was open to the unmarried daughter to claim share in those properties under Section 29A as amended by A.P. Amendment Act, 1986 before the passing of the final decree.

In *Ashok Kumar Ratanchand* v. *CIT*,[9] the A.P. High Court held that where a coparcener who obtains property on partition and marries subsequently, the status of unit of assessment after marriage is necessarily that of a Hindu undivided family and the income from such property is assessable in that status and not in the status of the individual. After discussing the entire case law on the subject, the Court observed that the property which a coparcener obtains on partition does not become for all times his individual and separate property. If he has a wife or a daughter, depending on him the property will be charged by the obligation to maintain them. If he marries later, his property, ancestral or self-acquired, will be burdened by an obligation to maintain his wife. If he begets a son, that son becomes entitled to a share in the property which thereby revives the character of joint family property. If he begets only daughters, the obligation to maintain them will be fastened on the property. An unmarried Hindu male, obtaining a share of ancestral property on partition retains the property as his absolute property. But after marriage the property becomes encumbered by an obligation to maintain his wife or other dependents. It sheds the character of separate property and revives its character as joint property of the smaller unit consisting of himself and his wife. In that limited sense, the income therefrom may be the income of the Hindu undivided family consisting of himself and his wife.[10]

The main points for consideration and elucidation of the consequences of the result of statutory inclusion of a daughter in the category of Mitakshara Coparcenary were that the anomalies and inconsistencies must be eliminated. As for the anomaly, it is to be made clear that at the time of marriage, the

8 AIR 1990 AP 263.
9 (1990) 186 ITR 475.
10 *Ibid*, p. 488.

daughter must for all purposes cease to be a member of the coparcenary in the family of her birth. The anomaly is that by virtue of marriage she has become the member of the family of her husband and the member of her husband's family cannot be the member of coparcenary of her family of birth. However, for the purpose of succession under Section 6 of the Hindu Succession Act, 1956, she will remain an heir in the Class I of the Schedule and as for the inconsistency, it would be inconsistent to regard her children to be the members of the coparcenary of their mother's family, because in the case of male coparceners, the children of the coparceners become the member by virtue of their birth in the family. But the daughter's children, in lieu of the coparcenary membership of their mother's family, get the membership of coparcenary of the family in which their mother is married, so there is no denial of any equality to the daughter of a daughter by denying her the coparcenary membership in the family of her mother's birth.

It was felt that not many cases on the Hindu Succession (Andhra Pradesh Amendment) Act, 1986 for claiming coparcenary interest were coming up in Courts. There might be two reasons for this. First, it might be that they were satisfied with the newly created statutory right in their favour. The second reason might be that the females did not want to disturb the existing usages, customs and practices of their family of birth. This reason seems to be the most plausible reason. Granting of coparcenary interest to females not only brings them proprietary interest but at the same time the females are also liable to the same duties to pay the debt of their father as the males are and after satisfying the debt their interest can be taken. Therefore, whether they do not claim the interest they would still be liable to pay the debt of their father. Further, the coparcenary interest will also be affected when a Karta alienates the joint property of the coparcenary. If the alienation is for legal necessity or for the benefit of the estate or for the welfare of the family, the female coparcener will be bound by the alienation unless she proves that the alienation was not for legal necessity or for the benefit of the estate or for the welfare of the family or that it was immoral or illegal. The aforesaid implications are not imaginary but they are natural and practical problems which the law must take into account.

Evaluation

The ownership and transfer of ownership is crucial to an understanding of the economic and social functioning of the institution of the family. It is impossible to study the relevance of the Hindu joint family, without examining the provisions of law relating to property. In other words, it is imperative that there exists an identification of the members of a family, who are entitled to inherit and pass on the property. It is the members of the family who hold and manage the joint family property.

In ancient times, everywhere, property could be owned by the patriarch of the family, who had an absolute control over persons and property of the family. The patriarch was held to be responsible for all the matters relating to household, ultimately earning him the title of the "*Grahapati*" or master of the household. In Roman law, he was known as *Patria Potestas*. The patriarchal system also laid the foundations for the system of primogeniture, whereby, the eldest male member of the family was deemed worthy of inheriting the family's property. Briefly speaking, this was the mindset of the *Vedic* Scholars, who spoke of property distribution, ownership and transfer. The concept of the coparcenary finds its origins against this very socio-economic backdrop. The coparcenary consisted of all those members within a family, who were identified as those capable of managing, and deserving of holding property. The members of the coparcenary were in better financial position than others, as they held within their hands, the reigns to the family's property and consequently, were at the helm of the family's economic affairs.

The constitution of the coparcenary differed depending on the customs and practices of the region. The multiplicity of customs led to the broad classification of customs related to property in two Schools, *viz.*, the Mitakshara and the Dayabhaga. The coparcenary in Mitakshara law can be defined as a group consisting of all those males who take by birth an interest in the joint or coparcenary property. These include father, his son, son's son, and son's son's son.[11] The same was envisaged by Section 6 of the Hindu Succession Act, 1956. Some eminent scholars are of the opinion that discriminatory treatment has always been meted out to women. The coparcenary has always been considered a narrower body within the joint family. In other words, these scholars are of the opinion that the control of the ancestral property continued to rest in a patrilineal regime.

The Amendment made to the Hindu Succession Act, 1956 in 2005 has attempted to make the daughter of coparcener a 'coparcener'. This amendment was made under the pretext of allowing for gender friendly succession laws. However, there are many ambiguities surrounding an understanding the Hindu Succession (Amendment) Act, 2005. There are several implications of the amendment, the most significant being a possible reconstitution of the Mitakshara Coparcenary. By introducing the daughter as a coparcener, the traditional patriarchal nature of the coparcenary has experienced a dramatic change. There is a confusion surrounding the definition of the Mitakshara Coparcenary, in the light of the Hindu Succession (Amendment) Act, 2005 - the position of the "daughter of a coparcener" is one which needs to be examined better.

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11 P.V. Kane, *History of Dharmasastra*, Vol. III, 3rd ed. 1993, p. 591.

Section 6 of the Hindu Succession (Amendment) Act, 2005 clearly states that the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. It also states that she shall have the same rights in the coparcenary property as she would have had she been a son, and that she would be subject to the same liabilities. The daughter is thus, an acceptable member of the Hindu coparcenary, by virtue of the Section 6 of the Hindu Succession (Amendment) Act, 2005. However, the matter is not so simple.

The first problem encountered on examining Section 6 entails the lack of an explicit distinction between married and unmarried daughters. This fact must be emphasized as the married and the unmarried daughter do differ in respects such as membership of family; something which is crucial to the notion of the coparcenary. However, working under the assumption that the term daughter, as used in the Act, is inclusive of both married and unmarried daughters, it is necessary to understand that the attempt to distinguish between a married and unmarried daughter might prove futile, with respect to defining the coparcenary.

Another interesting problem while defining the coparcenary concern the inclusion or exclusion of the adopted daughter is concerned. The text of the Section 6 of the Hindu Succession (Amendment) Act, 2005 nowhere mentions any reference to an adopted daughter, but maintains the inclusion of only a daughter by birth, as a part of the coparcenary. Thus, for all practical purposes, it is impossible to include the adopted daughter in the new definition of the coparcenary - a matter which needs to be re-examined.

The crux of the problems lies in the confusion which surrounds the phrase, "the daughter of a coparcener". It is clear from a reading of Section 6 that the daughter of the propositus is most definitely a coparcener, entitled to a share in the coparcenary property, equal to that of her brother's. However, it is necessary to understand that the applicability of this phrase is restricted to this interpretation alone. In other words, it is incorrect to include the daughter's children as coparceners in their mother's family. The text of Section 6 clearly makes no mention of the daughter's son, and hence, it may be safely assumed that he is to be excluded from his mother's coparcenary. However, while there is ambiguity surrounding the position of the daughter's daughter, it is impractical to suggest that the daughter of the daughter may be considered a member of her mother's coparcenary. On marriage the daughter ceases to be a member of her family of birth. Thus, she is a coparcener in her natal family, but no longer a member of it. Her daughter will receive a share in her father's coparcenary. If the daughter's daughter is allowed a share in the mother's coparcenary, she would be the recipient of a double share that is, a share from each of her parent's coparcenary. Thus, the daughter's children cannot be made coparceners.

This emphasises the unfair advantage attributable to the daughter's children that stems from problems linked to membership of a family. In essence, the married daughter's share in her father's coparcenary will only serve to help her husband's family. Thus, there is a crucial problem surrounding the membership of a family, and the coparcenary itself.

It is necessary to note that the system of the Mitakshara coparcenary loses its meaning, as membership of joint family is no longer a pre-requisite. The amended Section 6 of the Hindu Succession Act, 1956 has made a daughter who is not a member of the family, a coparcener. The system of the coparcenary proves itself futile as no matter how the property passed onto the married daughter, it will only benefit the family of her marriage. In essence, it is perhaps time to reconsider the notion of the coparcener, and in effect re-look the constituents of the Hindu joint family. However, based on the analysis of the sources mentioned above it is suggested that the Mitakshara coparcenary shall now consist of *"the common ancestor, the son, son's son, son' son' son, the daughter of common ancestor, son's daughter and son's son's daughter"*.

The Hindu Succession (Amendment) Act presumes the married female's continuance in the family of her birth. This presumption is neither logical nor workable. Therefore, the Act must provide that a daughter on marriage ceases to be the coparcener in the family of her birth … that the coparcenary interest of a daughter in the family of her birth would be determined at the time of marriage. Her interest will be ascertained on the date of the marriage presuming that it was the date on which the severance of her status has affected and it must follow actual division of coparcenary property (partition)…otherwise the Act will create more problems than it solves. The net result would be social and family feuds and tensions. Therefore, it is suggested that the aforesaid provision regarding continuance of a daughter as coparcener even after marriage be removed.

Further, it is submitted that the Hindu Succession (Amendment) Act makes discrimination between a daughter born in the family and a daughter adopted in the family of her adoption. Therefore, this anomaly must be removed by making an amendment in the existing Act to absorb adopted daughter in the family of her adoption as a coparcener as is done in the case of an adopted son.

Finally it is submitted that if there is a real desire to help the female in general and the Hindu female in particular in the light of the Hindu Succession (Amendment) Act, 2005, the provisions to make the wife a sharer in the property at the moment of her entry into the family of her marriage must be made. Since her entry in the family of her marriage is not temporary but is permanent for life, the female should be made a sharer in the property of the relations of her husband. Where the husband is a sharer, she should be an equal sharer with her

husband. If the Parliament is serious to improve financial position of Hindu female, the wife, who is the other half of her husband, it should make a law that should give her equal economic rights in the property of her husband and equal right of heirship with her husband in the property of relatives of her husband as she is the inseparable half of her husband. It will be in total conformity with the spirit of Hindu view of life as she is *Sapinda Gotraja*. On the analogy and rationale of *Dattaka,* all her rights must cease in the family of her birth after marriage and consequent replacement must take place in the family of her marriage. Further, every marriage must be registered.[12] If these provisions are made, divorce will become only an exception, and on divorce a Hindu female should be divested of all her properties which she had got by virtue of her marriage.

12 *Seema* v. *Ashwani Kumar*, AIR 2006 SC 1158: the Supreme Court held that marriages of all persons, citizens of India, belonging to various religions should be made compulsorily registrable in their respective States, where marriage is solemnized.

ENVIRONMENTAL PROTECTION: INTERNATIONAL LEGISLATIVE AND ADMINISTRATIVE EFFORTS

Aruna B. Venkat*

International concern for the protection, preservation and improvement of environment became pronounced only in the second half of the last century. In the context of today's interdependent world, with the economic globalization as the emerging international norm, any act or omission on the part of one nation adversely affecting its national environment may have far-reaching adverse consequences to the global environment. This fear has prompted the members of the family of nations to shed their attitude of indifference to the global environmental concerns and to become aware of the dangers of further environmental neglect. The result was the initiation of the international efforts to find international legislative and administrative strategies to address global environmental challenges.[1]

Prior to 1972, there was no major international effort to tackle and face global environmental challenges, although there were several international legislative instruments dealing with environmental issues incidentally which are still in operation. Some of these are: The Nuclear Weapons Tests Ban Treaty 1963; The Treaty for the Prohibition Of Nuclear Weapons in Latin America of 1967; The Treaty laying down the Principles Governing Activities of States in the Exploration and Use of Outer Space Including the Moon and celestial Bodies of 1967; The Treaty on the Non-proliferation of Nuclear Weapons of 1968; The Treaty on the prohibition of the Emplacement of Nuclear Weapons on the Seabed ocean Floor and Subsoil thereof 1971.

The Stockholm Conference, 1972

The major international effort for the protection of global environment began in 1972, when the international community convened the first historic United Nations Conference on Human Environment at Stockholm.[2] This conference marked the culmination of the efforts that preceded the Stockholm Conference[3] to place the issue of the protection of the environment on the

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1 Stockholm Conference, 1972, UN Doc/ A/ CONF/ 48/ 14. Rev.1; Rio Conference, 1992, UN Doc/ A/ CONF. A/ 151/ 5.

2 *Ibid*. The Conference was held from 5-16 June 1972, which was attended by 114 countries who agreed on a Declaration and an Action Plan.

3 The Stockholm Conference was held pursuant to the United Nations General Assembly's Resolution of 3 December 1968, which authorized the UN Secretary General to prepare a report on the problems of Human Environment. He prepared a report on 26 May 1969 (Document E/ 4667), which was endorsed by the General Assembly by another Resolution dated 15 December 1969. The same Resolution assigned to the Secretary General overall responsibility for organizing the Conference and established a 27 member preparatory committee to assist him.

official agenda of international policy and law as it represented the first major international effort to tackle the problem of the protection of environment and its improvement by international co-operation and agreement. The agenda of the conference was expanded to include the issues which recognised the relationship between development and environment. They were conceptualized as two side of the same coin and it was realized that environmental protection was an essential element of the social and economic development. The Conference adopted, among other things[4], three important non binding instruments which were: (a) A Declaration containing seven home truths and twenty-six principles; (b) A Resolution on Institutional and Financial Agreements; (c) An Action Plan containing 109 recommendations. A brief discussion of each one of these instruments would be appropriate.

The Stockholm Declaration

Referring to the significance and importance of the Declaration, it has been rightly observed that "this Declaration may be regarded as doing for the protection of the environment of the earth what the Universal Declaration of Human Rights of 1948 accomplished for the protection of fundamental freedoms and human rights."[5] Just as the Universal Declaration was essentially a manifesto, expressed in the form of an ethical code, intended to govern and influence future action and programmes, both at the national and international levels, so was the Stockholm Declaration.[6] It is, submitted that like the precepts embodied in the Universal Declaration of Human Rights, the Principles embodied in the Stockholm Declaration have already become an integral part of customary rules of international law.[7]

The Declaration was divided into two parts, a Preamble proclaiming certain home truths about man and his relation to environment, and an operative part enunciating 26 principles to govern international and national action in the environmental field.

(i) The Seven Truths

The most important and significant contribution of the Stockholm Conference was its efforts not only to bring in to focus the human rights approach to the problem of environmental protection, but also to recognize a linkage between development and environment from which the concept of "Sustainable Development" has gradually emerged to become a part of the customary rules

4 Other instruments adopted were: (a) Resolution on designation of a world environment Day; (b) Resolution for the convening of a second Conference, and (c) Decision to refer to governments' recommendations for action at the national level of the member countries.

5 JG Starke, *Introduction to International Law*, 10th ed 1988, p. 406.

6 *Id* at p. 407.

7 See, Justice Kuldip Singh's observation in *Vellore Citizen's Welfare Forum* v. *Union of India* AIR 1996 SC 2715-2722.

of international law.[8] This was evident from the several recitals of the preamble to the Declaration and several principles embodied therein.

The Declaration declared that while man was both creature and the moulder of his environment, rapid advances in science and technology had invested man with the potent power to transform his environment in countless ways and on an unprecedented scale.[9] The protection and improvement of human environment was a major issue, which affected the well being of peoples and economic development throughout the world.[10] If man used his power wisely, he could bring to all peoples the benefits of development and the opportunity to enhance the quality of life and if wrongly and heedlessly used, he could do incalculable harm to human beings and to the human environment. Obviously, man had used his power in a reckless manner, resulting in "harm in many regions of the earth; dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies harmful to the physical, mental and social working environment".[11] The developing countries must direct their effort to development, bearing in mind their priorities and the need to safeguard and improve the environment, so that their people could have adequate food, clothing, shelter and facilities of education, health and sanitation. For the same purpose of improvement of environment, the industrialized countries should make efforts to reduce the gap between themselves and the developing countries.[12] Since explosive population growth would present problems of preservation of the environment, adequate and appropriate policies and measures should be adopted to face this problem.[13] The Declaration declared that what was needed was an enthusiastic but calm state of mind to realize that for the purpose of attaining freedom in the world of nature, man must use knowledge to build, in collaboration with nature, a better environment. Man could defend and improve human environment only in harmony with the established and fundamental goals of peace and a worldwide economic and social development.[14] Since, the individual in all walks of life as well as organizations in many fields, will shape the world environment of the future, the Conference called upon all governments and peoples to exert common efforts for the preservation and improvement of environment for the benefit of the world people and for their prosperity.[15]

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8 *Ibid*.
9 Supra, n 1, Recital 1.
10 *Id.* Recital 2.
11 *Id.* Recital 3.
12 *Id*. Recital 4.
13 *Id.* Recital 5.
14 *Id.* Recital 6.
15 *Id.* Recital 7.

(ii) The Twenty Six Principles

The operative part of the Declaration embodied twenty-six principles to guide and govern international and nation actions in the fields of environment. The Declaration, highlighting the human rights approach to the problem of environmental protection, declared that while "[m]an has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being", he also "bears a solemn responsibility to protect and improve the environment for the present and the future generations".[16] The Declaration, in particular, required one and all to safeguard the natural resources of the earth including air, water, land, flora and fauna for the benefit of the present and future generations through careful planning and management.[17] In a similar vein, it required everybody to maintain, improve and restore the capacity of the earth to produce vital renewable resources.

As mentioned earlier, the linkage between the environment and development was given expression in several principles of the Declaration[18] , which, among other things, declared that environmental policies should enhance the development in the developing countries and that these be integrated with developmental planning in these countries.[19] It was also declared that the environmental standards, which were appropriate to the developed countries, might not be appropriate for the developing countries.[20] Stockholm Conference had recognized and accepted the principle that "States have … the Sovereign right to exploit their own resources pursuant to their own environmental and developmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of the other states or of areas beyond the limits of national jurisdiction."[21] Lastly, the

16 *Id.* Principle 1.

17 *Id.* principle 2.

18 *Id*. for example, Principle 8 reads: "Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life". Principle 11 declares: " The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures."; Principle 12 states: "Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate- from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose."

19 *Id*. Principle 13.

20 *Id*. Principle 14.

21 *Id*. Principle 21.

Declaration obligated states to cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damages caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction.[22] In conclusion, the Declaration required the states to spare man and his environment from the effects of nuclear weapons and to strive, by agreement, for complete elimination and destruction of such weapons.[23] Commenting on the achievements of the Stockholm Conference, Prof Starke rightly opined that Conference served to "identify those areas in which rules of international environmental laws, acceptable to the international community as a whole, can be laid down, as well as those areas in which the formation of environmental rules must encounter insurmountable obstacles."[24] According to him, to that extent, the Conference provided the foundations for the development of international environmental law.[25]

Resolution on Institutional and Financial Arrangements

The Resolution on Institutional and Financial Arrangements proposed that action be taken by the UN General Assembly to establish four institutions to implement the principles of the declaration. These were: (1) An Inter-government Governing Council for environmental programmes to provide policy guidance for the direction and coordination of environmental programmes. (2) An Environment Fund to provide financing for environmental programmes, and (3) An Inter-Agency Environmental Coordinating Board to ensure cooperation and coordination among all bodies concerned in the implementation of environmental programmes in the United Nations System.

The Governing Council was to be elected triennially by the UN General Assembly on the basis of equitable geographical distribution. The Council was to act as a central organ with its operations annually reviewed by the Economic and Social Council of the UN and the General Assembly. The proposed Council was expected to promote environmental cooperation among governments, guide and coordinate the existing environmental work being done by the various international organizations which were expected to continue to carry on as before within the ambit of their responsibilities. The Council was expected to be supported by a small environmental secretariat, which would coordinate United Nations programmes, advice international organizations, secure the cooperation of world scientists and submit plans, both medium range and long term for the United Nations action.

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22 *Id.* Principle 22.
23 *Id.* Principle 26.
24 Supra, n. 5 at p. 409.
25 *Ibid*.

It was recommended that the United Nations should establish a Voluntary Environment Fund of $ 100 million for a period of five years and called for voluntary contribution from states. It was also resolved to convene a Second United Nations Conference on Human Environment. Preparations in that direction were to be taken by the proposed Governing Council.

Resolution on Action Plan

The Conference proposed an "Action Plan" for the protection and enhancement of the environment. The proposed "Action Plan" involved three parts which were: (a) The Global Environmental Assessment Programme, known as "Earth Watch", (b) Environmental Management Activities, and (c) International Measures to support the national and international actions of assessment and management.

The Functions of the "Earth Watch" included the identification of the problems of international significance so as to warn against environmental crisis, gathering and monitoring of the data on specific environmental variables and evaluate such data in order to determine and predict important environmental conditions and trends, dissemination of knowledge and information within the scientific and technological communities and ensuring that the decision makers at all levels shall have the benefit of the best knowledge that can be made available in the forms and at the times in which it can be useful.

The environmental management covered all the functions designed to facilitate comprehensive planning that took into account the side effects of man's activities and to protect and enhance the human environment for present and future generations.

Coming to the last part of the proposed "Action Plan", i.e., International Measures to support the national and international actions of assessment and management, its functions related to measures required for coordinating the activities of environmental assessment and management. Its functions also included educational training and public information, organizational arrangements and financial and other forms of assistance.

In conclusion, it may be mentioned that the main contribution of the "Action Plan" consisted in its emphasis upon national and international action and cooperation for the identification and appraisal of environment dangers and problems of global significance.

The Stockholm Conference is significant for one thing, if not anything, i.e., it was instrumental in focusing world's attention on the environmental crisis and also in giving impetus to international cooperation. The Stockholm Declaration on Human Environment has set out the community prescriptions and global

strategies for environmental protection. It is axiomatic that the principles proclaimed in the Declaration are equally, if not more, relevant today as they were in 1972.

Post-Stockholm Developments up to Rio Conference

Administrative Measures for the Implementation of Stockholm Recommendations:

Some of the important and significant recommendations of the Stockholm Conference were implemented subsequently by resolution of the United Nations General Assembly at its 27th session held on 15th December 1972. By its Resolution 2997 (XXVII) on "Institutional and Financial Arrangements for International Environmental Cooperation", adopted on 15 December 1972, the General Assembly broadly gave effect to the organizational recommendations made at the Conference.[26]

As regards the recommendation for the establishment of a Governing Council, a supervisory body known as the United Nations Environment Programme (UNEP) was established with an executive body, which was to be representative Governing Council, as, proposed at the Stockholm Conference. This body was conferred global jurisdiction and was mandated to keep under review the world environmental situation. The UNEP was to have its headquarters at Nairobi (Kenya) was given Environment Secretariat and Environment Fund.

Subsequent Developments

After the Stockholm Conference, there have been a series of similar conferences where declarations and conventions[27] were adopted for the preservation and protection of environment. Some of these need to be discussed briefly.

(i) Nairobi Declaration, 1982

The tenth anniversary of the Stockholm Conference celebrated in Nairobi (Kenya) from 10 to 18 May 1982, and a declaration known as "Nairobi Declaration" was adopted on 18 May 1982. Expressing serious concern at the state of global environment at that time and recognizing the urgent necessity of

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26 The UN General Assembly Records, 27th Session, 15 December 1972, G A Res. 2996 (XXVI) and G A Res. 2997 (XXVII).

27 Some of these are: Habitat-1 Conference at Vancouver in June 1976; UN Water Conference in 1977; UN Conference on Desertification in 1977; The World Conservation Strategy in 1980; Nairobi Conference and Nairobi Declaration in 1982; The adoption of 'The World Charter for Nature' in 1982; International Conference on Environmental Education held at New Delhi in 1982; Vienna Convention in 1985; and the Montreal Protocol in 1987.

intensifying the efforts at the global, regional and national levels to protect and improve environment, the Declaration required the state governments and peoples to build on the progress achieved thus far. The Declaration also re-stated the principles of the Stockholm Conference.

(ii) The World Charter for Nature.1982

In October, 1982, the United Nations General Assembly adopted "The World Charter For Nature", which sought to lay down general principles of environmental protection, action plan and implementation scheme. It provided conservation principles, which were meant to guide all human conduct affecting nature. It declared that, "nature shall be respected and its essentials shall not be impaired."[28] It required states to integrate conservation measures with their national planning programme. The Charter stipulated that the principles set forth in the charter should be reflected in the law and practice of the members of the international community both at the national and international levels.[29]

(iii) Delhi International Conference on Environmental Education in 1982

An International Conference on Environmental Education was held in December (i.e., from 16-20) in Delhi, India, where the international community called for massive programme of environmental education, research and monitoring. The Conference suggested that environmental education should start from childhood and it should be both formal and informal. The conference also advised that non-governmental and voluntary organizations should encourage people in preserving and protecting their environment. It was also suggested that the specialized agencies should give appropriate support by way of giving training and supplying teaching materials to such organizations. The Conference supported the view of late Mrs. Indira Gandhi, former prime minister of India, that poor people would support environmental programmes only when they were concerned about their benefits to them.

(iv) The Report Entitled "Our Common Future", 1987

The World Commission on Environment and Development was created, pursuant to the UN General Assembly, Resolution 38/161 in 1983, for suggesting and recommending legal principles based on Stockholm Conference and Nairobi Conference and many other existing international conventions and General Assembly Resolutions. Mrs. Gro Harlem Bruntland, Chairman of the World Commission on Environment and Development submitted a Report titled, "Our Common Future" in 1987 with a foreword by late Shri Rajiv Gandhi, Prime Minister of India. The Report showed that politicians, industrial leaders, and environmental groups around the world had endorsed sustainable development

28 The World Charter for Nature, Principle 1.
29 *Id.* Principle 12.

– "Meeting the needs of the present without compromising the ability of future generations to meet their own needs"[30] … as a guiding principle for the future of their countries. The practical application of this vision would require profound changes in institutions and in the decision making process of industrialized as well as developing and underdeveloped countries.

(v) Vienna Convention of 1985 for the Protection of Ozone Layer

After Stockholm Conference of 1972, a Conference under the auspices of United Nations, was held at Vienna, on March 22, 1985 when a Convention was adopted, for the protection of Ozone layer.[31] The Convention, known as Vienna Convention provided a foundation for global multilateral undertakings to protect the environment and public health from the potential adverse effects of depletion of Stratospheric Ozone. The Convention addresses this important environmental issue primarily by providing for international cooperation in research and exchange of information. The Convention was the product of more than three years of negotiations under the auspices of UNEP. The Convention sets out the general obligations of parties, including a requirement to take appropriate measures for the protection of Ozone Layer and the obligation to cooperate in research and information exchange.[32] It specifies that parties will cooperate, as appropriate, in conducting the research and scientific assessments in a wide variety of areas, including chemical, biological, health and climatic effects.[33] There is also a provision in the Convention for the exchange of socio-economic, commercial and legal information.[34]

The Convention provides for the possible adoption of future protocols.[35] It is through such protocols that any coordinating regulatory measures that might, in the future, be considered necessary for the protection of Ozone Layer, would be implemented. The Executive Branch would examine the environmental impacts of such measures in connection with the negotiations and conclusions of any future protocols.

The Convention provides machinery for the settlement of disputes.[36] General provisions of the Convention[37] deal with participation by Regional Economic Integration Organizations (REIOs). Two annexes to the Convention delineate areas of cooperation, activities and procedures for exchange of information.

30 See, World Commission on Environment and Development, '*Our Common Future*' (1987).
31 See, Vienna Convention for the protection of Ozone Layer, Reprinted in 26 ILM p 1520 (1987), (hereinafter 'Convention').
32 *Id*. Art 2.
33 *Id*. Art 3.
34 *Id*. Art 4.
35 *Id*. Art 8.
36 *Id*. Art 8
37 *Id*. Art 11 to 15.

The Conference could not achieve its original goal of producing a draft protocol. However, it was an important step towards protecting and enhancing public health and global environment. And, it also served as a framework for the Montreal protocol.[38]

(vi) Montreal Protocol, 1987

The Conference of Plenipotentiaries met in Montreal, September 14-16, 1987 under the auspices of the UNEP and adopted a Protocol, which was signed by 47 participants including USA and EEC.

The Protocol established specific obligations to limit and reduce the use of chlorofluro carbons and possibly other chemicals that deplete ozone. The substances that the Protocol currently addresses are listed in Annex-A.[39]

The ozone negotiations culminating in the Montreal Protocol seemed to show that the Vienna Convention created a framework of cooperation in which states can reach agreement quickly when new scientific evidence became available, thus enabling them to respond to environmental problems before the damage becomes much worse or irreversible.

Although the Montreal Protocol sets reduction schedules for ozone-depleting chemical production, the Protocol allows member-states to overshoot the imposed limits by ten to fifteen percent if they do so for purposes of "industrial rationalization"[40] , or "to meet the basic needs of the developing countries"[41] . Developing countries may defer compliance for up to ten years and may even increase production and consumption of ozone-destructive Chlorofluro Carbons (CFCs) above 1986 levels[42]. The protocol provides for a multiple-steps freeze and percentage reduction of CFC levels.[43]

The Protocol also provides for payments by developed countries to underdeveloped countries to refrain from using CFCs and to purchase CFC substitutes. The Protocol exacerbates the inadequacy of the incentive structure and the side payments because it does not provide any monitoring of enforcement mechanism. Instead, it leaves these issues for resolution at the first meeting of the parties.[44]

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38 'Montreal Protocol on substances that deplete Ozone Layer', opened for signature 16 September 1987, 26 ILM 1541 (entered into force on 1 January 1989).

39 *Id*. 26 ILM at 1541

40 The Protocol defines Industrial Rationalization as 'the transfer of all or a portion of calculated level of production of one party to another', which is permitted if it increases economic efficiency or if it anticipates shortfalls caused by plant closures.

41 Supra n. 38, Art. 2(1)-(4).

42 *Id*. Art. 5(1).

43 *Ibid*.

44 *Ibid*. Art. 8.

Administrative Measures

Following the Vienna Convention, 1985 and the related Montreal Protocol, 1987, to which India acceded in 1992, India insisted at London in 1990 upon the creation of an international fund to assist developing countries in fulfilling their obligations under the Convention and the Protocol.[45] An interim multilateral fund has been established under the Montreal Protocol, which is designed to assist developing countries in meeting any additional costs incurred by eliminating the use of substances damaging the ozone layer. Similarly, the Global Environment Facility was instituted in 1991 to facilitate the funding of programmes in areas not yet governed by international agreements. It is managed by the World Bank jointly with the UN Environmental Programme (UNEP) and UN Development Program (UNDP).

U N Conference on Environment and Development (UNCED), 1992 (Rio Summit)

The second landmark event in the process of the evolution of the development of international concern for global environment was the United Nations Conference on Environment and Development held at Rio (Brazil) from 3 to 14 June, 1992, to confront the twin problems of environment and development. The Conference, known as Rio Summit, was a spectacular event with 178 nations striving to evolve plans to save the planet earth from environmental degradation. In terms of numbers, it was one of the largest meeting ever held. The Conference was of great importance for its fivefold contribution to the international efforts to combat global environmental problems. The Conference resulted in the conclusion of a treaty on climate change with a general recognition of the importance of curbing emission of greenhouse gases. Another treaty on bio-diversity aiming at the preservation of flora and fauna was also concluded. There was a 'Statement of Principles on Forests"- a non-binding agreement for conservation and sustainable management of global forests. There was the most important "Rio Declaration", a non-binding set of 27 principles that deals with the rights and responsibilities of nations of the earth relating to environment and development. Besides these, a massive, 300 page document titled as 'Agenda 21' known as "blueprint for sustainable development", was adopted.[46] It is supposed to be an action plan attempting to deal comprehensively with all aspects of environment. Although it is non-binding, it may serve as the yardstick against which actions taken by each government in the following years is likely to be measured.[47]

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45 Carter and Trimble (ed), *International Law: Selected Documents* 73.

46 See, UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc A/ CONF 151/ 26.

47 See K Srinivasan, *Keeping pace with Law*, Eighth Co-operative Law Advisor 73-74 (1992).

Rio Declaration

The Rio Declaration embodies guidelines for the political agenda of both developed and developing countries. It contains in a way, 27 "commandments" on environment. Its principal legacy is the Sustainable Development Commission to be set up on the lines of Human Rights Commission. It may be noted that the commission has already been constituted. The Declaration sets out general non-binding commands for "Sustainable Development" some of which are: The human beings who are at the Centre of Sustainable Development concerns have to exercise their right to healthy and productive life in harmony with nature.[48] States' have a sovereign right to exploit their own resources in accordance with their own policies without harming the environment elsewhere.[49] The right to development must be so exercised as to meet the developmental and environmental needs of the present and future generations.[50] The concern of environmental protection should be made an integral part of the development process.[51] While the states are under mandatory obligation to cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem, they, in view of their different contributions to environmental degradation, have common but differentiated responsibilities towards global environmental protection.[52] In order to achieve and sustain sustainable development, states should reduce unsustainable pattern of production and consumption.[53]

Since, the environmental issues are best handled with the participation of all concerned at the relevant level, the individuals at the national level should have appropriate access to information concerning environment, including hazardous materials and activities in their communities along with an opportunity to participate in the decision making process. In this context, States should facilitate and encourage public awareness and participation by making information widely available. The States should also provide effective access to judicial and administrative proceedings to have appropriate remedy.[54] The States should not only develop national laws regarding liability and compensation for the victims of pollution and other environmental damage, but also co-operate to develop further international laws regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.[55] The States are also obligated to discourage or

48 Supra n. 45, Rio Declaration, Principle 1.
49 *Id*. Principle 2.
50 *Id*. Principle 3.
51 *Id*. Principle 4.
52 *Id*. Principle 7.
53 *Id*. Principle 8.
54 *Id*. Principle 10.
55 *Id*. Principle 13.

prevent the relocation and transfer to other states of any activities and substances that cause severe environmental degradation or found to be harmful to human health.[56] In order to protect the environment, the states should apply the Precautionary Principle and lack of full scientific certainty should not be a reason or excuse for postponing cost effective measures to prevent environmental degradation[57]. The National Authorities in the States should make efforts to internalize the environmental costs by adopting the principle that the polluter should bear the cost of pollution, with due regard to the public interest.[58] The States should provide for an environmental impact assessment, as a national instrument, for activities that are likely to have a significant impact on environment.[59] The Declaration put the States under an obligation to notify other States of any national disasters or other contingencies that are likely to produce sudden harmful effects on the environment of those states. The international community should spare no effort to help the affected states.[60] The States are also obligated to provide prior and timely notification and relevant information to potentially affected states on activities that may have a significant adverse trans-boundary environmental effect.[61] The Declaration has reminded the international community that since women have vital role in environment management and development, their full participation is essential to achieve sustainable development.[62] The Declaration has called for mobilization and harvesting of the youth's creativity, ideas and courage to forge a global partnership in order to achieve sustainable development and to ensure better future for all.[63] Since warfare is inherently destructive of sustainable development, States are required to respect international law providing protection for environment in times of armed conflict and to co-operate in its further development.[64] Since, peace development and environmental protection are inter-dependant and indivisible[65], the States are mandated to resolve their environmental disputes peacefully and by appropriate means in accordance with the Charter of United Nations[66]. Lastly, the States and their peoples are required to co-operate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in the Declaration and also in the further development of international law in the field of sustainable development.[67]

56 *Id*. Principle 14.
57 *Id*. Principle 15.
58 *Id*. Principle 16.
59 *Id*. Principle 17.
60 *Id*. Principle 18.
61 *Id*. Principle 19.
62 *Id*. Principle 20.
63 *Id*. Principle 21.
64 *Id*. Principle 24.
65 *Id*. Principle25.
66 *Id.* Principle 26. In this context, see Chapter IV of the UN Charter, which mandates the States to settle all international disputes peaceably.
67 *Id*. Principle 27.

Agenda 21

Agenda 21, which was adopted at the Rio Conference, is another important document of universal significance. It provides a comprehensive charter of action plan for the 21st century to resolve the present and future problems of environment and development. The document looks at the possible solutions of global environmental problems with a view to ensuring sustainable development.

Agenda 21 is a comprehensive document with four sections covering forty chapters. While Section I deals with social and economic dimensions of action plan, Sections II, III and IV deal with conservation and management of resources for development, strengthening the role of major groups and means of implementations, respectively.

Section I deals with the recommendations for international co-operation to accelerate sustainable development in developing countries. It discusses issues relating to international co-operation, combating poverty, changing consumption patterns, population and sustainability, protecting and promoting human health, sustainable human settlements, etc. Section II deals with topics like protection of the atmosphere, land resources, deforestation, sustainable agriculture and rural development, conservation of biodiversity, protection of oceans, fresh water resources, toxic chemicals management, hazardous waste management, solid waste management and radio-active waste management. In short, it focuses on developing resources, protecting environment, managing fragile ecosystems, sustainable agricultural farming etc. Section III projects programmes of global action by incorporating environmental protection as a way of life for various groups like NGOs, women, children, youth, trade unions, local authorities, business and industry, indigenous people and scientific and technological community. It attempts to project the idea that development and ecological protection and preservation go hand in hand. Section IV deals with issues like financial resources and mechanisms, environmentally sound technology, co-operation, science for sustainable development, promotion of education, international legal instruments and mechanisms, etc.

While commenting on Agenda 21, Mr Maurice F Strong, Secretary General of UNCED, observed:

Agenda 21 constitutes the most comprehensive and far-reaching programme of action ever approved by the world community.

In a similar vein, Mr. Boutros Ghali, the Secretary General of UN observed:

Agenda 21 is a comprehensive and far-reaching programme for sustainable development and it constitutes the centerpiece of international co-

operation and co-ordination of activities within the United Nations systems for many years to come.

Thus, Agenda 21 represents "a global consensus and political commitment at the highest level on development and environmental co-operation".[68]

Forest Principles

These are principles, which aim at supporting sustainable development of forests world over. An attempt on the part of industrialized nations to control deforestation through the conclusion of a convention was thwarted by the developing countries led by India on the plea that it would amount to an infringement of their sovereignty. At the end, consensus was reached on the non-binding forest principles for conservation of sustainable management of global forests. Recognizing that forests are essential for the economic growth and maintenance of all forms of life, States committed themselves to the prompt implementation of forest principles.

The Climate Change Convention (UNFCCC), 1992

An international instrument showing international concern for the protection of global environment was the convention on the climate change, which was signed by 154 countries. The convention requires the states to prevent the global climate change, by taking appropriate steps to reduce their emissions of greenhouse gases believed to contribute to global warming.[69] During the debate on the provisions on the convention, there was a wide divergence between the views of the developed countries and those of the developing countries. While the former wanted a 20% cut in greenhouse gases emissions like carbon dioxide and methane by 2005 and a major shift from the use of coal and wood for energy, the latter blamed the former for excessive emissions over the past 150 years and wanted them to reduce them considerably. The developed countries refused to agree to any cut in their emissions, as it would hinder their development. Ultimately, consensus was that by the year 2000, the emissions of carbon dioxide gases were to be reduced to the 1990 levels. Under the convention, the developed countries have agreed to provide financial help and technology to the third world nations, to help them deal with global warming.

68 Agenda 21, adopted at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992, addresses the pressing environmental and developmental problems of today and also aims attaining long-term goals of sustainable development. The United Nations Conference on Environment and Development was a landmark event. For the first time a new global partnership for sustainable development was launched - a partnership, which respects the indivisibility of environmental protection and the development process. It is founded on global consensus and political commitment at the highest level. Achieving sustainable development cannot be done without greater integration at all policy-making levels and at operational levels, including the lowest administrative levels possible.

69 31 ILM 849 (1992).

Commenting on the convention, Mr Boutros Ghali, the then UN Secretary General opined that the convention was a "major step forward and a platform with potential".

The Biodiversity Convention, 1992

This convention[70], signed by 153 countries, seeks to ensure that animals, plants and microorganisms as well as genetic variety and ecosystem, water, land and air, in which they live, are properly protected. The treaty supports all guidelines to make economic use of natural resources more compatible with their planned conservation. The convention requires the signatory nations to regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring the conservation and sustainable use.[71] It obligates the countries to promote the protection of ecosystems, natural habitat and the maintenance of viable populations of species in natural surroundings.[72] The States have, under the convention, agreed to adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity.[73]

While the convention is largely a 'framework' agreement, setting out principles for the protection and preservation of biodiversity, its wordings are somewhat weak as the obligations created under the convention are qualified. Besides, the convention does not prescribe specific methods or standards for their compliance nor does it prescribe enforcement mechanisms.

Post- Rio Summit Developments up to Johannesburg Summit

There have been several significant international efforts, since Rio Summit, for the protection of global environment. Some of these are: (a) Cairo Conference on Population and Development, 1994 (ICPD); (b) SAARC Conference, 1995, 1997 and 2002; (c) The United Nations Conference on Human Settlements, 1996; (d) Earth Summit + 5 – Programme for Further Implementation of Agenda 21, 1997; (e) The United Nations Millennium Declaration, 1997; (f) The Kyoto Protocol, 1997 and (g) The Delhi Summit on Sustainable Development, 2002.

The Cairo Conference on Population and Development (ICPD), 1994

Following close on the heals of the Earth Summit was another global conference held at Cairo. The International Conference on Population and Development (ICPD)[74] was held in September 1994 in Cairo. Many

70 *Id.* at p. 818 (1992).
71 *Id.* Art. 8 (c).
72 *Id.* Art. 8 (d).
73 *Id.* Art. 8 (b).
74 See, the United Nations International Conference on Population and Development (ICPD), held from 5-13 September 1994 in Cairo, Egypt. UN Doc A/CONF.171/13 and Add.1.

environmentalists, especially those from the North, regarded over population as the leading cause of environmental destruction around the world. They hoped that the lack of emphasis on population stabilization at the Earth Summit would be more than compensated by the issues, commanding preference at Cairo Conference. For one thing, the Cairo Conference changed the framework of debate from conventional issues of family planning to broader questions of reproductive health, empowerment of women and integration of population policy with environmental policy and development strategies. Representatives from 183 nations declared their consent to a programme of action that aimed at stabilizing human population by the year 2020, providing greater equality for women along with improved reproductive health care and the controlling of AIDS as part of population policy.

The Cairo Conference, like the Earth Summit, largely failed to integrate demographic, environmental and economic development issues. The World Human Rights Conference in Vienna in June 1993, the World Social Development Summit in Copenhagen in March 1995, have all failed to highlight the importance of the linkage between environment, population and development.

SAARC Conference, 1995 and 1997, 2002

Hand in hand with the global efforts, there have been regional efforts also to improve and protect environment at regional level. Thus a Conference of SAARC (South Asian Association for Regional Cooperation) was held at New Delhi, on 2-4 May 1995. The SAARC countries, through Delhi Declaration[75], expressed their deep concern at the unabated degradation of the environment and recurrence of devastating natural disasters. They also underscored the risks and dangers involved in overlooking the challenges posed by these problems. They expressed their commitment to implementing at all levels - national, bilateral, regional and global, programmes for the protection and preservation of environment and prevention of its degradation.

They recalled the decisions expressed in the Dhaka Declaration on April 1993 on the outcome of the UN Conference on Environment and Development of June, 1992 and reiterated the urgent need to ensure the flow of new and additional resources that are adequate and predictable to successfully implement the programmes of Agenda 21. They also noted that international actions in the area of environmental protection should be based on partnership and collective endeavors and should reflect the principle, enunciated in the UNCED, of common but differential responsibilities. They also noted that the Commission on Sustainable Development set up to monitor the implementation of the Rio agreements has met thrice since their earlier meeting and expressed the hope

75 34 IJI, pp. 162-163 (1994).

that the Commission would be able to facilitate the necessary flow of resources and technology. The latest Conference of the SAARC countries was held at Kathmandu (Nepal) from 4 to 46 January 2002. The heads of state or government reiterated their call for the early and effective implementation of the SAARC environment plan of action as endorsed by the SAARC environment ministers who were also directed to take the SAARC environment plan into account and come up with an agreed position in their forthcoming meeting. They also noted with satisfaction the growing Public awareness on the need for protecting the environment within the framework of regional cooperation.

The heads of state or government also felt that there is a strong need to devise a mechanism for cooperation in the field of early warning as well as preparedness and management of natural disasters along with programmes to promote conservation of land and water resources.

They also stressed the need to develop a cooperative mechanism for the protection, enrichment and utilization of bio- diversity as provided for in the UN Convention on biological diversity and to establish a regional biodiversity data-base with a view to providing equitable benefits to all member states.

The United Nations Conference on Human Settlements, 1996[76]

The United Nations Conference on Human Settlements was held in June 1996 in Turkey and Habitat Agenda, 1996 was adopted which lays down that the national governments at the appropriate levels should establish legal frameworks to facilitate the development and implementation of public plans and policies for sustainable urban development and rehabilitation, land utilization, housing and the improved management of urban growth. The Habitat Agenda, 1996 lays down, as its objectives, the following:

- Integrating urban planning and management in relation to housing, transport, employment opportunities, environmental conditions and community facilities.
- Providing adequate and integrated environmental infrastructure facilities in all settlements including continuous and safe fresh water supplies, sanitation and drainage and waste disposal services.
- Promoting the development of more balanced and sustainable human settlements by encouraging productive investments, social infrastructure

76 United Nations Conference on Human Settlements Istanbul, Turkey 3-14 June 1996, is also known as 'Habitat II'. The purpose of the second United Nations Conference on Human Settlements (Habitat II) is to address two themes of equal global importance: "Adequate shelter for all" and "Sustainable human settlements development in an urbanizing world". Human beings are at the centre of concerns for sustainable development, including adequate shelter for all and sustainable human settlements, and they are entitled to a healthy and productive life in harmony with nature. UN Doc A/CONF.165/L.1.

development, harnessing and enhancing the efforts and potential of productive informal and private sectors.

- Giving priority attentions to human settlement programmes and policies to reduce urban pollution resulting especially from inadequate water supply, sanitation and drainage, poor industrial and domestic waste management, including solid waste management, and air pollution.
- Encouraging dialogue among public, private and non-governmental interested parties to develop an expanded concept of the 'balance sheets". The concept would recognize that the economic, environmental, social and civic consequences for directly and indirectly affected parties including future generations should be taken into account in making decisions on the allocation of resources.
- Promoting optimal use of productive land in urban and rural areas and protecting fragile eco-systems and environmentally vulnerable areas from the negative impacts of human settlements.
- Promoting the redevelopment and reuse of already serviced but poorly utilized commercial and residential land in urban centers in order to revitalize them and reduce development pressures on productive agricultural land on the periphery.

Earth Summit +5 programme for the Further Implementation of Agenda 21[77]

A special session of the UN General Assembly, held from 23 to 28 June 1997 in New York to review the progress of the Rio Earth Summit- called 'Earth Summit + 5', adopted a comprehensive document titled "Programme for the Further Implementation of Agenda 21". This was called to assess the progress in the five years since the 1992 Earth summit at Rio and to chart out the future course for further action based upon Agenda 21 adopted at that Conference. It was acknowledged that, since Rio Conference, the global environment had continued to deteriorate with rising levels of polluting emissions, notably of greenhouse gases, toxic substances and waste volumes.[78] It was also noted with concern that renewable resources, notably fresh water, forests, top soil and marine fish stocks continued to be exploited at rates that were clearly unsustainable.[79] To address and to take care of these problems, the governments resolved to take several steps at the special session, as reflected in the final document. The governments not only reaffirmed that Agenda 21 remained the fundamental programme of action for achieving sustainable

77 Published by the United Nations Department of Public Information DP1/ 1953 (1997).
78 Earth Summit +5 Programme for Further Implementation of Agenda 21, section II, para 9.
79 *Id.* para 10.

development[80] but also expressed their commitment to fully implement the Agenda Programme.[81] While recounting the achievements made by the international community since Rio Conference and the progress made in the implementation of the commitments of the Rio Declaration through a variety of international and national legal instruments, the final document expressed its regret that much remained to be done to embody the Rio principles more firmly in law and practice.[82] In practice, it was regretted that the Rio commitment by the developed countries to contribute 0.7% of their Gross National Product (GNP) to ODA or the United Nations target and 0.15% of GNP as ODA to the least developed countries was not yet fulfilled.[83] The final document reaffirmed that economic development, social development were mutually reinforcing components of sustainable development[84] and that sustainable development strategies were important mechanisms for enhancing and linking national capacities so as to bring together priorities in social, economic and environmental policies.[85] It was asserted that the achievement of sustainable development could not be carried out without greater integration[86] at all policy-making levels and at operational levels, including the lowest administrative levels possible. While emphasizing the importance of adequate, sustained and predictable funding of the Global Environment Facility (GEF) to the developing countries, it called upon the member countries to fulfill their financial commitments of Agenda 21 agreed upon at Rio Conference.[87]

Section IV of the document, which deals with international institutional arrangements, required the strengthening of the existing institutions for the effective implementations of the action plan for sustainable development envisioned in Agenda 21. It appears that a suggestion for the creation of a separate organization known as "International Environmental Organization" to take care of global environmental problems was not accepted at the Conference.[88] The document required to strengthen the Inter-Agency Committee on Sustainable Development of the Administrative Committee on Coordination and its system of task managers.[89] The role of UNEP, as a Principal United Nations body in the field of environment was required to be further enhanced. The Commission on Sustainable Development, which is

80 *Id*. Section 1, para 3.
81 *Id*. para 6.
82 Supra n. 77, paras 13 and 14.
83 *Id*. para 18.
84 *Id*. Section III, para 23.
85 *Id*. para 24.
86 *Ibid*.
87 *Id*. paras 78 and 79.
88 For a Report of the "Earth Summit +5" held from 23 to 28 June 1997, See, Times of India, dated 27 June 1997, p.12.
89 Supra n. 77, para 120.

expected to review the progress achieved in the implementation of Agenda21 was given several guidelines to enhance its functioning.[90] Finally, Earth Summit+5 document required the Committee on Trade and Environment of the World Trade Organization, UNCTAD and UNEP to advance their co-coordinated work on trade and environment involving other appropriate international and regional organizations in their cooperation and coordination.[91]

United Nations Millennium Declaration[92]

The United Nations Millennium Declaration was a landmark international 'soft' law instrument of the new century which was adopted at the Millennium Summit held in New York from 6th to 8th September 2000 and attended by 191 (approx) nations, which was the largest ever gathering of the world leaders. The Declaration recognised that certain fundamental values including respect for nature, are essential to international relations in the 21st century.[93] Elaborating the content of the fundamental value of "respect for nature", the Declaration articulated that prudence must be shown in the management of all living species and natural resources, in accordance with precepts of sustainable development, and that only then, can the immeasurable riches provided to us by the nature be preserved for posterity and that the current unsustainable pattern of production and consumption must be changed in the interest of our future welfare and that of our descendants.[94]

Reaffirming its support for the principles for sustainable development, including those set out in Agenda 21 which were agreed upon at the Rio Conference,[95] the international community, through the Millennium Declaration, resolved: to make efforts to ensure the entry into force of the Kyoto Protocol at the earliest and to embark on the required reduction in emission of greenhouse gases; to intensify the global efforts for the management, conservation and sustainable development of all types of forests; to press for the full implementation of the Convention on Biological Diversity and the Convention to Combat Desertification in those countries experiencing serious draughts and/or Desertification, particularly in Africa; to stop the unsustainable exploitation of water resources by developing water management strategies at the regional, national and local levels, which promote both equitable access and adequate supplies; to intensify cooperation to reduce the number and effects of natural and man-made disasters and to ensure free access to information on the human

90 *Id*. para 133.
91 *Id*. para 127.
92 The Declaration, has been published by the United Nations Department of Public Information – DP1/ 2163 – September 2000.
93 *Id*. para 6.
94 *Ibid*.
95 *Id*. para 22.

genome sequence[96] .

In conclusion, the Declaration embodied the pledge of the international community of its unstinted support for the common objectives set out in the Declaration and its determination to achieve them.[97] The international community, through the Declaration, also made a request to the UN General Assembly to review on a regular basis the progress made on the implementation of the provisions of the Declaration and to ask the Secretary General to issue periodic reports for consideration by the General Assembly and as a basis for further action.[98]

Kyoto Protocol, 1997

The Kyoto Protocol, 1997[99] to the United Nations Framework Convention on Climate Change was adopted in 1997. The Protocol, which consists of 28 provisions, requires the country parties to the protocol to endeavour to implement all the policies and measures (like enhancement of energy efficiency in relevant sectors of national economy; promotion and enhancement of sinks and reservoirs of greenhouse gases not controlled by the Montreal Protocol; Promotion of sustainable forest management practices, aforestation and deforestation; Promotion of sustainable forms of agriculture in the light of climate change considerations; encouragement of appropriate reforms in relevant sectors aimed at promoting policies and measures which limit or reduce emissions of greenhouse gases not controlled by the Montreal Protocol and measures to limit and / or reduce emissions of greenhouse gases in the transport sector.[100]) in such a way as to minimize adverse effects, including the effects of climate change, effects on international trade and social, environmental and economic impacts on other parties, especially developing country parties to the convention.[101] The protocol also called on the developed country parties to reduce, either individually or jointly, their emissions of the greenhouse gases by at least 5% compared to 1990 levels by the period 2008-2012.[102] They are also required to strive to implement their commitments mentioned above in such a way as to minimize adverse social, environmental and economic impacts on developing country parties, particularly those identified in paras 8 and 9 of Art 4 of the Climate Change Convention.[103] The countries were given individual emission targets to be achieved by domestic action by a range of international

96 *Id*. para 23.
97 *Id*. para 32.
98 *Id*. para 31.
99 UNFCCC / 01 / 10 The International Conference, which led to the adoption of the Kyoto Protocol, was held in Kyoto (Japan) in December 1997.
100 *Id*. para (a) (i). (ii), (iii), (vi) and (vii) of Art. 2.
101 *Id*. Art. 2(3).
102 *Id*. Art. 3(1).
103 *Id*. Art. 3(14), 4(8), (9).

co-operative mechanisms such as clean development mechanism[104] , multilateral consultative process[105] and emission trading[106] which should be supplemental to domestic actions of developed country parties.

Follow-up Administrative Measures

After the adoption of Rio Declaration and Agenda 21, several follow-up administrative measures were taken to create a few administrative bodies mandated by Rio Declaration. Thus the UN General Assembly by its Resolution 47/190(1992) created a Commission on Sustainable Development under the UN Economic and Social Council (ECOSOC) to ensure the effective implementation at the local, national, regional and international levels of what had been agreed at the Rio Conference. Its main functions, among others, were: to ensure follow-up of the United Nations Conference on Environment and Development (Rio Summit), to enhance adequate international, scientific and technological co-operation, to catalyze inter-governmental decision making capacity and to ensure regular and effective reporting on the implementation of Agenda 21 at national, regional and global levels. By another resolution, i.e., Resolution 47/191, the General Assembly provided the terms of reference for the Commission on Sustainable Development, its composition, guidelines for the participation of Non-Governmental Organizations (NGOs) and other major groups and the organization of the work.

Similarly, an Inter Agency Committee on Sustainable Development was created to co-ordinate the work of organs, organizations and programmes of United Nations System on the implementation of Agenda 21.

The Delhi Sustainable Development Summit (DSDS) 2002

A summit on Sustainable Development was held from 8-11 February 2002 at Delhi, India[107] which was organized by Tata Energy Research Institute (Teri), a research oriented non-governmental organization with its headquarters in New Delhi, to discuss, examine and elaborate the dynamics of concept of Sustainable Development with a view to making recommendations for consideration at the World Summit on Sustainable Development (WSSD) to be held later in the year at Johannesburg (South Africa). The Delhi Summit was one of the regional conferences organized in the run-up to the main World Summit on Sustainable development held at Johannesburg. The Delhi Summit sought to focus on poverty alleviation as the overriding concern to achieve sustainable development. It was

104 *Id*. Art. 12.
105 *Id*. Art. 16.
106 *Id*. Art. 17.
107 The Summit was to adopt a "Delhi Declaration" and a report on the Conference, which were to be presented to the Commission on Sustainable Development for consideration of the Johannesburg Summit. But, unfortunately, this effort did not materialize.

realized that the path followed until now by governments and international institutions, giving priority to economic growth does not necessarily bring about sustainable development, whose core-dimension was the alleviation of poverty by meeting the basic need of the poorest of the poor which had remained the primary challenge in the developing countries. It was also realized that all efforts to preserve the environment or to promote sustainable development would prove self-defeating unless the basic needs of the poorest of the poor were met. This is more so in the context of globalization. It was emphasized that this understanding lied at the heart of the concept of sustainable livelihood both as an objective in itself and as an approach towards poverty eradication based on an understanding of the basic needs of the poor. This theme was echoed by Mr Atal Behari Vajpayee, the Prime Minister of India, when he, in his inaugural address observed:

> We need to make both sustainable development and globalization work for the poor… we cannot take the poor and the deprived wait any longer in their aspiration to live a better life. This is the first and foremost task in sustainable development.

The Summit emphasized that poverty alleviation cannot take place on a sustainable basis if it does not enhance human and organizational capacities for higher value production work. Enhancing such capacity would require a substantial upgrading of skills and increased access to technical know-how even in the most deprived and destitute communities in the world. It was urged that Johannesburg Summit must focus on design of programme of a comprehensive nature that would enhance the capacity and technical wherewithal of poor communities through out the world.

The Delhi Summit called for not only an increase in the quantum of financial resources - Official Development Assistance (ODA), Foreign Direct Investment (FDI) but also more effective use of available resources. It also called for major increases in the funding levels for the Global Environmental Facility (GEF). The Summit noted that the Clean Development Mechanism (CDM) introduced under the Kyoto Protocol offered opportunities to tap private capital for sustainable development activities, while at the same time providing access to technology to developing countries. It was also noted that this mechanism also enabled the developed countries to meet their commitments to reduce greenhouse gas emissions flexibly and effectively.

The Delhi Summit also emphasized the need for all governments to implement the principle of good governance – accountability, stakeholder involvement and transparency - in their national territories on the premise that it is the fourth pillar of Sustainable Development.[108]

108 The other three pillars of Sustainable Development are: (1) Economic Prosperity, (2) Social Progress, and (3) Ecological Balance.

The Delhi Summit came out with a list of recommendations, which are:

- ✍ Recognize the pivotal role of business and industry in achieving Sustainable Development and accord to it the priority it deserves.
- ✍ Foster an enlightened, transparent, and participatory mode of governance.
- ✍ Secure definitive commitments towards increased official development assistance.
- ✍ Liberalize trade and facilitate movement of labour to achieve true globalization.
- ✍ Promote innovation in socially responsible technology and encourage its spread worldwide so that its benefits are reaped by all.
- ✍ Ensure universal but appropriate education designed to serve as the true foundation of a sustainable, equitable, and progressive society.
- ✍ Guide the overall course of development away from the vision dominated by material prosperity, competition, and short-term concerns to a path that leads to well-being, cooperation, and long-term prosperity for all.
- ✍ Support a holistic approach to natural resource management based on an understanding of the dynamic interactions between people – especially the poor – and the environment and an explicit delineation of rights and responsibilities that encourages the involvement of local communities.

The International Law Association (ILA) NEW Delhi Conference, 2002

The International Law Association held its 70th biennial conference from 2-7 April 2002 at Delhi (India), where the Reports of the various International Committees of the International Law Association on a variety of topics were examined and discussed. The Committee on 'Legal Aspects of Sustainable Development' submitted its Fifth and Final Report for consideration of the Conference, which after a thorough discussion of the Report along with the earlier four reports of the Committee, came out with a Draft Declaration entitled "New Delhi ILA Declaration on Principles of International Law Relating to Sustainable Development". The Report and the Draft Declaration were submitted to the UN Secretary General with a request to forward the same to the UN Commission on Sustainable Development, UNCTAD, UNEP, the WTO, the World Bank and other relevant intergovernmental and non governmental organizations for their considerations, including organizations at the regional level.

The Declaration took note of the fact that the doctrine of sustainable development is now widely accepted as a global objective and that the doctrine has been amply recognized in various legal instruments, including treaty law

and jurisprudence at international and national levels.[109] It emphasized that the ideal of sustainable development is a matter of common concern both to developing and industrialized countries and that, as such, it should be integrated into all relevant fields of policy in order to realize the goals of environmental protection, development and respect for human rights.[110] The Declaration also expressed its concern about growing economic and social inequalities between and within States as well as about the ability of many developing countries, particularly least developed countries, to participate in the global economy and to benefit from globalization.[111] The Declaration, gave an expansive meaning to the objective of sustainable development, which involved a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the earth and the protection of the environment on which nature and human life, as well as social and economic development depends, and which seeks to realize the right of all human beings to an adequate living standards on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom, with - due regards to the needs and interests of future generations.[112]

The Declaration suggested certain principles of international law which it thought would be instrumental in pursuing the objective of sustainable development, some of which are: States are under a duty to manage natural resources, including natural resources solely within their own territory, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including the ecosystems of the Earth. States should also take into account the needs of future generations in determining the rate of use of natural resources. All relevant actors (including states' industrial concerns and other components of the civil society) are under a duty to avoid wasteful use of natural resources and promote waste minimization policies.[113] The Declaration propounded a new concept of "common concern of human kind" which is different from common heritage of mankind. The Declaration declared that protection, preservation and enhancement of the natural environment, particularly the proper management of the climate system, biological diversity and flora and fauna of the Earth, are the common concern of humankind. The resources of outer space and celestial bodies and of the seabed, ocean floor and sub-soil there of beyond the limits of national jurisdiction are the common heritage of humankind.[114]

109 New Delhi ILA Declaration on Principles of International Law Relating to Sustainable Development, Preamble, ILA 2002 – 70th Biennial Conference of the International Law Association, p. 211.

110 *Ibid*.

111 *Ibid*.

112 *Ibid*.

113 *Id.* para 1(2).

The Declaration emphasized that the principle of equity which refers to both inter-generational equity (i.e., the right of the future generations to enjoy a fair level of the common patrimony) and intra-generational equity (i.e., the rights of all peoples with in the current generation of fair access to the current generations entitlement to the Earth's natural resources) as central to the attainment of sustainable development.[115] While the present generation has a right to use and enjoy the resources of the Earth, it is under an obligation to take into account the long – term impact of their activities and to sustain the resource base and the global environment for the benefit of future generations of humankind.[116] The Declaration declared that while each state has a primary responsibility to aim for conditions of equity within its own population and to ensure, as a minimum, the eradication of poverty, all states which are in a position to do so are also under a secondary responsibility, as recognised by the Charter of the United Nations and Millennium Declaration of the United Nations, to assist states in achieving this objective.[117]

The Declaration also articulated the principles of "common but differentiated responsibilities"[118], the precautionary approach[119], public participation and access to information and justice[120] , good governance[121] and of integration and interrelationship, in particular in relation to social, economic and environmental objectives[122] as viable principles for adoption and application by states in their endeavours to achieve the goal of sustainable development.

Global Judges Symposium to Strengthen World's Environment Related Laws

A two-day Symposium of global judges, sponsored by the United Nations Environment Programme, was held from 18 - 20 August 2002, at Johannesburg, where the "Johannesburg Principles on the Role of Law and Sustainable Development" were adopted to strengthen the development, use and enforcement of environment- related laws. The Judges affirmed their commitment to the pledge made by the world in the millennium Declaration "to spare no effort to free all of humanity, and above all our children and grand children, from the threat of living on a planet irredeemably spoilt by human

114 *Id*. para 1(3).
115 *Id*. para 2(1).
116 *Id*. para 2(2).
117 *Id*. para 2(4).
118 *Id*. para 3.
119 *Id*. para 4.
120 *Id*. para 5.
121 *Id*. para 6.
122 *Id*. para 7.
123 Senior Judges Adopt Ground – Breaking Action Plan to Strengthen World's Environment – Related Laws – The Johannesburg Principles on the Role of Law and Sustainable Development, (see p 54 b), UNIC/ Press Release/ 93-2002, p 2.

activities and whose resources would no longer be sufficient for their needs.[123] The judges, while expressing their conviction that the framework of international and national laws that were brought into existence since Stockholm Conference provided a sound basis for addressing the present major environmental threats, urged for a more determined, concerted and sustained effort to implement and enforce these legal regimes in order to achieve their objectives.[124] The Judges were of the view that an independent judiciary and judicial process was vital for the implementation and enforcement of environmental laws and that the members of the judiciary, as well as those contributing to the process at the national, regional and global levels were crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental laws.[125] The judges expressed their conviction that deficiency in the knowledge, relevant skills and information in regard to environmental law was one of the principal causes that contributed to the lack of effective implementation, development and enforcement of environmental laws.[126] Therefore, the judges strongly felt that there was an urgent need to strengthen the capacity of judges, prosecutors, legislators and all persons who played a crucial role at national level in the process of implementation, development and enforcement of environmental law including multilateral environmental agreements, especially through the judicial process.[127]

The judges agreed unanimously upon the following principles, which should guide the judiciary in promoting the goals of sustainable development through the application of rule of law and the democratic process, which are:[128]

- A full commitment to contributing towards the realization of the goals of sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process,
- To realize the goals of the Millennium Declaration of the United Nations General Assembly which depend upon the implementation of national and international legal regimes that have been established for achieving the goals of sustainable development,
- In the field of environmental law there is an urgent need for a concerted and sustained programme of work focused on education, training and dissemination of information, including regional and sub-regional judicial colloquia, and

124 *Ibid*.
125 *Id*. p. 3.
126 *Id*. p. 4.
127 *Ibid*.
128 *Id*. pp. 4-5.

- That collaboration among members of the Judiciary and others engaged in the judicial process within and across regions is essential to achieve a significant improvement in compliance with, implementation, development and enforcement of environmental law.

For the realization of these principles the judges brought out a comprehensive "programme of work", which should include the following.[129]

- The improvement of the capacity of those involved in the process of promoting, implementing, developing and enforcing environmental law, such as judges, prosecutors, legislators and others, to carry out their functions on a well-informed basis, equipped with the necessary skills, information and material,
- The improvement in the level of public participation in environmental decision- making, access to justice for the settlement of environmental disputes and the defense and enforcement of environmental rights, and public access to relevant information,
- The strengthening of sub-regional, regional and global collaboration for the mutual benefit of all peoples of the world and exchange of information among national Judiciaries with a view to benefiting from each other's knowledge, experience and expertise,
- The strengthening of environmental law education in schools and universities, including research and analysis as essential to realizing sustainable development,
- The achievement of sustained improvement in compliance with and enforcement and development of environmental law,
- The strengthening of the capacity of organizations and initiatives, including the media, which seek to enable the public to fully engage on a well-informed basis, in focusing attention on issues relating to environmental protection and sustainable development,
- An Ad Hoc Committee of Judges consisting of Judges representing geographical regions, legal systems and international courts and tribunals and headed by the Chief Justice of South Africa, should keep under review and publicize the emerging environmental jurisprudence and provide information thereon,
- UNEP and its partner agencies, including civil society organizations, should provide support to the Ad Hoc Committee of Judges in accomplishing its task,
- Governments of the developed countries and the donor community, including international financial institutions and foundations, should give priority to financing the implementation of the above principles and the programme of work.

129 *Id.* p. 5.

The World Summit on Sustainable Development

The Johannesburg Summit on Sustainable Development was held at Johannesburg (South Africa) from 27 Aug to 04 September 2002, under the auspices of the Commission on Sustainable Development, which reviewed the progress made on the prospect of achieving the goal of Sustainable Development since the Rio Conference and recommended concrete steps for further implementation of the Rio Principles and Agenda 21.[130] Reaffirming its commitment to the Rio Principles and Agenda 21, the international community expressed its commitment to undertake concrete actions and measures at all levels to enhancing international co-operation, taking into particular account, the principle of common but differentiated responsibilities as set out in Principle 7 of the Rio Declaration.[131] The members of the international community were required to promote the integration of the three components of sustainable development, i.e., economic development, social development and environmental protection as interdependent and mutually reinforcing pillars.[132] It was declared that poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for, sustainable development.[133]

Recognizing that the implementation of the outcome of the Summit would benefit all sectors of the societies, particularly women, youth, children and vulnerable groups, it was declared that the implementation process should involve all relevant actors through partnerships, especially between governments of the North and South on the one hand, and between governments and major groups, on the other hand, as this was required to achieve the widely shared goals of Sustainable Development.[134]

The international community recognizing, the importance of good governance both within each country and at international level, stipulated that at the domestic level, sound environmental, social and economic policies, democratic institutions responsive to the needs of the people, rule of law, anti-corruption measures, gender equality and an enabling environment for investment are the basics for Sustainable Development.[135]

The plan of implementation document declared that peace, security, stability and respect for human rights and individual freedoms, including the

130 *World Summit on Sustainable Development – Plan of Implementation*, Advance Unedited text, 4 September 2002, para 1.
131 *Id.* para 2.
132 *Ibid*.
133 *Ibid*.
134 *Id*. para 3.
135 *Id*. paras 4 and 120.

right to development, as well as respect for cultural diversity, are essential pre-requisites for achieving Sustainable Development.[136]

Recognizing that the eradication of poverty, which is the greatest global challenge facing the world today,[137] is indispensable requirement for sustainable development, the plan of implementation document required action to be taken at all levels to halve, by the year 2015, the proportion of the world's people whose income is less than $1 a day, the proportion of people who suffer from hunger and the proportion of people without access to safe drinking water.[138] It also required action for the establishment of a World Solidarity Fund to eradicate poverty and to promote social and human development in the developing countries pursuant to the modalities to be determined by the General Assembly.[139] It also recommended actions to be taken to promote women's equal access to and full participation on the basis of equality with men in decision-making process at all levels.[140] The plan of implementation document recommended the strengthening of the contribution of industrial development to poverty eradication and sustainable natural resource management.[141]

Emphasizing that changing unsustainable pattern of consumption and production is indispensable for achieving global sustainable development,[142] the document directed all the countries to promote sustainable consumption and production patterns, with the developed countries taking the lead in this respect.[143] In this context the countries were required to take into consideration the Rio Principles, including the principle of common but differentiated responsibilities set out in Principle 7144 of the Rio Declaration.[145] It also required that governments, relevant international organizations, the private sector and all major groups should play an active role in changing unsustainable consumption and production patterns.[146]

Emphasizing the need to manage natural resource base in a sustainable and integrated manner, which is essential for sustainable development, the Document directed the international community to reverse the current trend in natural resource degradation as soon as possible. Towards this end, it is necessary to implement strategies which should include targets adopted at the national and, where appropriate, regional levels to protect ecosystems and to achieve

136 *Id*. para 5.
137 *Id*. para 6.
138 *Id*. para 6(a).
139 *Id*. para 6(b).
140 *Id*. para 6(d).
141 *Id*. para 9.
142 *Id*. para 13.
143 *Ibid*.
144 Supra n. 52.
145 Supra n. 1, para 13.
146 *Ibid*.

integrated management of land, water and living resources, while strengthening regional, national and local capacities.[147]

Since oceans, seas, islands and coastal areas form an integrated and essential component of earth's ecosystem and are crucial for global food security and for sustaining economic prosperity and the well-being of many national economies, particularly developing countries, it is necessary to ensure sustainable development of the oceans.[148] This requires an effective co-ordination and co-operation, including at the global and regional levels, between relevant bodies, and actions at all levels to invite states to ratify or accede to and implement the United Nations Convention on the Law of the Sea, which provides the overall legal framework for ocean activities.[149] This also requires the promotion of the implementation of Chapter 17 of Agenda 21, which provides the programme of action for achieving the sustainable development of oceans, coastal areas and seas.[150]

The Document declares that since change in the earth's climate and its effects are a common concern of human kind and that since the Climate Change Convention is the key instrument for addressing climate change, the international community reaffirms its commitment to achieving its ultimate objective of stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous atmospheric interference with the entire climate systems.[151] The Document recalled the United Nations Millennium Declaration in which it was resolved that efforts should be made to ensure the entry into force of the Kyoto Protocol to the Climate Change Convention by the 10th anniversary of the Johannesburg Summit 2002. The states, which have not ratified the Kyoto Protocol, were strongly urged to ratify the same in a timely manner.[152]

The Document called upon the international community to strengthen the international framework for sustainable development which is the key to the full implementation of Agenda 21, the follow-up to the outcomes of the World Summit on Sustainable Development and meeting the emerging sustainable development challenges.

Summation

It is submitted that the above brief examination of the various international efforts taken to combat, the formidable global environmental challenges as reflected in several international conferences, including the latest one held at Johannesburg and the international legal instruments that have been concluded

147 *Id.* para 23.
148 *Id.* para 29.
149 *Id.* para 29(a).
150 *Id.* para 29(b).
151 *Id.* para 36.
152 *Ibid.*
153 Supra ns. 77 and 78.

periodically, has given the impression that despite these efforts the health of the global environment has not improved. On the contrary it has deteriorated appreciably since the Stockholm and Rio Conferences. This disappointing scenario has been acknowledged at the Earth Summit +5 held at New York in 1997. It was regretted that since Rio Conference, the global environment had continued to deteriorate with rising levels of polluting emissions, notably greenhouse gases along with alarming depletion of renewable resources, notably fresh water, forests, top soil and marine fish stocks due to unsustainable exploitation.[153] It was reminded that much remained to be done to embody the Rio Principle more firmly in law and practice.[154] The main reason is not only the non-binding nature of the international obligations which have their foundation in various declarations adopted at the conferences held periodically which are in the nature of 'soft' law, to use international law jargon, but also unwillingness on the part of the members of the international community to accept such binding commitments in respect of the issues of the protection of global environment. In this context, the states have made extravagant use of their right to sovereignty and the accompanying doctrine of domestic jurisdiction to shut out all arguments in favour of imposition of international environmental obligations. Even the international treaty obligations undertaken by various states under various environmental treaties have not proved to be effective, for, the states have not taken them seriously as these are only "umbrella agreements which state the general goals of the parties but do not impose any mechanisms which obligate them to achieve those goals".[155] This is evident from the observation that the "States are reluctant to bind themselves to international obligations which may interfere with their right to determine their own economic development".[156] With the infusion of new content into the concept of sustainable development with its over-reaching range, it should be possible not only to induct a new content into the concept of new international economic order but also to establish a new international environmental order with all its implications for the global environmental protection. To achieve this goal, it is also necessary to have the right to healthy and clean global environment guaranteed as a human right. And also, it is imperative to have a separate international environmental organization created to deal effectively with all problems of global environmental concerns. It is also imperative to have all environmental disputes compulsorily adjudicated by separate and independent International Court of Environmental Justice which should be created on the lines of International Court of Justice.

154 Supra n. 81.

155 See, State of the Environment in Asia and the Pacific, p. 446 (1995) – prepared by the Economic and Social Commission for Asia and Pacific and Asian Development Bank.

156 *Ibid*.

Conclusions and Suggestions

- While the Stockholm Conference succeeded not only to place the issue of Global Environment Protection on the agenda of International Policy and Law but also to establish a link between development and environment protection from which the concept of sustainable development has emerged, the Rio Conference gave to the world a comprehensive blueprint of global action to combat the challenges of global environmental degradation.
- As has been rightly observed, the story of the growth of environmental law, whether it is national or international, has been the story of striking a viable balance between the claims of development and those of sustainable development.[157]
- The scope and content of the concept of sustainable developing, which has now become the ultimate panacea not only for the problem of achieving the goal of socio-economic development and justice in the developing countries but also for all the ills of the global environmental degradation, needs to be strengthened at the international level by ensuring a new era of new international economic and social order. It is also imperative that the new international economic and social order should be infused with the ideal of distributive justice to enable the developing countries to take the concept of sustainable development more seriously.
- The Stockholm Declaration has done for the protection of global environment what the Universal Declaration of Human Rights and Fundamental Freedoms has accomplished for the protection of International Human Rights movement.
- The same Declaration recognized and acknowledged the sovereign right of all states to exploit their own resources pursuant to their own environmental and developmental[158] polices which is, however subject to the condition that these activities within the State's jurisdiction or control should not cause damage to the environment of other states or areas beyond the limits of their national jurisdiction.
- The concept of sustainable development, as originally proposed by the Bruntland Commission's Report – "Our Common Future" and later elaborated by Agenda 21 accepted at Rio Conference, along with concomitant Precautionary and Polluter Pays Principles, Trusteeship Principle and inter-generational equity Principle etc, have become a part of customary rules of international law.[159] By the same token, they have

157 P. Leelakrishnan, *Environmental Law in India*, Preface (1999).

158 See Principle 2, Rio Declaration, 1992.

159 See, the case concerning *Gabcikovo – Nagaymaras Project between Hungary and Slovakia*, ICJ Reports, 1997, pp. 85-119. See also Justice Kuldip Singh's observation in *Vellore Citizen's Welfare Forum* v. *Union of India* (1996) 5 SCC 647.

also become part of the law of the land.[160]

- It is debatable, however, whether the concept of sustainable development with all its all embracive dynamic scope and content can be considered to be imposing much needed limitations and restraints on the extravagant claims of state sovereignty which is needed not only in the field of environmental protection[161], but also for the eventual creation of a new international environmental order.
- The United Nations General Assembly's adoption of "The World Charter for Nature" was another significant international event in the process of the evolution of international environmental jurisprudence. The Charter required the States not only to integrate the environmental conservation measures in their national planning programmes but also to ensure reflection of Charter principles in the law and practice of members of the international community both at the national and international levels.
- The Rio Summit has given a new impetus to the international efforts for the protection of global environment by providing, in particular, Rio Declaration and Agenda 21 which provides a comprehensive Charter for global action plan for resolving the present and future problems of environment and development. Agenda 21 looks at the possible solutions of global environmental problem with a view to ensuring sustainable development, at the national levels. It may be noted that the concept of sustainable development has come to subsume within its ambit economic prosperity, social progress, ecological balance and good governance as its four pillars.
- The Rio Conference was instrumental for the creation of the Commission on Sustainable Development with a mandate to review the progress made in the implementation of Agenda 21 objectives.
- All Post-Rio Summit developments in the areas of environment have concentrated on the reiteration of the state's commitments to the objectives of Rio Conference as well as strengthening the further implementation of Agenda 21. This reiteration was articulated against back drop of the acknowledged fact that since Rio Conference the global environment continued to deteriorate with rising levels of polluting emissions, notably of greenhouse gases and alarming depletion of renewable resources, particularly, fresh water, forests, top soil and maritime stocks due to unsustainable exploitation.

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160 *Vellore Citizen's Welfare Forum* v. *Union of India* (1996) 5 SCC 647.

161 For the view that it imposes such restraints on the nation-states' extravagant claims of state sovereignty, see the Fifth Report of the Committee on the Legal Aspects of Sustainable Development, ILA 2002 – 70th Biennial Conference of the International Law Association, pp. 195-210.

- The Convention on Climate Change, a "brown" treaty, has provided the necessary international strategies and mechanisms for controlling and reducing the emissions of greenhouse gases in the developed countries. The follow-up Kyoto Protocol under which the developed countries have undertaken to reduce greenhouse gas emissions has not yet come into force. This may be the reasons why the obligations under this protocol are not taken seriously. This is evident from the rise in the greenhouse gas emissions.[162]
- The Biodiversity Convention, a "green" treaty, provides guidelines for States to ensure sustainable economic use of natural resources more compatible with their planned conservation of biological diversity.
- The Earth Summit +5 held at New York in 1997, while emphasizing the importance of adequate, sustained and predictable funding of the Global Environmental Facility to the developing countries, urged the developed countries to fulfill their financial commitments under Agenda 21.
- The Millennium Declaration, reiterating the international community's distress and concern for the unsustainable pattern of production and consumption, particularly, in the developed countries, urged these states to change their pattern in the interests of, and for the benefit of, the international community's future welfare and that of its posterity.
- As has been rightly observed, international environmental law should be an expression of interdependence rather than independence of states if the environment threatening problems such as those posed by the destruction of biological diversity, greenhouse effect and transboundary chemical pollution, are to be met effectively. It is in this context, that the extravagant claims to, and reliance on, the doctrine of State sovereignty to shut out all internationally binding obligations in the field of global environmental protection should be discouraged.
- The Delhi Summit has expounded an innovative new dimension of the concept of sustainable development, in the context of developing countries economies, when it urged the members of the global community to appreciate the concept of sustainable livelihoods as a new approach towards poverty eradication based on the understanding of the basic needs of the poor. According to this new approach, poverty alleviation cannot take place on a sustainable basis if it does not enhance human and organizational capabilities for higher value productive work.

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- The concept of sustainable development has been given an all embracive meaning to comprehend, within its scope and content, all activities involving "a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standards on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom, with due regards to the needs and interests of the future generations".

- A distinction between the doctrine of 'common concern of humankind" and that of "common heritage of humankind" has sought to be made in the context of the achievement of the objective of sustainable development. While the protection, preservation and enhancement of the natural environment, particularly the proper management of the climatic system, biological diversity and flora and fauna of the Earth are the common concern of humankind, the resources of outer space and celestial bodies and of the seabed, ocean floor and subsoil thereof beyond the limits of national jurisdiction are the common heritage of humankind.

- All these international efforts, discussed in this chapter, have their own inherent limitations which are profound and which can be surmounted only by a real collective political will of the International Community.

- To have such a collective political will, the members of the international community ought and should shed their extravagant claims of autonomy and independence based upon the notions of sovereignty and domestic jurisdiction and be prepared to cooperate and be bound by collective decisions in regard to the global management of environment. This is evident from the opening remarks of the South African President, Mr. Thabo Mbeki at Earth Summit on Sustainable Development that was held in Johannesburg. He remarked: "Sadly, we have not made much progress in realizing the grand vision contained in Agenda 21 and other International Agreements. It is no secret that the global community, has yet not demonstrated the will to implement the decisions it has freely adopted."

- As a first step in that direction, the international community should seriously pursue the proposal for the establishment of a "World Environmental Organization" which was mooted at the "Earth Summit Plus 5" held at New York, USA in 1997.

- As a second step, all the nation-states should become parties to the major multilateral environmental conventions without appendage of reservations so that these conventions become effective and universal in nature.
- As a third step, the right to clean environment should be incorporated and guaranteed as an enforceable international fundamental human right with appropriate sanction for its violation by making global environmental violations enforceable by special environmental tribunal.
- The last and most important suggestion is that, there should be an International Court for Environmental Justice established with the conclusion of a statute for its creation and with compulsory jurisdiction over all matters concerning global environment conferred on it.

IS DISPUTE SETTLEMENT SYSTEM OF THE WORLD TRADE ORGANISATION AN ADJUDICATIVE OR ADJUSTIVE SYSTEM?

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The dispute Settlement Understanding (DSU) is often seen as one of the major achievements in the WTO Agreement. This paper is an attempt to inquire into the position of the developing countries in the WTO Dispute Settlement Mechanism (DSM). Reasonable people disagree as to whether it has enhanced and maintained equality between developing and developed countries. Through examining its concrete provisions, procedures and several important factors such as resource availability and political influence outside the WTO, it can be found that there are conditions under which the new rule-based. Even if, the argument runs, a developing country obtains a clear legal ruling that an industrial country has violated its legal obligations the developing country has no effective way to enforce the ruling; that the "law" of the WTO does not give weaker countries the same protection that well-developed domestic legal systems usually afford their weaker citizens.

Introduction

The multilateral framework of international trade originated after World War II with the General Agreement on Tariffs and Trade (GATT). It was a shift from bilateralism in the international economy, policy and trade. This process of shift evolved into the World Trade Organization (WTO) in 1995, after several decades of negotiations. The World Trade Organization deals with the rules of trade between nations at the global level. The rules regarding trade in goods are primarily derived from GATT principles (Das 2003). As different states have their own domestic laws according to their social, political and economic conditions, they placed their positions in the WTO looking for common welfare from the international Trade. The WTO's main function is to provide an orderly and effective medium for international trade and communication and to reduce potential conflict in trade among member-states. So to eradicate these conflicts, which existed from the early GATT negotiations and treat all nations equally, especially during the course of dispute, the Uruguay Round of negotiations set up Dispute Settlement Understanding that were part of the process of structuring the WTO (Jackson 1998). DSU fosters a rule-based dispute settlement system as opposed to a power-based system.

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This article, focusing on the challenges faced by developing countries in the enforcement of DSB recommendations and rulings, is important in the present context where more developing countries are actively participating in the WTO dispute settlement system as complainants, defendants, and third parties. It is important for negotiators and policymakers from developing countries to understand the challenges they are facing and to be able to suggest improvements during the ongoing DSU review negotiations. The study focuses on substantive issues, as opposed to procedural issues.

Dispute Settlement Mechanism: A Brief Overview

Dispute Settlement Mechanism is called the judicial body of the WTO mechanism. This judicial mechanism provides a legal and organized process to speedy resolution of disputes and prevents deliberate blocking action by the erring member countries. It has the authority to set up panels, adopt or reject panel and Appeal Body (AB) reports, maintain surveillance of the implementation of decided rulings, and authorize limited trade transactions. Nations are able to file suit against specific policies of WTO member states that they believe are in clear violation of the principles of honest and non-discriminatory world trade. The DSM encourages countries to first settle their dispute through bilateral consultation by themselves. If the discussion fails, the parties can bring the dispute to the DSB. Then the DSB establishes a "panel" composed of three experts to investigate the case, after which the panel issues a report with rulings or recommendations. Either side disagreeing with the report can appeal the report at the AB. After reviewing the case based on points of law rather than reexamining the evidence, the AB can uphold, modify or reverse the panel's conclusions by issuing a new report. And the DSB needs to accept or reject the AB's report, but rejection is only possible by consensus. When the case has been decided by the DSB, the losing defendant must bring its actions into line with the decided rulings or recommendations. If it does not comply with the rulings in a certain period of time, and it also fails to reach a mutually acceptable compensation in negotiation with the complaining side, the latter may ask the DSB for authorization to impose trade sanctions against the other side.

Dispute Settlement Mechanism under GATT

During the first few years' disputes were usually treated as diplomatic negotiations during regular meetings of the GATT signatories. The second change is about the "automaticity". One of the most decisive changes from GATT to the WTO mechanism is the introduction of "negative consensus." Unless there is a consensus within the DSB to reject the establishment of a panel, the panel must be set up. Similarly, decisions of the panel and the AB are also automatically adopted unless there is a DSB consensus to reject them.

Dispute Settlement Mechanism under WTO

On 1 January 1995 the WTO came into force and the Dispute Settlement Understanding or DSU, is attached to the WTO Agreement as Annex 2 and constitutes an integral part of that Agreement, which is effectively an interpretation and elaboration of GATT Article XXIII. Its prime objective is the prompt settlement of disputes between WTO members concerning their rights and obligations under the various agreements. Two important policy considerations are referred to in the DSU, namely, protecting the security and predictability of the DSS and satisfactory settlement of disputes (Article 3.2).

Table 1. Stages in the WTO Dispute Settlement Process

How long to settle a dispute?	
60 days	Consultations, mediation, etc
45 days	Panel set up and panelists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	(without appeal)
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total =1year 3 months	(with appeal)

Source: World Trade Organization, "Understanding the WTO – A Unique Contribution," http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

After the 1995, the DSM has improved its participation and surveillance mechanism for decision implementation. It works better and decisions making process were good enough than the GATT. It moves towards a more rule-oriented mechanism than the power based GATT system. So the participation of the developing countries encouraged and equality in international trade demanded. But according to the developing countries opinion still the DSM not favoring them. The problems and issues related with the dispute settlement system of WTO have been explained in the next section bellow.

WTO and DSU: Major Problems and Challenges for Developing Countries

The dispute settlement mechanism of the World Trade Organisation was assumed to evolve into a rule based mechanism to facilitate international trade. This has however, not taken place thus far as shown by the experience of developing countries. Indeed, the new DSM of the WTO better enables

developing countries to use the system for trade dispute resolution. The problems and issues in the WTO dispute settlement categorised into two types by the developing countries - firstly, procedural or constitutional issues, and secondly, substantive new issues.

Technical and Provisional Issues

Cost of Access

The present dispute settlement process is very costly and lengthy. Short of human resources, the developing countries always depend on the experts of the developed countries to get their WTO rights. The cost of litigation may contain various elements such as preparation of a complaint, collection of data on the scope of the infringement, and calculation of the precise monetary value of the injury using plausible price elasticises. In addition, the complaint needs to be prepared by lawyers having a thoroughgoing knowledge of the particular legal aspects of the GATT/WTO Agreement (Wilckens 2007). The litigation costs can go up if there are other complainants whose complaints target the same disputable trade measure of the same defendant. These situations may be distinguished into (i) disputes where there are multiple complainants who put a complaint jointly, and (ii) disputes where the defendant and the subject coincide with other complaints. In cases where the developed countries complain against developing countries, and the latter were not found in violation of the WTO obligation, it has been proposed that the former should pay the litigation costs.

Limited Power of Retaliation

In the situation, where countries are found to be in breach of law, it is very difficult to penalise developed countries. In some cases the complainant countries have taken retaliatory measures but they are effective when implemented by developed countries. In the mid 1980s-90s in cases between the EU and Australia and the US and Nicaragua, the US did not follow the Panel's recommendation and was ready to face the retaliation (Lichtenbaum 1998). However, in the US-EU *Banana* case, the US took retaliatory measures because implementation by the EU was inadequate. The formal or legalistic approach to dispute settlement under the DSU does not erase the factual economic imbalances among WTO members. In the *Bananas* case-*III*, for example, the DSB granted Ecuador $201.6 million as compensation, but Ecuador did not subsequently claim payment, recognizing that the adverse economic effects of an actual suspension of concession would be felt more by itself than by the EC. In a situation like this, the non-complying country or region may continue to follow with impunity measures contrary to its WTO obligations and commitments.

Provisions regarding Special and Differential Treatment

Although special and differential treatment had been provided to facilitate equal participation by developing countries in the dispute settlement process, these provisions have not in reality been implemented with equal effectiveness. Such provisions are, of a declaratory nature and have no implementation modalities. Developing countries in several cases have failed to use them.

Special Attention

Some of the clauses in the DSU regarding developing countries have in practice have proved to be more declaratory than operative. For instance, the concept (Article 4.10) of giving "special attention" to the particular problems and interests of developing countries during consultations has no operative content and has not been developed in Panel or Appellate Body reports. Although in one case this article was mentioned in a DSB meeting to support a developing country's position, there was no substantive discussion of the "special attention" concept. A similar problem arose with special and differential treatment clauses in such agreements as that on anti-dumping. *For example*, in 1995 Chile and Peru requested that a Panel be established on the trade description of scallops drawn up by the European Community (EC). The EC asked that the item be removed from the DSB agenda, arguing that the time periods for consultations and for the inclusion of those items on the agenda stipulated in the DSU had not been respected. In practice this was discrimination against Chile and was not in conformity with the obligations of WTO members towards a developing country; Canada, a developed country, had been granted that right earlier.

Article 8.10 states that if developing countries wish to keep one panelist in dispute cases with the developed countries, they can request for it and it is the duty of the Secretariat to nominate a panellist based on that request. However, in cases between the United States *Measure Affecting Imports of Woven Wool Shirts and Blouses* from India, complaint by India (WT/DS33), there was very much disappointment in store for India.

Extension of Time Periods

Article 12(10) of the DSU provides optional "extension of time periods" for the developing countries in the consultation period. It is the duty of the DSB Chairman to inform the developing-country complainant about it, but there is not a single case in which the DSB chairman has taken any such steps.

Anti-Dumping

Article 15, provides that "special regard must be given by developed country members to the special situation of developing country members when considering the application of anti-dumping measures." In European Community:

Antidumping Duties on Imports of Cotton-Type Bed Linen, India contended that the EC had not taken into account India's special situation as a developing country and that the EC had not acted consistently with Article 15, of the Agreement on Anti-dumping. The EC did not react to detailed arguments from Indian exporters pertaining to Article 15. The United States, as a third party in this dispute, argued that Article 15, provides procedural safeguards, and thus, does not require any particular substantive outcome, or any specific accommodation to be made on the basis of developing-country status.

Surveillance of Implementation

DSU provisions related to the surveillance of implementation of DSB recommendations and rulings are too weak to imply any difference between the possibilities open to industrial and developing countries. Article 21.7, mandates that when a matter is raised by a developing country, the DSB is to consider what further action might be appropriate to the circumstances. The language of this provision merely replicates that of the 1979 Understanding on Notification, Consultation, Dispute Settlement and Surveillance. To date, this provision has not been used by a developing country, perhaps because a precondition is that the country devotes resources to analysing and following cases.

Responsibilities of the Secretariat

According to DSU Article 27.2, it is the responsibility of the Secretariat to provide all means of legal help. The experts in the secretariat are required to maintain impartiality. Unlike the lawyers hired to fight a case, the experts are constrained from advising on the best manner of pursuing a case with a view to gaining a favourable adjudication.

The Advisory Centre on WTO Law

Venezuela proposed and many developing countries approved the creation of a legal firm to provide legal assistance to developing countries in WTO dispute settlement. The complex rules of the WTO require that members have a full understanding of the content and scope of their rights and obligations when they want to access the dispute settlement mechanism. Otherwise, the ever-growing complexity and breadth of the system, coupled with the relative scarcity of specialized human resources in developing countries and the costs of specialized external legal counsel, would marginalize many members. In respect of legal advice, developing-country members of the Centre are entitled to receive annually a specified amount of free legal advice on WTO law (Jackson 2002), while non-member developing countries may receive such advice at higher rates and subject to the priority enjoyed by members. The Centre has three principal functions: (a) training government officials in WTO dispute settlement,

(b) providing specialized legal advice on WTO law, to include support throughout legal proceedings; and (c) legal assistance in WTO dispute settlement proceedings. As of October 2006, the Centre's website listed 23 WTO cases in which it had directly provided assistance.

The ACWL faces the problem of funding to be able to function effectively. A developed rich-country government may not want to give sufficient funds for legal assistance that is used in litigation challenging its own actions. Depending on funding from non-governmental sources impacts on the functions and scope of ACWL. Also, it does not have enough human resources in legal expertise to be able to go out into the field and provide information to the developing countries in the litigation.

Transparency and Participation

Under GATT, the 1979 DSU stated that its objective in international trade dispute proceedings was to bring "as much clarity and transparency as possible into the operation of the dispute settlement provisions of the General Agreement in order to make the provisions more predictable ..." But during the negotiations of the Uruguay Round the importance of transparency was somewhat overshadowed by negotiations in critical new substantive trade areas, such as agriculture, intellectual property, services, and textiles. But some WTO provisions state explicitly that there should be confidentiality in consultation and Panel proceedings unlike other international bodies like ICJ and ECHR (Article 4, 14 and 18 DSU). These are extremely important issues, regarding the operation of the dispute settlement process and its credibility in the eyes of both member state governments and non-government observes, including the civil society (Jackson 1998). Transparency in dispute settlement has been an issue of concern in international trade negotiation for some time. The lack of transparency tensions based on power hierarchies between the contracting parties.

Issues relating to Decision-making Process

The WTO is based on one-member-one-vote principle (Article IX.1). A member can participate in any committee or meetings. The Ministerial Conference meets every two years. The day-to-day working of the WTO is carried out by the General Council, located in Geneva. But there are some decision making issues for the developing countries in the WTO. These issues are-

Participation in Consensus-based decision-making

Out of the 153 member countries of the WTO, more than a hundred are developing and least developed countries. Though in a majority, they experience that the WTO rules and regulations are weighted against them. This is because

the decisions are not taken on the basis of vote but by establishing consensus. In consensus-based decision-making the developing countries have less opportunity to participate. Some constraints to this participation are elaborated below.

First, there is a lack of representatives or delegations from the developing countries as they lack sufficient expertise to depute in Geneva, different embassies, and in their country capital. The participation of delegations from developed countries is on an average 7.38 per country and for developing countries it is 3.51. Secondly, in the process of consensus decision-making developing countries are not able to express their opinion openly, because of the fear of developed countries. Thirdly, the goal of consensus has often been used by some developed countries to engage in consultations with small groups that exclude a large number of developing countries. This leads to putting bilateral pressures on them outside the WTO forum in the name of reaching a multilateral consensus in WTO meetings.

Staff Assistance to Developing Countries

The Secretariat of the WTO has limited power. As a result, the power hierarchies outside get translated into the negotiating politics of the WTO. It has been observed that the Quad (US, EU, Canada and Japan) are the best equipped and able to negotiate deals to their advantage. The negotiators and experts belonging to developed countries have little interest in finding about a just solution for developing countries. In negotiations, developing countries, even if present at the meetings, are often reduced to watching from the sidelines, as their small delegations are unable to make the informed choices that can present a match for the preparation of the developed countries. As developing countries delegates are not able to participate in the Green Room and Informal Meetings, the staffs can best to provide information to them.

Informal Processes in WTO decision-making

A major problem in WTO meetings is the informal consultation, which leads to lack of transparency. A small group of people decide on the list of participants for these consultations. Most of the time this is done in a confidential manner in order to avoid further requests for participation. In the Seattle Ministerial Conference, some steps were taken to avoid this non-transparency. However, this has not led to any substantial change in the consultation process. The 'Green Room' diplomacy has been replaced by the term 'small group meetings'. Second, while the tentative schedule for formal meetings for the year is put up on the WTO's bulletin board, informal meetings are still more ad hoc and are called at much shorter notice. Not enough time is available for planning, preparation and resource allocation. Third and the most important,

even if a genuine effort is made to use the small-group meetings for merely consensus-building rather than decision-making, the results of the meetings are presented to the general membership in a relatively final stage of the discussions. It is not easy for developing countries to intervene effectively at this decision-making stage, if they have not participated in the initial discussions and lack a detailed understanding of the issue.

The Role of the Secretary and some other Organizational Issues

There are some serious problems in the role of the Secretariat. Of the 512 posts in the Secretariat (with 39.5 posts vacant or under recruitment), 410 are occupied by individuals from developed countries and 94 from developing ones. Article VI.4 of the Agreement establishing the WTO states, "The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials." However, developing countries allege that the WTO Secretariat and the Director are partial to the interests of developed countries (Oesch 2003). Some developing countries have argued that staff parity in representation from developed and developing countries are necessary to ensure that developing-country viewpoints are represented. Other developing-country members argue that the problem is not so much of unequal representation of nationalities as much as ideologies, whereby only certain kinds of professionals are recruited. For example, neo-liberal economists whose views reinforce the interests of the great powers are preferred for conducting the negotiation. A classic example of the Secretariat's bias is the active promotion of the New Round by the Director General. Such open advocacy by the Secretariat of a position on which there is no consensus among the majority of the members themselves considerably undermines the status of the WTO Secretariat as a neutral broker. Another problem relates to the technical assistance by the Secretariat. The developing countries hold the view that sometimes the Secretariat gives technical advice on the existing rules and regulation but not on needed advice on interest identifications. Developing countries have expressed doubts with both the timing and content of technical assistance programmes in this context.

Conclusion

This article has discussed about the empirical role of WTO dispute settlement mechanism and how it dominated by the developed nations. As the dispute settlement mechanism (DSM) of WTO is often considered as the centerpiece of the architecture of the multilateral trading system, but it has

failed to provide neutral or equal justice to both part of the world. The WTO, in particular, is seen by many to be an example of non-legitimate governance because the strong Northern nations dominate proceedings and sway decisions, and the Southern nations often do not accurately represent their citizens' interests, meaning representation of citizens is unequal. Finally, the WTO offers an ineffective dispute resolution process, which is of differential use to its member nations, the poorer of which can expect little justice from the politicized system. It is for these reasons that civil society has the potential to be a valuable contributor in the WTO decision-making process. The prime focus should be some positive reforms in the administrative as well as judicial organ of the WTO. And at the same time, need to change some of the rules and procedure as well as maintain transparency, equality and play a neutral role in the global trading system. Thus, in the practice of the DSM, developing countries are not enjoying a really equal status as developed states do.

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THE ROLE OF NEW TECHNOLOGY IN IMPROVING ENGAGEMENT AMONG LAW STUDENTS

Suraj Tamariya*

Introduction

The issues of engagement and critical thinking of law students in higher education are well recognized by tutors. These issues may not be new ones but the features of the modern student community and the modern tools for learning and teaching provide different aspects to these challenges, and some possible solutions. I propose that the tools of the modern age, if married to educational pedagogy, can create learning and teaching methods that are more effective for the diverse community of higher education law students. This article reviews pedagogic themes, features of the modern student community and recent reports on the use of technology in education. It takes an interpretative approach in summarizing research into the perceptions of the students on the use of the wiki and the recorded lecture.

Developments in Educational theory

Key writers have described the vital role of engagement and collaboration in higher education (Marton (1984), Biggs (2003), Ramsden (2003)).The theories explore how a student engages with the material in order to learn with the development of critical thought.

They describe the greater depth of learning and engagement achieved by a student who analyses the views of his peers, works with the material in problem solving tasks and thereby constructs his own knowledge through his evaluation of that material.

Marton 's initial work (1975), pursued later in conjunction with Saljo, asserts that what is learnt depends upon the student's intentions. An approach to research termed "phenomenology" developed whereby the learning process is studied from the experience of students rather than from external or physical factors. Marton's work inspired the work of Entwistle, with Ramsden, and also the work of Biggs, to develop the theories of surface and deep learning that a student can demonstrate different degrees of learning whether via a surface approach featuring rote learning of mere facts or via a deeper approach that engages with and challenges the material. Biggs' work also discussed the role of collaboration in encouraging deeper learning. Commenting upon the work of Abercrombie (1969), Biggs emphasized how students become more aware of how to learn from collaborating with their peers than from listening to a tutor.

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Added to this is the debate sparked by Gardner's work on multiple intelligences (1983) positing that learners' have several intelligences, for example linguistic and spatial, that can lead individuals to perform highly in one area, such as factual memory but poorly in others, such as empathizing with other people. Such intrapersonal intelligence would have significant importance in vocational legal education. Entwistle's recent work (2009) uses his own strong base in psychology to build on his key earlier works to contend that the value of collaboration comes from the involvement of the short term memory. Here information is received, meaning is interpreted and processing strategies developed, thus leading to a deeper understanding of complex ideas. Entwistle describes how the size of the short term memory is extremely limited. With traditional lectures, the student only gets one chance to store and keep under review any received information.

Developing alongside this was the theory of social constructivism (Vygotsky (1962)) coming from the substantial heritage of Piaget's constructivism (1950) describing the student's role in the creation of knowledge. Constructivism suggests that we learn by examining existing knowledge and understanding, some of which we bring with us unconsciously, and from our own work we change that knowledge as well as ourselves.

In legal education, these elements combine in a pedagogic clash between the definition of what is learning in a sense of knowing a fixed bundle of legal knowledge establishing an "intelligence quotient" that Gardner, rather ironically, said was only suitable for law professors or, in the constructivist sense, as comment upon and skilful use of pre-existing material that creates new knowledge.

A theory that has become more acceptable within post graduate vocational legal education is experiential learning (Kolb, 1984). This theory describes learning as a cycle involving the receipt of a body of knowledge and its consideration by the learner. The learner engages with this material by adding their own evaluation, including by using it in their employment, and from this engagement, creates new experiences which feed into the body of knowledge and starts the process anew.

In the 1990s interest arose in the role of creativity in the creation of knowledge and understanding. This was spurred on by the NACCCE report all our Futures: Creativity, Culture and Education (1999).The report was set up to examine the role of creativity in education and to identify any obstacles to its development. It investigated whether creativity in teaching and learning would encourage engagement and independent thought .It encouraged a debate about the role of technology in stimulating and supporting this creativity. The chapter

by Jenny Leach (2001) in *Creativity in Education* describes some interesting case studies concerning IT and creativity. This topic was explored as it formed the theme for the 2007 annual conference for UKCLE (*Learning in Law 2007*). There are some useful resources are available from this for encouraging creativity in legal education.

Before leaving this brief review of the theoretical perspectives, a final word should be given to the role of the theories of learning in the affective domain. The work of Krathwohl et al (1964, 1973) on the affective domain was meant to develop as the sister work to Bloom's taxonomy in the cognitive domain (1956). However, it never gained the fame of its celebrity relative, although has received some recent attention (Boyle (2007)).The work gives significant importance to feelings, values, beliefs and motivation in the achievement of successful learning and teaching and has led to some interesting studies regarding motivation and engagement. Elements of the affective domain may gain greater significance within learning and teaching online as discussed below. Special attention will be required for the challenges of e-learning here.

The Student Community

Socio-political changes since the 1990s, such as the movement for widening participation in higher education and the changing methods of modern communication, have brought new challenges to legal education. Students are entering higher education in greater numbers with a much wider range of skills and attitudes. Today's students bring a greater variety of cultural approaches and prior educational experience than seen before. This variety adds to the mix in the pre-existing debate about the variety of learning styles re visual and kinaesthetic learning et al and the development of the theory of multiple intelligences by Gardner (1983). Improved access and the acceptance of reasonable adjustment in education are bringing more students into higher education with differing needs for learning support. The increase in the numbers of overseas students brings further new elements and accentuates cultural differences far above the practical issues of language. Teachers in legal education are now experiencing different student intentions and understanding of their role in contributing to a lesson.

However, not only are students more culturally diverse but they are also subject to a range of increasingly diverse influences.

The report *Digital Britain* (2009) and the article Intellectual Property and the Digital Divide (Endeshaw (2008)) highlight the differences that exist in the electronic experience between the haves and the haves not's in their access to the resources of technology. Digital Britain establishes future priorities for the UK government (at a time before the current economic difficulties) to

increase the availability of high speed Broadband and wireless services and to provide significant resources to increase public education of information literacy with the aim of the promotion of a sense of citizenship. Endeshaw describes the work of UNESCO in assessing the differences in access to technology across the industrial and developing countries.

In spite of all the current educational practice that strives to connect with the diverse student community, teachers are becoming increasingly concerned about a declining level of engagement from our students. The report *Higher Education in a Web 2.0 World* (2009) believes that the world of traditional higher education and the modern technology-enhanced world currently co-exist through "the natural inertia of any established system" [however this is] "unlikely to be sustainable in the long term" p40

Into this mix we add the ever growing economic pressures upon students. In my experience the demand for distance learning or part time post graduate courses is expanding at a faster rate than their full time equivalent not only because of the flexibility of study that they offer in time and place but also because they permit the student to take employed work concurrent with their studies. Most full time students are feeling the pressures of time and finance also so they are taking employment for at least 1 day in a normal working week to supplement their income. When De Mont fort post graduate law students were surveyed about hindrances to their learning 32% of first years and 55% of second years stated that lack of time was the biggest single issue.

Enhancing Learning through technology

Policy makers are encouraging an increased use of information technology in higher education (The Dearing Review of Higher Education (1997), HEFCE (2009)). Educationalists are recognizing that teaching methods need to adapt to the new generation of diverse learners, seeking time and cost efficient education (HEFCE (2009), Web 2.0 World (2009)). The economists are looking towards technology to keep the vital UK service industry of education competitive and provide the soft skills of collaboration and problem solving for all industry (Bradwell (2009)). The advantages offered by technology are recognized by these stakeholders as flexibility and efficiency in time, space and cost, improved access for and retention of a diverse student body and a contemporary approach to meet student expectations for their future education (HEFCE (2009)).

However, these policy statements have concentrated on the acquisition of technology, developing IT skills and increasing access to information. Significant evidence (LLiDa (2009), Web 2.0 World (2009), CIBER (2008)) suggests that improved access to technology has not developed critical skills for information processing, sometimes termed "Information Literacy". Despite

an increase in the availability of materials via the use of technology in higher legal education, there remains a gap between the achieved and desirable levels of engagement, of critical skill and of understanding for the ethical and legal issues in their use. The vast task of keeping pace with the required level of IT skill has not been accompanied by a similar level of development of critical skills, including specifically an awareness of the authenticity of available information.

Research by CIBER on students' perception of the internet (2008) found that:

- a significant minority see the internet as one huge database with little appreciation for the distinctions between private or public ownership of documents or the relative authority of content,
- the level of satisfaction with the results from a Google search is higher (93%) than a librarian assisted search (84%),
- despite the growth in available information, most online documents are not read but downloaded to be hidden away, unread, and
- participation in online networking sites for educational purposes has been slow (6%) despite a high social use.

A further problem from anecdotal evidence gathered from the experiences of De Montfort teachers is that this deficit in the skill level extends into a lack of self-awareness of it. An analysis of some failed assignments requiring information literacy skills showed that the most frequent reasons for the failure involved the use of inappropriate online sources, a lack of progression from the first online source and an inability to identify effective search words.

The CIBER study also highlighted some misconceptions of tutors that:

- all modern students have a high level of technical skill which is ever increasing,
- students expect to be entertained by ever present educational resources and
- students have a zero tolerance to delay in the provision of materials.

The Web 2.0 World report (2009) also found that while students still place a high value on face to face study, they are aware that staff capabilities in technology are largely lagging behind what they experience in their everyday lives.

One of the conclusions of this must be that a vast increase in technology used to date has not kept pace with the need to support engagement or understanding among the student community as it exists today. There may even be a causal link between the explosion of information and this lack of progress. With this in mind, Leicester De Montfort Law School piloted some specific technological tools.

Leicester De Montfort Law School Research - the student experience

In 2008/09 the Leicester Institute of Legal Practice within Leicester De Montfort Law School devised a two part strategy for its post graduate legal courses to provide a more effective method of communicating legal knowledge in a more familiar way for the modern student to engage with and contribute to, namely a series of interactive online lectures and a wiki specific to a subject.

The online lectures replaced traditional lectures entirely and consisted of a slide show with an integrated audio recording provided by the lecturers. All lectures contained at least the same content and detail as a traditional lecture and also interactive exercises, active web links and self test questions. The web links were accompanied by a "walk- through" commentary from the tutor explaining what the student should be seeing on a web site for research. The online lectures also had their own wiki acting as a location for urgent questions about the lectures.

The wiki was embedded in the VLE and ran alongside the face to face tutorials and the online lectures. It contained different tasks each month that were aligned to the learning outcomes for analytical legal skills. A variety of tasks was used including diagrams to describe legal concepts and digital media to target different learning styles. The complexity of the tasks increased throughout the year, so that the first task asked for students' opinions about the merits of a strict set of legal rules. This did not require legal knowledge but led into a debate about the common law/equity issue in tutorials. Another early task attached an academic article to the wiki and asked for comments on its persuasiveness and clarity. This produced some high quality results from students as consumers of academic writing which could be carried forward to their role as academic producers. Contribution to the wiki was voluntary as we did not want strategic learning to affect the process and students were informed that the contribution from tutors would be limited, except for the wiki containing urgent questions about the online lectures.

The pedagogic reason for each format was informed by a review of the educational theories above, recent research on wikis ((Cubric, (2007), Maharg (2007a, 2007b)) and e-learning case studies (JISC studies on e-learning (2004, 2007)).

Specifically, the reasons for the online lecture were:

- to improve legal knowledge, thereby start the engagement process;
- to have flexibility of time, place and duration of lectures, encouraging repetition and self directed study; and
- to enliven lectures via a variety of interactive exercises with feedback, live external web links and attached documents.

The reasons for the selection of wiki were:

- providing an area, not dissimilar to familiar social networking sites like Face Book, for students to overcome any initial anxiety about expressing an academic view;
- introducing a variety of tasks with multi media for increased interest;
- providing a working area that exists over time to allow more time for reflection and is built upon feedback from colleagues and has flexibility of place; and
- a storage place for work created collaboratively by students.

The students' opinion was sought via a survey of the full time and part time cohorts containing a questionnaire followed by small scale focus groups. In addition, the response rate for each task was analyzed quantitatively and a discussion was held with experienced tutors on the course. Due to the requirement for a consistent learning and teaching experience, it was not possible to run a pilot group without these tools. A largely interpretative approach was taken here which was thought appropriate to the aim of gathering the students' perception of the effectiveness of the tools and for the design of future online materials, although some quantitative data is included below.

From the responses concerning the online lectures, the following conclusions were made:

- 89% of students are in favor of online lectures;
- the greatest value came from constant repetition of the substantive law (often they were listened to 3 or 4 times) and the flexibility to study at their own pace; this was valued by the full timers as much as the part timers;
- most students found them easy to use, and where students did not, most of these liked the idea if they had the skills to access them; and
- more detail could be included due to number of times that a student listens to a lecture.

From the responses on the wiki, the following conclusions were made:

- 40% of students made a significant contribution to wiki;
- the quality of responses showed a much higher level of critical involvement with the task than was seen typically in face to face tutorial; and
- most respondents agreed that the wiki would help with their learning, even those who did not contribute.

Another issue of note however, was that there was very little comment on the contributions of others. It is believed that the role of the affective domain of learning is significant here. Conclusions from student responses in this area included:

- a remaining reluctance to comment as many still remained shy about having their comments available for others to see, having a fear of "looking foolish";
- some express a sense of satisfaction with handling technology and the ability to manage higher education within their lives but a significant highly vocal few felt frustration and anger when it did not operate as they expected. The greater benefits of success available to the mature student mean that there was not a strong correlation with these responses and age of the student; and
- the use of an on-screen lesson made the part time student feel "in a working environment" (Questionnaire, student OL4) that facilitated working from home.

The response rate from the different tasks on the wiki was reviewed. It was seen that the type of task had a limited effect on the number of views but the number of contributors did decline as the course progressed. Surprisingly, the task that was most closely linked to the assessment had one of the lowest contributions: however this came at the end of the course indicating that shortage of time is still one of the strongest influences upon student work. It may also suggest that the students accepted that the wiki was not a strategic tool for assessment success. From anecdotal comments on the survey, there appeared to be some residual expectation that the tutor would contribute regularly. This may also have been a contributing factor to the decline in usage. No student was using a wiki in their daily life outside university thus supporting some of the findings of the CIBER study concerning technical expertise.

Conclusions and Recommendations

Technology touches a large part of our lives. It is a working tool like the roller ball ink pen and the pocket calculator. Students value the flexibility and improved access to higher education that it brings. Unjustified use of technology may result in frustration and isolation. It certainly forms an increasing part of the learning and teaching in legal education.

The learning and teaching of legal critical thinking, that may be called information literacy, faces greater challenges than ever before, including the increased diversity of the modern student community, growing economic pressures and cultural differences. It is suggested that difficulties with

engagement contribute towards the lack of this skill and the causes of limited engagement are varied, some, for example economic pressure, are out of the influence of the teacher.

This research intended to pilot some tools for improving engagement and critical thinking in order to test their effectiveness. It was the further intention to move towards establishing a sound pedagogy appropriate for each tool and each group of students.

It was found that by designing new tasks for the electronic environment, some which would not have been practical in a traditional classroom, a progressive development of skills could be achieved, and engagement increased. A base of reflection was developed that could be expanded in the classroom. The online lecture could include a greater amount of substantive knowledge over a face to face format, allowing rigour to be at least maintained and, it is believed, increased supporting the demand for a high level of rigour in legal education. This is largely due to the ability of the student to take the course at their own pace and listen again to most challenging parts. This format then releases the time of the teacher for the further development of skills in face to face sessions.

The research suggests that there is significant support from the student community, although there are some unresolved issues that require further support.

Unresolved issues

Collaboration

The use of wikis and other Web 2.0 tools for the purposes of collaboration appears to remain within limited areas of the academic community: the student community is still not comfortable with this. It may be that there remains some misunderstanding of the rules relating to private and shared ownership, possibly fuelled by the fear of the boundaries of plagiarism. This has consequences not only for the loss of the educational value of shared ideas but also a loss of the employability skill of effective teamwork. A possible route would be for further exercises to be built in to provide authority for peer collaboration.

Affective domain

Many experience emotional issues regarding technology, including fear and frustration. More investigation is needed to reduce this and, in the short term, more effort is needed to ensure that instructions are simple and easy to use and that the benefits for the students are valid and clear. This will also require an increase in the capabilities of staff to design tasks for these tools.

E-pedagogy

The Web 2.0 World report (2009) believes that there is an uncomfortable co-existence between the norms of our social world and that of education that cannot be sustained. Adoption of the new methods in legal education remains as pockets of innovative practice.

Further identification will continue into valid learning outcomes for these new tools in legal education. The elements of what is currently referred to as "e-learning" should be compared to the valid established aims of higher education so that shortly e-learning will lose its "e-" special status and just become part of the varied learning and teaching tools in our portfolio.

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GLIMPSES OF SCIENCE OF REGIONAL PLANNING TECHNIQUES ADOPTED IN MEDIEVAL NANDED DISTRICT OF MAHARASHTRA

Brototi Biswas*

It is quite a well known fact that science and technology of the medieval era was very well developed. Though unlike modern times huge machinery, electronics or for that matter electricity etc were not available then, however through simple yet natural science and techniques life was no less convenient then as it is now. For ex, use of stones, which are found abundantly in the study area, in construction helped to keep the room temperature lower or use of Vastu helped the rooms to be naturally lit and airy. They adapted their economic activities according to the climate and in fact did better than what is being done now.

Introduction

In previous days Kandhar and Nanded both capital cities of yesteryears of Maharashtra might have good architectural planning in the form of Vastushastra, followed the basic geographical attributes in the form of Land Slope, availability of water etc. Furthermore since the area geographically is situated in hot, dry region, so the study tries to find out the irrigational practices used then. The constructional techniques used then helped to keep the houses cool and this was possible through the use of cheap, locally available techniques. Moreover the incorporation of Vastu shastra in their architectural planning helped the greater usage of natural air and light.

So in view of the above points the researcher tries to study and compare the regional planning, architecture, constructional techniques, agriculture etc. of present Nanded and Kandhar (both medieval capital cities of the district of Nanded), in Maharshtra, India.

The effort will be made to find out the possibility of using the old techniques with regards to regional planning, Vastu Shastra, irrigational practices, use of agricultural land and constructional techniques, and the relevance of these techniques to present day planning procedure of Nanded and Kandhar City.

The possibility and relevancy of using old techniques formed the stimulus to take up the study with reference to regional planning.

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Objective

(1) The present study would like to understand whether the regional planning techniques of historical -Nanded and Kandhar can be adopted in the present study area.

(2) To understand whether Vastu Shastra had any acceptance in that era.

(3) Whether natural and simple techniques regarding architecture was adopted and if so what were the techniques and what purpose did it serve along with whether relevancy of such technique in present day.

(4) To understand the agricultural technique adopted then and whether such technique has any relevance in present agriculture.

(5) To understand whether medieval Nanded had environ-friendly economic activity and if yes whether that kind of activity can be rejuvenated now.

Study area

The area under study falls under Nanded district of Maharashtra, namely- Nanded taluka and Kandhar taluka. The district of Nanded lies in the border of Maharashtra and shares boundaries with Yavatmal District in the north, Parbhani, Latur and Osmanabad Districts in the west, Bidar District of Karnataka in the south and Nizamabad and Adilabad Districts of Andhra Pradesh in the east. With population of 28, 68,158 (2001 Census) is among the most backward districts of the state of Maharashtra. About 80 percent of the workforce is engaged in agriculture and allied activities, 4 percent in cottage and household industries and about 5.15 percent in trade and commerce. Kandhar is situated on the banks of Manyad river and is at latitude 180 52' N and longitude 770 14'. Nanded is at 19° 09' N and 77° 18' E

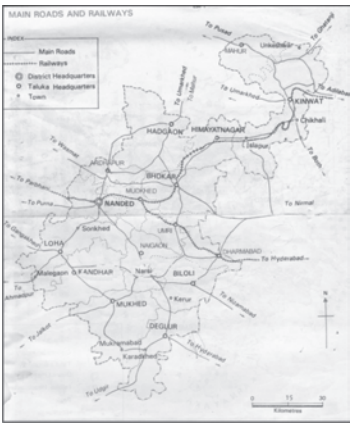

Fig. 1 Nanded District

Fig. 2 Kandahar Taluka

Fig. 3 Nanded Taluka

Methodology

Extensive field survey was carried out to get primary information regarding the architectural, agricultural, water supply, irrigational techniques used in medieval times in this region. Eminent archeologists, historians were also consulted regarding the same. At the same time local aged people were consulted to get a descriptive data of the medieval days. Use of secondary data in the form of literatures was also done. At the same time extensive use of websites were done.

Discussion and Results

During the medieval times the study area was ruled by a number of dynasties. The area was effectively ruled by the Yadavas and then came the Rashtrakutas. Amongst the Rashtrakutas Krishna I, II and III were very effective rulers. They not only ruled the people but also took into account their requirements.

REGIONAL AND TOWN PLANNING OF THE PAST

The fact that town planning was prevalent in the medieval ages is proved from *Kautilya's "Arthashastra"*.

The region though does not boast of any elaborate town planning however from the archaeological remains and the scanty literature available it can be said that town planning was at par with the other regions of that time. Towns were planned for 100-500 families.

The uses of pipes/ drains were elaborate. There was a main drain for the full house and the waste water would drain outside into the main drain which ultimately would pour to a main soak pit. Town planning in this region was with regard to roads, arrangement of houses and water distribution.

Town planning to some extent followed circular pattern (CBD theory). At the middle of the town was the palace and temple, surrounding this was the administrative wings and the house of the priests, then main market, blacksmiths, coppersmiths, then villages and fields, then the untouchables settlement. Generally towns were located by river side (Kandhar along Manyad river, Nanded along Godavari river). In Kandhar we see that at the centre of the town is the palace and temples surrounded by market, surrounding this was limestone market. Some of the other special features of town planning of yesterdays were:-

- Social life centered on the village community.
- The village communities were economically self-reliant and self-sufficient units, each having its own set of ethics and residential enclaves, shops, temples etc.
- The administration was autonomous.
- Town had a multinucleated structure

Towns like Kandhar which had forts had separate elaborate planning. Kandhar Fort is at Kandhar town in Nanded district of Maharashtra. The fort is encircled with a ditch full of water. It is believed that Rashtrakuta King Krishna III of Malkhed who styled himself as Kandharpuradhi Swar constructed the fort. To enter Kandhar there were 4 separate doors/ entrance (ex- Narrangpura entrance). The forts used to be surrounded by a deep canal (Khandak).With regards to waste water of the Kandhar fort the waste water drained outside into the "Khandak" (Water barricade).

Educational scenario

Nanded and Kandhar both were important educational centres. Imparting of education was mainly in the form of "Gurukuls" during that time. "Gurukuls" were situated outside the town. Apart from Gurukuls, Jain/Hindu/Buddhist temples also served the purpose. In many cases state (King) used to gift knowledgeable Brahmins (Pandits) lands called "*Agrahar"* for imparting education. During the Rashtrakutas dynasty more than 200 Agrahars were gifted.

It is an important fact that during the medieval age Kandhar had 1 in-house educational institution with 60-70 residential students.

Incorporation of Vastu Shastra in Architecture

While building houses five aspects were kept in mind – Earth, Water, Fire, Air and Space.

(a) Earth – while selecting sites for building construction congenial environment with respect to greenery and availability of water was given preference.

(b) Water – septic tanks and sewerage system were located in north-west and wells located in north-east according to Vastu.

(c) Fire – kitchen was located directly opposite to water systems in south-east direction.

(d) Air – air flow, according to Vastu, should be in south- west/ north-east direction. So houses were either north facing or south facing.

(e) Space – traditionally the houses used to have an open space (courtyard) in the centre of the house. It provided the dwellers not only the open sky but also sunlight and cross ventilation of air.

In Nanded and Kandhar still old houses display this sort of old house planning, where the courtyard was in the middle and the rooms built around it. Arrangements of rooms were purely based on Vastu. This allowed free flowage of air and helped all the rooms be well lit naturally but at the same time kept the room temperatures low.

Agriculture and Livestock Farming

Agriculture during the medieval times was the mainstay of economy. Dry farming was most widespread (Raychaudhari et al 2007).Generally there were two types of agriculture – small and large. Depending upon agricultural size 6, 8, 12 and 24 oxen were used. Agriculture had a totally natural outlook. Canals, earthen reservoirs, earthen dams were built to help in agricultural practices. Farmers were provided with economical help. Farmers were required to pay taxes (1/10th of agricultural produce) to the state which was used for irrigational systems. The village assemblies were empowered to collect taxes, rents accruing from irrigation facilities and also to penalize those who failed to fulfill their obligations (Chakravarty et al, 2006). With cropping livestock farming was also done not only for extra income but to get *natural fertilizer. Chemical fertilizers* were nonexistent. Natural fertilizers made by fermenting a mixture of excreta of livestock mixed with soil were used extensively to enhance crop production. Pesticides, Insecticides were unknown. In the study area Neem leaves and urine of cow were used as pesticides/insecticides. Cropping was done at least twice a year and sometimes thrice a year.

The annual flood waters from Godavari in Nanded and Mayyad river in Kandhar brought with it enormous amount of silt which provided the annual natural fertilization for the agricultural fields every year.

As mentioned earlier apart from agriculture, livestock farming was also practiced which not only provided an auxiliary income but also provided natural fertilizer which was used at that time instead of chemical fertilizer which was non-existent then. Livestock farming was the secondary occupation of the people

of this area at that time. Kandhar and Nanded was self-sufficient with regards to milk and milk products during that time. Livestock was kept for the following purposes –

1. Milk and milk products. Among the various varieties Kandhari cow was the best variety
2. Camels, horses, elephants, bullocks were used for transportation and war.
3. For poultry
4. Fishery was done
6. To supplement in diet (for non-vegetarian people)
7. To obtain natural fertilizers
8. For irrigational purpose
9. Agriculture
10. Carrying of loads

Secondary Occupation

With respect to secondary occupation it has been found out that the people of that era fully utilized their surrounding natural resources and secondary occupation was based on these unlike nowadays where we are ignoring our immediate surrounding natural resources.

Nanded and Kandhar during medieval time specialized in pottery and earthenware making. Near Kandhar there is a village named "Ghoraz". The soil of this village which was very fine and smooth was used for pottery and earthen ware making. This industry was very renouned during that era.

Textile industry was also very much well known, specially silk and cotton industry. Silk from silk worms was very famous. However it is of a great concern and thought that this industry (specially silk) is non-existant now. The fact that this area specialized in silk industry from silk worm proves the fact that geographically the area is suitable. Since the region is a nodal point situated at the center and connected with the main markets of Secunderabad, Hyderabad and rest of Andhra Pradesh, Mumbai, Pune, Aurangabad, Nagpur so economically (market wise) the industry is viable. With this industry was also prevalent colour and dyeing industry. Generally natural colours were used obtained from flowers. This industry is also on the decline in this region. A special class of specialized people specializing in colouring had emerged during this time and they were known as "Rangaris". This industry is *nonexistent* now.

Nanded and Kandhar both specialized in carpet industry and weaving industry in the medieval age. There was a huge demand for these products outside this region and these products formed an important article of trade which is evident after interacting with older people of the area. This industry is

also diminishing in this region.

The region earlier was famous for ornamental stone, so ornamental stone industry (Amethyst etc) was familiar during that time. This industry has diminished now though not extinct in the area.

The region has a good history of having cattle population. This is evident since the area (Nanded and Kandhar) once was the leading production house of leather goods. Previously the region had dense jungle having high elephant population. Ivory trade and artisans specializing in ivory were also another dominant activity. Both these industries which were purely based on locally available raw materials are *nonexistent* now.

Architecture of Houses

The region under study has a hot dry climate, so simple yet effective techniques were used with regards to the architecture of the house. Generally houses had 5 rooms. Every house had its own bathroom facility. Houses had a courtyard surrounding which were built the rooms. Doors were road facing. 3-4 storey houses were not uncommon. Bathrooms were made of only stones (specially granite since that is found in abundance in the region). Apart from the use of granites, Deccan traps which are also abundant were also used since that had a good binding effect. To keep the rooms cool in hot season and normal in cold season houses were built with a mixture of stone and white soil. For this very old soil was only used which was obtained from "Buruj". Such Buruj is still found in the area, though the number has reduced. In Nanded taluka's Killa road there is a buruj near Kumbhar Tekri. If that was not available then white soil was made by crushing soil by bullocks or oxen for days. Repeated crushing of soil for days transformed the soil into very smooth, light coloured, somewhat off-coloured soil. This soil was made into moulds and kept in river banks for accumulating moisture and at the same time the moulds were dried in this procedure. If any mould while drying would break that would become unsuitable for constructional works. These moulds, white soil and stones were used for architecture. Bricks in that era meant these moulds. Ceilings were at a height of 14 ft – 18 ft. This helped in good air circulation and proved to be an insulator against extreme temperatures. This kept the room temperature neither too hot in summer nor too cold in winter. Every day the mud floor of the houses were given a layering of cow-dung and mud water mix. For proper ventilation rooms had a number of windows which allowed free flowage of air and light. The ceilings were supported by wooden planks called "*Kilchand*". Moulds of soil were used to construct the ceiling. This kept the room temperature low. Double storey houses were common in this region which again kept the room temperature low. Stone and soil the two common ingredients of architecture worked as insulator which neither allowed room temperature to increase abnormally or

decrease abnormally. Still later in certain cases bricks were used and for cementing small pieces of bricks or burnt raw coal was used. This was mixed with lime in the ratio of 4:1. Lime was obtained organically from Snell shale or grounded oyster shale. The mixture was fermented in a pit for 4 days. This proved to be a very good insulator. Moreover lime / calcium is itself very cold and since air gets trapped inside the pores that also proves to be a good insulator. Moreover walls were 10-15" thick. It is important to note that neem trees were heavily found along with tulsi plant which kept the surrounding cool and neem trees also has more cloud formation ability since evapo-transpiration is more.

In some well to do families hygiene was also properly taken care of. Septic tanks were built in front of the household to carry off the waste materials. In front of various rooms of within forts/palaces big water tanks were constructed to keep the rooms cool. Furthermore earthen pipes surrounded the walls of the rooms specially those of queens to keep the rooms cool. (ex of this is found in Kandhar fort). At the entrance to the inner premise there would be another open sitting room. Rooms were constructed around a central courtyard. That would lead to the courtyard of the inner premises. Small water storage areas of stone were scattered in the houses. Since they were built of stone so they acted as refrigerators. Inside the houses arrangement of roof top water harvesting was common.

Architecture of Wada

- The traditional residence in Maharashtra was called the Wada.
- A Wada was typically a large building of two or more storey with groups of rooms arranged around open court yards.
- Two types of wadas:
- One which houses many families, like an apartment building of recent times or chawl of Mumbai.(Mostly for the middle class families)

One in which only one family resided. (Mostly owned by the richer class like relatives of the peshwas and traders)

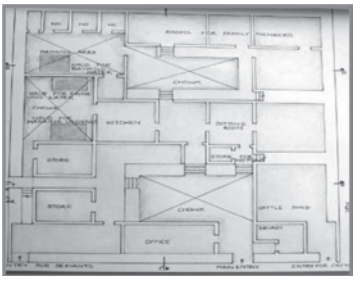

Fig 4 Ground floor plan of a medieval Wada

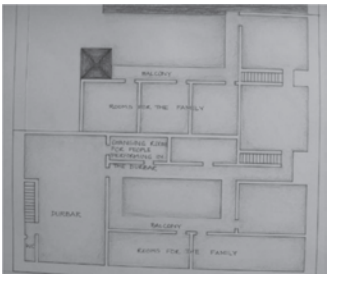

Fig. 5 First Floor Plan of a wada

Plans of houses

(A) Huts- these were square or rectangular, rarely circular. Circular huts were erected as temporary shelters by nomadic people like Banjaras.

(B) Houses proper- these were resided by the commoners. They are usually rectangular in shape. There was a sort of partition wall dividing the space in two into one living room/ bed room and another the inner kitchen. There existed an open verandah in front of the house.

Houses of more important and wealthy people- they had more rooms, a courtyard in front and sometimes double storeyed. These sometimes have wells in the courtyard, the open space were utilized to house milch cows and buffaloes or bullocks. Such houses belonged to village headman (Patil) or moneylenders- a role often combined into one.

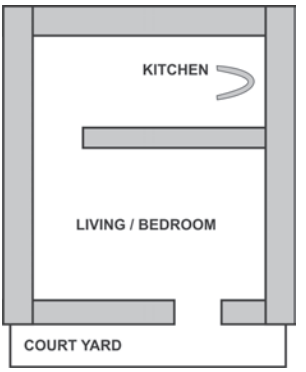

Fig 6- House plan

(C) A large house of similar plan but more rooms, is surrounded by a boundary wall or ramparts, which were known as *Huda* in Marathwada and *Gadhi* in Western Maharashtra. Such Hudas belong to provincial hereditary officials 'Deshmukhs'.

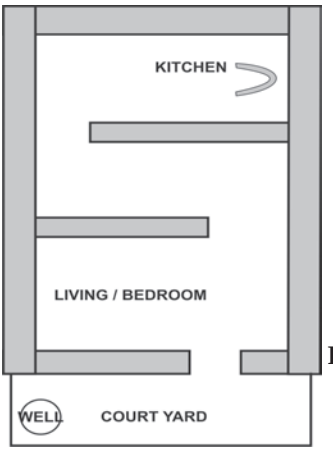

Fig 7- House plan of well to do family

2. *Construction of houses*

The houses rested on timber poles and beames- undressed in poorer houses and dressed in wealthy houses. Walls were erected around the frame. Roofs were covered with terracotta tiles or were thatched.

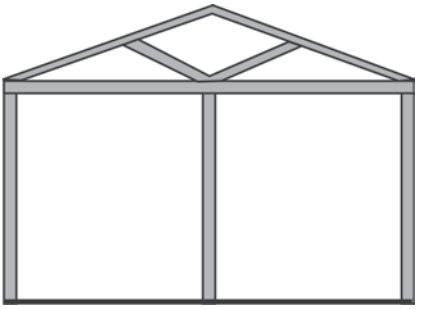

Fig 8- Framework of houses

3. *Walls*

Usually of sun dried mud moulds or rough stones, both set in mud, mortar. Incase rough stone is used, at the place where window or door framing are to be set, earthen moulds were used to obtain straight surfaces to accommodate posts.

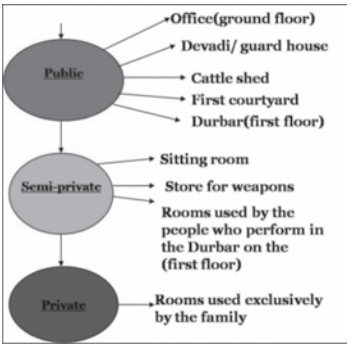

Fig - 9- Small window openings with wooden grills

Fig 10- Small window openings with wooden grills

- All the staircases were places in 4ft thick walls.
- This was done so that when the women moved around in the house they wouldn't be seen from the outside.
- This way the privacy of the house was maintained.
- All the external walls of the wada were 4ft thick.
- This helped to keep the interior of the wall cool in summers.(http://www.archinomy.com)

REGIONAL AND TOWN PLANNING OF THE PRESENT

The study area can not by any means be termed as planned cities. Both the towns have developed haphazardly. No trace of regional planning is found in either of the two cities. However some aspects of planning can be easily incorporated here for the betterment of the two cities.

- Just like that of the past use of drainage pipes should be made more elaborate. There are vast sections of the township in Kandhar and also in Nanded where the sewerage water, drains out into the open land instead of draining out systematically into the main drain. Moreover main sewerage drain pipes are in many cases non-existant. Apart from drainage pipes, water distribution system should also be given special attention.
- Arrangement of roads and laying of roads needs attention in the study area. Road planning is an important aspect of town planning. The present can learn from the past about the rectangular arrangement of the roads. Also recreational planning in the form of laying of parks etc is a must since they prove to be the lungs of the town.
- The CBD pattern which was adopted in the past is not seen in the present study area. The various localities have developed quite haphazardly. However each sector should be developed into a self-sufficient unit. Here ex of the Chandigarh city model can be cited.
- Since both the cities were the pillars of imparting quality education, in present times this system can again be renewed. Already Nanded has a number of educational institutions besides having an University, however proper attention is required for Kandhar.

Vastu Shastra and Modern Architecture

- Nowadays such elaborate and scattered arrangement as was in the past with respect to architecture of houses cannot be done because of space constraint. However while constructing houses proper care can be taken that Vastu is followed since Vastu is not a myth but a natural science. The district has a hot climate so according to the medieval style if the orientations of the houses are made in north-south direction that will

ensure proper ventilation and air flow. Moreover greater usage of natural light will automatically lower electricity consumption.

- The study area has lot of stony waste, so the stone should be utilized in constructional aspects, so as to keep the room temperatures cool since stone acts as insulators.

Incorporating certain Traditional Architectural traits in Modern Architecture

If we give a look at the various housing types of the study area then it is not hard to understand that the houses of today lack the basic attributes of planning. Though the houses have beautiful architectural pattern but qualitatively they are far lagging behind. The basic natural traits (those features which kept the rooms cool, airy etc) are absent in present day architecture. However it is not entirely impossible to incorporate certain features of traditional architecture of this hot dry area in modern day architecture which can keep the rooms naturally airy and cool but lighted.

- Ceiling- the height of ceiling from floor in modern day houses is very low. This may be for economic reason. However atleast 14-15 feet helps in the good circulation of air and also prevents the room air from getting heated up through contact from the heated ceiling from above.
- Walls- the walls of modern day houses are quite thin, again for economic reasons. However if we can make the walls on the four sides a lot wider (atleast 2ft) then that will act as an insulator against extreme temperature condition. At the same time since the area under study has got lots of stone waste so the use of stone as building material should be considered as it is a tested fact from our traditional houses that stone acts as an insulator and keeps the room temperature normal (neither hot in summer nor too cold in winter). The Deccan trap rocks found in certain parts of the region acts as good binding material, so this should be utilized in construction.
- Bricks- in modern days bricks are made from the fertile riverine soil obtained from river bed. Instead of using this fertile soil for such wasteful act good quality building purpose soil may be made by repeated and heavy crushing of soil as was done in traditional times (instead of oxen machinery may be used). This will provide white soil which will yield good bricks having good, tight insulation properties.
- Usage of lime/calcium- nowadays calcium/lime is not used for building purpose. Cement is used instead. This instead of lowering the temperature only increases the temperature. However the traditional practice of using organic lime cannot be supported. Other inorganic sources should be utilized instead.

- Air flow and house direction- the concept of Vastu is again regaining momentum in todays buildings. However the buildings / houses should be south facing as far as possible. The north-south should not be blocked so that there is no blockage of air. Courtyards were a common feature in traditional houses. This aspect should be kept in mind in todays buildings. In the study area, especially Nanded, big housing societies are coming up. So the center can be kept open which can be used both as play ground and also an open space for free air flowage.
- Ventilation and window- most of the rooms that are being build today (specially housing societies) lack the facility of proper ventilation. Moreover the number of windows are also very less. This obstructs coming in of pure air and outflow of impure air. So, modern architecture should keep in mind about proper ventilation.
- Overall it can be summed up as, modern architecture should incorporate certain traits of Vastu as well as traditional architecture to get the desired natural cooling effect for this hot dry climate of the study area.

Agriculture and Livestock Farming of the Present and Requirement and Possibility of Incorporation of Traditional Traits

Villages nowadays have ceased to act as self sufficient and independent units. Giving more power to the village administrative authority to develop their village into self sufficient units might help in uplifting the condition. The intensive cultivation taken up during the past three decades has resulted in the deterioration of soil health. Indiscriminate use of chemical fertilizers and pesticides has led to the following side effects to the eco system:

- Development of resistance to pesticides
- Resurgence of treated pests
- Environmental pollution and pesticides associated health hazards
- Elimination of natural enemies due to improper and frequent spray of insecticides and their mixtures.
- Vanishing of soil moisture and essential soil nutrients

Instead of using chemical fertilizers, Vermicomposting and natural fertilizers can be adopted successfully under all conditions in the rural areas as the farmers have the input for the purpose. Excreta of livestock, which is the main raw material for this, is easily available. Only one cow is needed for thirty acres of land for organic farming (http://www.palekarzerobudge tnaturalfarming.com). The yield from this type of farming is much more and having no side effects.

Nanded is having a very good cattle population. The official figure is 604734 according to 2003 census. One of the main positive side of the region is the availability of Kandhari cow which has huge milk potential. Like yesteryears the region can again rejuvenate into a strong milk and milk product centre. The estimated per capita milk availability was 173 gm./day, is comparable to state average of 169 gm. and recommendation of 215 grams per day (NABARD, 2008-09). The barren lands and the hilly region of the study region are best suited for the rearing of livestock which otherwise comes to no use. As for poultry is concerned which was an important source of economic activity in the past can again be revived since the area is close to Andhra Pradesh and the estimated egg production was 289.28 lakh during 2003 - 04 in the whole district (NABARD, 2008-09).

Comparison of Secondary Activities of Past and Present

The secondary activities found nowadays have no link with the natural resources of the study area. Weaving industry, silk industry etc (discussed before) which were prevalent in medieval study area is nonexistent now. The climate of the region is ideal for the growth of silk worms. The temperature and humidity from July to January is ideal for mulberry silkworm rearing. The region still has a huge base of skilled carpet industry weavers but due to non-availability of this type of industry the talent is going waste. Market wise these industries are best suitable for this region since both Andhra Pradesh and Karnataka is close by.

Conclusion

Thus it can be concluded that science and technology of the past were purely based on natural science and at the same time were highly effective and cost effective. Science and technology had close connection with nature and not against nature as is the case nowadays. Thus if the various aspects of regional planning, agricultural aspects, architectural aspects of the present can incorporate in them traits of the past the region can develop itself in a more self-sustaining and strong way. Since then the basic natural attributes will be kept in mind while development.

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DISQUALIFICATION ON THE BASIS OF DEFECTION - A NEED FOR STRENGTHENING ANTI DEFECTION LAW

K.P.S. Mahalwar*

India is a Democratic Republic. It has struggled against several odds and still survived on democratic path even with volumes of illiteracy, poverty, linguistic and cultural diversities. Parliamentary form of Government is the first pillar of democracy in our country. People of India by exercise of their franchise participate in the formation of Government. They elect members for their law making bodies at the Centre as well as States. Principle of majority rule is the essential attribute of our Parliamentary Government whether it is a matter of appointment of the Prime Minister or that of Chief Ministers of States. Framers of our Constitution were aware that majority rule may curtail or abridge the freedom and liberty of individual, therefore, they established a Republic over Democracy to protect the individual from the majority. The framers of our Constitution created institutions within the Constitution itself such as Legislature, Executive and Judiciary which were given the responsibility to safeguard the liberty of individual as well as democratic norms. They were great visionaries full of wisdom and dedication to the task of making our Constitution the best in the World.

The rule of majority and numerical strength of political party, or their alliances are the deciding factors in our democratic Constitutional set up. Political parties in India have been greatly influenced by cultural diversity, social, ethnic, caste, community and religious pluralism, traditions of nationalist movement, contrasting styles of party leadership and clashing ideological perspectives. For mustering the numerical strength use of corrupt and malpractices like defection have crept in the system. It would be unfair to attribute all these immoral malpractices only to the post independent India.

In fact, the evils of crossing the floor, political turncoatism, politics of opportunism, politics of defection or horse trading had started much earlier, as early as 1937 when Mr. Hafiz Mohd. Ibrahim elected on Muslim League ticket joined the Congress Legislature Party by crossing the floor and was appointed as a Minister in the cabinet of Pt. Gobind Ballab Pant in U.P. Subsequently, he resigned from the Assembly and contested the election on a Congress Ticket and won the election. Toppling game was played in Bengal in March 1945, when Muslim League Ministry led by Khwaza Nazimuddin was voted out of office when Nawab Bahadur of Dhaka along with his 15 friends defected (Dynamics of Indian Government and Policies 1985).

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The evil of defection is not confined to India only. It is rampant, perpetuating and flourishing in other countries having Parliamentary form of Government. In England also, Sir, Winston Churchil defected more than once, but India has the dubious distinction with matchless peculiarities and angularities in the defections of Legislators at the States as well as Union levels. Causes of these defections are several; such as - Regional Politics, lure of office, water thin majority of political party in House, lack of political ideology, lack of Constitutional morality, turning of Legislators into tradable commodity etc. Thus, the "Aaya Ram- Gaya Ram" culture coined by late Shri Y.B.Chavan in the context of Haryana in 1967 has made a mockery of the democracy, as change over of only a few Legislators could change the majorities in the House, Governments were made and toppled in quick succession with crossing of floors by the Legislators shamelessly. Thus, politics of India gradually de-generated into the struggle for power for personal ends. This became the depressing feature of our Parliamentary democracy. Many times, coalitions had entered into between the political parties which are ideologically opposed to each other, which do not last very long and are mostly infested with instability with deleterious effect on the entire body politic. (Bharat ki Rajnitik Vyavastha 1992).

Deep concern has been expressed by all those who believe in Constitutional morality. Soli Sorabji laments – "the painful fact is that today Constitutional morality has become irrelevant and any mention of it raises cynical laughter, corruption, not morality or principle is the pervasive force in our political life, and its worst manifestation is the spectacle of unabashed defections. In essence, defection is disloyalty, abandonment of duty or principle. The defector is disloyal not only to the party on whose ticket he or she has been elected but also commits a breach of faith with the electorate whose votes were secured on the basis of his or her electoral affiliation and promises".

Alarmed with the ill consequences of defections on political system the Lok Sabha resolved on 8th December, 1967 to set up a Committee of Experts to consider the problem of Legislators changing their allegiance and frequent crossing of floors. The recommendations of this Committee on defections dated 7th January, 1969 led to the Constitutional amendment, which passing through various stages of deliberations culminated into the enactment of the Constitutional (52nd Amendment) Act 1985, which is usually called as anti defection law. It has added 10th Schedule to the Constitution, besides amending Articles 101, 102, 190 and 191. This much needed amendment was a turning point in our Parliamentary history, which imposed specific disqualifications on Legislators on the ground of defection. It has also added Clause 2 to Articles 102 and 191 which provide that a member shall be disqualified for being a member of either House of Parliament or State Legislature, if he incurs disqualification on the

following grounds (see 10th Schedule):

i) If he voluntarily gives up the membership of the political party on whose ticket he is elected to the House; or

ii) If he votes or abstains from voting in the House against any direction of the political party or by any person or authority authorized by it in this behalf; without prior permission of such party and unless it has been condoned by the party within 15 days from the date of voting or abstention; or

iii) If any nominated member joins any political party after the expiry of 6 months from the date on which he takes his seat in the House.

These qualifications do not apply on a member who goes out on merger of his original party with another political party, provided 2/3 of the members of Legislature Party have agreed to such merger or if a member, after being elected as the Presiding Officer gives up the membership of the party to which he belongs, or does not rejoin that party or becomes a member of another party.

Doling out the ministerial berths in the Council of Ministers was still increasing the defections and advancing the evil in larger proportions. Hence to curb this evil the size of council of ministers was reduced (to not exceeding 15% of the total number of members of the House concerned as the case may be) by amending Articles 75 and 164 through the Constitution (91st Amendment) Act 2003. This came into force w.e.f. 1.1.2004. This amendment further provided that a member of either House belonging to any political party who is disqualified for being member of that House on ground of defection shall also be disqualified to be appointed as a Minister until he is re-elected. Happily, the exemption from disqualification provided in case of split of 1/3 members has also been omitted by the 91st Amendment Act 2003. All these amendments have remarkably ameliorated the state of affairs.

With all these good provisions imposing disqualifications on the defectors, the authority of adjudication as to whether a member of House has become subject to any of the disqualifications has been invested in the Speaker of the House and he has been made the sole arbiter. Of course the verdict of Speaker may be subject to judicial review. Thus, the Speaker holds a high, important and ceremonial office. All questions of well being of the House are the matters of Speaker's concern. The Speaker is the embodiment of propriety and impartiality. He performs wide ranging functions including the performance of important function of judicial characters. According to Jawahar Lal Nehru, "the Speaker represents the House. He represents the dignity of the House, the freedom of the House and because the House represents the nation, in a particular way, the Speaker becomes the symbol of the Nation's freedom and liberty." G. V.

Mavalankar, who himself was a distinguished occupant of the office of Speaker said about the Speaker -"he holds the scales of justice evenly irrespective of party or person, though no one expects that he will do justice in all the matters; because, as a human being he has his human drawbacks and shortcomings. However, everybody knows that he will intentionally do no injustice or show partiality. Such a person is naturally held in respect by all." M. N. Kaul and S. L. Shakdhar referring to Speaker say that "within the walls of the House, his authority is supreme. This authority is based on the Speaker's absolute and unvarying impartiality – the main feature of his office, the law of its office. This obligation of impartiality appears in the Constitutional provision which ordains that the Speaker is entitled to vote only in case of equality of votes. More over his impartiality within the House is secured by the fact that he remains above all considerations of party of political concerns, and to that effect he may also resign from the party to which he belonged." This is in view of this high status of the Speaker that the investiture of jurisdiction as to disputes on the disqualification of the members on the basis of defection holds constitutionally valid. It would not be appropriate to express distrust in the office of Speaker, simply on the ground that some Speakers have not truthfully adhered to the good traditions annexed to this high office (The Indian Speakers Crisis of Identity 1982).

The anti defection law, as it exists today on the statute book, is an outcome of the decades of experiences with turbulences and upheavals in the Parliamentary norms and morality. Still, what was thought and hoped by the framers of our Constitution about the genuineness of Speaker's role in discharge of their constitutional obligation seems to be belied in the recent past. The speaker should severe all links with any political party in order to stand tall as a party less torch bearer of democratic accounting and accountability. Unfortunately, this has not happened in India. Many speakers have been put on trial on the anvil of Constitutional morality and proved mettle less (T.R.Saha). Past experiences stand testimony to the fact that in certain eventualities of defection and consequent disqualifications of the defectors, the Speakers have fallen pray to unwarranted controversies due to their partisan role. Wider discretion to the Presiding officers under the anti defection law have caused instability, and imposed unnecessary elections cost heavily on the public exchequer (Roda Mistry).

It is pertinent to note that Constitutional provisions embodied in Articles 102, 191 and 10th Schedule provide for disqualifications for being members in the Union and State legislature and also disqualifications earned after being elected to these Houses. The decision on the question as to disqualification of members under Article 102 Clause (1) lies with the President based on the

opinion of Election Commission. Similarly, the question as to disqualification of member under Article 191 (1) lies with the Governor of concerned State based on the opinion of Election Commission. Surprisingly, contrary to this the decision on disqualification under Article 102 Clause (2) or Article 191 Clause (2) lies with the presiding officer of the concerned House, which has offered ample scope and opportunity for causing instability in the House and imposing unwarranted and untimely elections against the spirit of the Constitution.

In view of past experiences, the power of Speaker / Chairman under Clause (6) of the 10th Schedule, to decide on the question of disqualification of a member on the basis of defection needs to be scrapped. The decision on the question of disqualifications under the 10th Schedule should be entrusted to the President / Governor as under Articles 103 and 192 for disqualifications under Article 102 Clause (1) and Article 191 Clause (1). For disqualifications under Article 102 Clause (2) and Article 191 Clause (2), the decision should be rendered by the President / Governor as the case may be in accordance with the opinion of the Election Commission (A. P. Mavalankar). The question of disqualification on whatsoever grounds shall be governed by the same authority. Thus, removal of the dichotomy in vesting the power in the President/Governor instead of Speaker in deciding regarding disqualifications would strengthen the anti-defection law and go a long way in strengthening the Parliamentary democracy in consonance with the spirit of Constitution of India.

INVESTIGATION INTO CRIMES SUPERVISION BY PROSECUTOR

Jayasankar.K.I*

Introduction

Every aspect of criminal justice administration is badly in need of reform. Several committees have recommended legal and institutional changes to strengthen the system. Among them, those in respect of investigation and prosecution are considered primarily significant.

The prosecution agency is that segment of the criminal justice system responsible for prosecuting those found by the police to have committed a criminal offence. The objective of the prosecution proceedings is to protect the innocent and seek conviction of the guilty. Given this dual purpose and the adversary nature of criminal proceedings, the role of the prosecutor is value-laden with notions of fairness and justice. The prosecutor is motivated neither by any sense of revenge nor commitment to get a conviction. In this sense, the impartiality of the Public Prosecutor is as vital and significant as the impartiality of the judge.

Normally, the Public Prosecutor's role begins after the investigation agency presents the ease in court. The objective was obviously to ensure that police officers who investigated a case would have no manner of control or influence over the prosecutors. The prosecutor used to keep a close watch on the proceedings of a case, inform the jurisdictional police to produce the witnesses on the day of the trial, refresh the memory of witnesses with reference to their police statements and examine them at length.

Most police officers as well as some administrators and judges believe that the lack of coordination caused by the separation has resulted in falling conviction and disposal rate, filing of poorly investigated cases, indifferent management of trial proceedings including bail, and lack of effective review, particularly at the district level. There is no doubt that the police-prosecution interface is in need of immediate remedial action but giving the prosecution back to the police is neither desirable nor practical. Lack of professional competence and common among Public Prosecutors and Assistant Public Prosecutors is another factor contributing to the weakness of the system. There is no attempt to professionalize the prosecution service systematically. Selection is neither merit-based nor competitive. Remuneration and conditions of service arc not attractive. There is no system of education and training for prosecutors. Because of this, the morale of the service is very low and prosecutors become vulnerable to bribery and corruption.

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If the prosecution at the district level is to function efficiently and impartially, it is essential not only to have a proper system of selection and training but also provide for a closer supervision and monitoring mechanism, particularly at the junior level. This would require a unified integrated structure which may be functionally separate in terms of the tasks of investigation and prosecution. To achieve mutual cooperation without subordination of one to the other and without impinging upon the independence of either, arrangement should be worked out to have a common centre of control and accountability. The failure of prosecution is not always of its own making. While it is important to select prosecutors properly and give them adequate training, and constitute an independent directorate for professionalizing the system.

While prosecutors may not play an investigative role in all or even most criminal cases (the majority of which are probably reactive as well as routine, the importance of the investigative role lies not in the number of cases it affects, but in the significance of the role in the matters where it arises[1] . It is felt that the establishment of the Office of the Director of Public Prosecutions has demonstrated the need for better definition of the roles of the prosecution towards investigative agencies. But at the same time the possibility for prosecution services to be completely independent from the police is doubtful. So in this paper the researcher attempts to make a comparative analysis on the respective roles of prosecutor in Investigation into Crimes

Prosecutor-Investigator Relationship - Comparative Aspect

The first of all it is referred to the situation where the prosecutor is involved in investigatory processes, such as with the grand jury which is used in the Federal and some state jurisdictions in United States of America. Importantly the prosecutor is involved in investigatory processes rather than controlling the work of the investigator. The secondly it is observed from Australia and indicates the difficulty of establishing a clear boundary between the prosecutor and the investigator in that jurisdiction. In Australia there are major differences in the ways in which federal and state prosecutors operate. Both quotes point to the significance of the division between investigator and prosecutor and the concurrent difficulty of clearly establishing the boundary between the two among common law jurisdictions and in relation to the presentation of summary and indictable offences within each jurisdiction.

Comparative analysis in relation to prosecution systems reveals the crucial importance of understanding the subtlety with which any legal system operates in practice. In the United States of America, the District Attorney on the whole does not have the power to directly control the work of the investigator but the

1 Little, R. K., *'Proportionality as an Ethical Precept for Prosecutors in their Investigative Role'*, (1999), 68, (December 1999), Fordham Law Review, 723, p. 728.

investigator at a practical level realises the need to secure District Attorney's sanction for investigative activity. This is in part a result of the District Attorney's control over the presentation of the information or indictment and the exclusionary rule in the United States of America which give the prosecutor a strong controlling influence over investigators. In Australia, the Commonwealth DPP has the power to lay a charge and whilst state DPPs do not control the charging process they control the indictment to be presented at trial. There is also a need to consider the subtlety of language involved. For example, any discussion of the difference between common law and civil law systems gives rise to the definition of civil law. At one level 'civil' law refers to systems based on Roman law or the Napoleonic code and within common law jurisdictions 'civil' law may refer to the non-criminal or 'private' law aspects of the jurisdiction. There is considerable variety in the organisation of criminal prosecutions in common law jurisdictions. It is attempted in this context to outline the significant features and models in common law jurisdictions to provide a framework for analysis and compare it with that of continental system.

The relationship between prosecutors and the police and in particular, on the assertion that in the common law tradition there is a clear prosecutor-investigator divide or that such a divide represents some ideal prosecution model.[2] It is found that whilst it is difficult to draw a clear line between the work of the prosecutor and the investigator, there is a trend towards increasing prosecution control over investigators, particularly in specialised areas.

The jurisdictions that adhere to a common law tradition include England and Wales, Ireland, most of Canada, most of the United States of America, and many former British colonies. Among the civil law jurisdictions there are those based on Roman law and others based on the Napoleonic Code. There are also

2 The maintenance of an investigator-prosecutor divide was central to the report which led to the establishment of the Crown Prosecution Service. See Royal Commission on Criminal Procedure, Royal Commission on Criminal Procedure Report, HMSO, London, 1981. Hetherington comments 'the underlying philosophy of the … system is that there should be a division of responsibility between the investigator, the police officer, and the prosecutor, the CPS and those instructed to appear on behalf of the Crown, but it has always been accepted by those involved in the setting up of the new system that, in practice, the division of responsibility between the two arms if the administration of justice cannot be as clear cut as is might appear to be on paper.' See Hetherington, T., *Prosecution and the Public Interest*, 1989, p. 181. In Bryett and Osborne's 2000 report for the Northern Ireland Office, it is argued that independence of the prosecutor is 'essential to a fair and just prosecution system' and independence is seen in terms of both freedom from political influence and a clear demarcation of criminal investigations from prosecution decisions. See Bryett, K. and Osborne, P., *Criminal Prosecution Procedure and Practice: International Perspectives*, Northern Ireland Office, Belfast, 2000. Bryett and Osborne argue that the prosecutor should be independent of the investigator, the executive, the judiciary, the victim, independent within their organisation, and should be financially independent. At para 3.4. This report has as its central focus the need for a prosecution system in which the prosecutor would be prepared to prosecute police and other officials in the event of corruption or misconduct, to ensure that confidence in the impartiality of the system was maintained.

those jurisdictions that combine aspects of more than one tradition such as Quebec, Louisiana, Vanuatu, South Africa and Scotland.[3] Adversarial and inquisitorial procedures for the resolution of matters before the courts most clearly mark the difference between the common law and civil law jurisdictions, whereas distinctions

Adversarial and inquisitorial procedures for the resolution of matters before the courts most clearly mark the difference between the common law and civil law jurisdictions, whereas distinctions based on the prosecutor-investigator relationship are increasingly more difficult to maintain.[4]

The classical divide between the prosecutor and the investigator which is often seen as a distinguishing characteristic of common law systems has either been beyond clear definition or is dissolving. In this chapter I describe six generic common law models for managing the relationship between prosecutor and investigator. It is also compared the prosecution frameworks in the jurisdictions of England and Wales, the United States of America, Australia, Scotland and South Africa and other major continental countries with regard to the relationship between the prosecutor and police, special investigation units, private investigations by or on behalf of the victim, and intelligence services.

As we have seen the history of criminal prosecutions at common law begins with the absence of a state prosecuting authority. As Sir Thomas Hetherington points out, Bentham had in 1790 drawn a distinction between the French and English models for criminal prosecutions. The French model was described as 'closed' because of its reliance on a public official to commence proceedings and the English model was described as 'open' because individuals were responsible for initiating criminal prosecutions. The open system of prosecutions was justified on the basis that it allowed the citizen to take action against another citizen (where government officials may not be prepared to act) and allows the citizen to prosecute others, including government officials themselves. However, a major problem with a system of private prosecutions is the capricious nature of its enforcement. Indeed, Bentham advocated a mixed system for England to overcome the problem of individual reluctance to bear

3 Tetley, W., '*Mixed Jurisdictions: Common Law* vs *Civil Law* (codified and uncodified)' (1999), unidroit.org, <http://www.unidroit.org/english/publications/review/articles/1999-3.htm>24 July 2003. The Quebec law for criminal matters is substantially the same as for the rest of Canada whereas private law follows the civil law tradition.

4 In a review of prosecution models conducted for the Commonwealth DPP (in Australia), Corns whilst speaking of the differences between common law and civil law prosecution systems, says 'notable (but diminishing) differences of opinion can be found between many continental, inquisitorial-based jurisdictions with a civil law tradition, and those countries, such as Australia, with a common law, adversarial tradition.' See Corns, C., *Prosecution Systems: An evaluation of Four Models for the Structure, Role and Functions of the Commonwealth Office of the Director of Public Prosecutions*, Commonwealth Director of Public Prosecutions, Canberra, 1993, p. 2.

the cost of prosecuting, whilst at the same time avoiding the concentration of too much power in the prosecutor.[5] It is the centrality of the right to privately prosecute attaching to individual police officers or other investigators that led to the notion of a prosecutor-investigator divide. Whilst prosecutions were subject to political control (except in relation to the elected prosecutor in the USA) it was important to maintain such a division. With an independent prosecutor's office there is less of a risk of political interference reaching back through the prosecutor to the work of the police or other investigators.

It should not be surprising that there is considerable diversity in prosecution-investigator arrangements in common law countries. The systems of prosecution in these countries reflect the existing indigenous law to the extent that it has been recognised, the initial colonial law, and to varying degrees, reforms to English law incorporated into local law, as well as the separate legal development of each jurisdiction. Given the multiplicity of arrangements that this process has given rise to, it is not possible to identify a consistent model at common law for setting the prosecutor-investigator relationship.

Six Models for Criminal Prosecutions

Irrespective of the institutional framework that dominates a particular common law jurisdiction there are a range of approaches to managing the prosecutor-investigator relationship. Six models are examined here ranging from lowest prosecution control to highest prosecution control. The degree of prosecutor control depends firstly, on whether the prosecutor's office is separately constituted or not, and secondly, if it is, the extent to which the prosecutor can direct the work of the investigator.

In general, there has been a steady movement from an insistence on prosecutor detachment from the investigator. In those jurisdictions without an elected prosecutor this is because of a movement away from direct government control of the prosecutor to establish independent prosecution agencies. At the same time, there has been a blow out in the cost, complexity and importance of criminal prosecutions leading to a focus on issues of expediency.[6]

Investigator Control of the Prosecutor – by Default

There is in fact no separation of the investigator from the prosecutor in relation to summary criminal cases in a number of common law jurisdictions.

5 Hetherington, pp. 4-5, Referring to Bentham J., Organisation of the Judicial Establishment, 1790.

6 For example, Standing Committee of Attorneys General Working Group on Criminal Trial Reform, Criminal Trial Reform, Attorney General's Department, Canberra, 2001.. In relation to the Serious Fraud Office as a response to the complexity of fraud prosecutions see Wright, R., 'Fraud: What are we doing to counter the threat?' (2002), Serious Fraud Office, <www.sfo.gov.uk/publications/speechesout/sp_46.asp?id=46>12 August 2003.

For example, this is the case in some states of the USA[7], the Republic of Ireland[8], New Zealand[9] and in the Australian states[10] .

Prosecutor – Investigator Divide

The division between the prosecutor and the investigator in relation to serious charges in the Republic of Ireland approximates this model[11] .

Prosecutor Requisition Power

In general, each Australian state DPP has the power in varying degrees to require the police to answer requisitions or undertake further inquiries. This may or may not be backed up by a statutory requirement for the police to comply.

Prosecutor Charge Control

This power is exercised by the Australian Commonwealth DPP and the DPP for the Australian Capital Territory[12] . Such a power has been recommended for the CPS by the report of Lord Justice Auld and a trial project is currently being evaluated.

Prosecutor Authority over a Separate Investigation Agency

An example of this arrangement is found in the operation of the Procurator Fiscal's Office in Scotland. However, Scotland cannot be said to have a purely common law heritage.

Prosecutor as Investigator – by Design

Examples of this model are the Serious Fraud Office in England and various special prosecutors' offices such as those established to investigate Presidential misconduct in the USA and to investigate World War Two war crimes in Australia.

Jurisdictional Comparisons

England and Wales – A History of Increasingly Centralized Prosecution Authority Overall, the history of the prosecutor in England has followed the transition from a private law enforcement model to one of independent public

7 Horwitz, A., *'Taking the Cop out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases'*, (1998), 40, Arizona Law Review, 1305-1378.

8 Bryett and Osborne,

9 New Zealand Law Commission, Criminal Prosecution, New Zealand Law Commission, Wellington, 2000

10 Krone, A., *The Independent Prosecutors Dilemma: Fairness and Efficiency in a 'Law and Order'* Environment, Ph.D., UNSW, 2003.

11 See Bryett and Osborne.

12 However, the ACT DPP lacks control over the decision to proceed by way of summons. See Krone.

prosecutions. The English common law tradition of private prosecutions has been overlaid with a system in which official agencies have progressively gained power over prosecutions and ultimately the investigation of particular cases. The idea of a state prosecutor is not new and whilst a centralised state prosecutor was proposed in 1534 by King Henry VIII, this was not implemented.[13] The English system continued to rely on essentially private investigations and prosecutions up until the time that organised police services were legislated for in the Nineteenth Century.[14] Police services had therefore already been established before the first centralised prosecution agency in the form of the Director of Public Prosecutions in 1879.[15] Prior to the creation of the office of the DPP, there had been a number of calls for the creation of a centralised prosecution agency with the power to control investigations.[16]

The office of the Director of Public Prosecutions for England and Wales for most of its history from 1879 until 1985 had a very narrow brief and the DPP had a limited jurisdiction in relation to referred cases.[17] Up until the establishment of the Crown Prosecution Service (CPS) in 1986 the limited role of the DPP meant that the bulk of criminal prosecutions were in the hands of the police themselves and they had almost exclusive control over the prosecution of state-instigated criminal investigations undertaken by police.[18] As a result, the police developed their own arrangements for the conduct of criminal prosecutions and most criminal prosecutions begun by police were conducted by solicitors working for, or who were engaged directly by, each police service. As a result, there has been a history of weak prosecutorial independence or a lack of prosecutorial independence. This has been supplanted by a system of centralised prosecution authority, which in turn, has led to a developing role for the prosecutor in investigations.

Against this background, the Crown Prosecution Service (CPS) was established to ensure the independence of the prosecution from the police. At the same time, prosecution control was centralised for England and Wales and

13 Hetherington, p. 4. Hetherington quotes research conducted for the Royal Commission on Criminal Procedure. See Royal Commission on Criminal Procedure

14 Hay, D., *'The Criminal Prosecution in England and its Historians'*, (1984), 47, (1), The Modern Law Review, 1-29.

15 The Prosecution of Offences Act 1879 (UK).

16 Edwards, J. L. J., The Law Officers of the Crown, 1964.

17 Hetherington, p. 11. Hetherington quotes from Mr Farrer Herschell (later Lord Chancellor) who said in 1879 'It should be the exception, rather than the rule, that prosecutions should be carried on by the Public Prosecutor.' On the history of the DPP see Edwards, Edwards, J. L., The Attorney-General, Politics and the Public Interest, 1984.

18 Despite the limited role for the DPP prior to the creation of the CPS, the supposed divide between that office and the conduct of investigations was not always able to be maintained. For example, in the 'Poulson affair' of the 1970s the Attorney-General supervised an investigation of high level corruption utilising a team of DPP prosecutors and police. See Hetherington

it was envisaged that the CPS would maintain a strict divide between its work as prosecutor and the work of the investigator. In 1981, the Philips Royal Commission had recommended a prosecution system for England and Wales, where 'the point of charge or the issue of summons should mark the division of responsibilities between the police and the prosecutor.[19] The Royal Commission reviewed the prosecutor-investigator divide and recommended that the CPS not have a role in supervising police investigations apart from giving advice to police, which the Royal Commission encouraged[20].However, it also recommended that the CPS not have the power to direct the police to undertake further inquiries.[21] The Philips Royal Commission saw the separation of the prosecutor from the charge decision as being essential to the maintenance of a proper relationship between prosecutor and investigator. The investigator-prosecutor divide based on the police decision to charge is premised on the belief that if the prosecutor becomes involved in the investigation of a case, then the prosecutor may become committed to a particular line of inquiry and lose objectivity in assessing that case.[22] It can be argued that the prosecutor-investigator divide based on the police decision to charge actually heightens the risk of case construction by the police and such remoteness of the DPP in the prosecution of offences has not been a check on major miscarriages of justice in England and Wales (despite the adherence to 'fair trial' values in the courts)[23] .

19 Royal Commission on Criminal Procedure, at recommendation 9.2, p. 186. There are a number of common law models where the prosecutor has greater control over the initiation of charges such as the USA where most District Attorneys are elected officials and in Scotland with the Procurator Fiscal's Office. There is also the model of the Commonwealth of Australia and the Serious Fraud Office in England and Wales. In England a trial has taken place for the collocation of the CPS prosecutor in the police station. See Glidewell, Report, Home Office, London, 1998. Through collocation, the relationship between the prosecutor and the police is resolved through informal rather than formal means. The review of collocation was generally positive and states 'All sites report that the collocation of Police and CPS staff is eliminating unnecessary work through improved communications. Enquiries by CPS and the Police which used to take weeks to clear can now be resolved satisfactorily in minutes. Speedier notification of proposed discontinuance, for example, has reduced the wasted effort on upgrading files unnecessarily.' Glidewell Working Group, An Early Assessment of Collocated Criminal Justice Units, Home Office, London, 2001, p. 7. Brown also points to the benefits of collocation, saying that 'locating Crown Prosecution Staff at police stations had improved police/CPS relationships and ensured more files were right first time', p. 1. The gains in process efficiency might just as well have been achieved through electronic means although the personal interaction of CPS and police personnel has probably encouraged co-operation. Importantly this model is based on police control of the charging process and there is a danger that the CPS officers will lose a degree of their independence and objectivity by being co-opted into the rubber stamping of police decision-making. See Baldwin, J. and Hunt, A., 'Prosecutors Advising in Police Stations', (1998), Criminal Law Review, 521-536.

20 Royal Commission on Criminal Procedure, pp. 71-73.

21 *Ibid*. pp. 73-74.

22 The prosecutor may lose objectivity in the desire to win a case in any event (or at least appear to lose objectivity).

23 Even a partial list of miscarriage of justice cases from England is sobering. 'The Guildford Four, the Birmingham Six, the Maguire Seven, Judith Ward, Stefan Kiszko, the Cardiff Three, the

Indeed, it is said that:

Police, forensic experts and prosecution lawyers (deliberately or inadvertently) failed to disclose material that would have collapsed, or substantially weakened, the prosecution case.[24]

In a commentary in 1984, Lidstone looked at the proposition that the introduction of the CPS in England and Wales appeared 'to be a radical reform breaking the monopoly which the police had enjoyed over pre-trial decision-making since the creation of modern police forces in the nineteenth century.[25] However, Lidstone saw that the police control over information flows to the prosecutor would severely constrain prosecution discretion:

Independent decision-making, which is what is required of the prosecutor, is impossible so long as he remains dependent upon the police for the relevant information. In deciding whether to involve the prosecutor before a charge is made or in deciding what and how much information the prosecutor should be given, the police will be guided by their law enforcement concerns which are not necessarily the same as those of the prosecutor.[26]

Lidstone argues that the failure to give the prosecutor control over investigations meant that the control over prosecutions would actually stay with the police.[27]

Taylor sisters, numerous West Midlands Serious Crime Squad defendants, Patrick Nicholls, the Bridgewater Four, Kevin Callan, and Iain Hay Gordon to name only some.' See Whitty, N., Murphy, T. and Livingstone, S., Civil Liberties Law: The Human Rights Act Era, Butterworths, London, 2001. At p. 164. See also: Walker, C. and Starmer, K., Miscarriages of Justice: A Review of Justice In Error, Blackstone, London, 1999, pp. 45-52. And Dein, J., 'Police Misconduct Revisited', (2000), Criminal Law Review, 801. For Australian examples see the cases of Ziggy Pohl (see Hogg, R., 'Law and Order and the Fallibility of the Justice System', in D. Brown, et al. eds.), Criminal Laws, The Federation Press, Sydney, 1995, 1493.) and Michael and Lindy Chamberlain (see the discussion of miscarriage of justice cases in Brown, D., Farrier, D., Egger, S. and McNamara, L., Criminal Laws, The Federation Press, Sydney, 2001, pp. 318-337).

24 Whitty, Murphy and Livingstone, At pp. 163-5 and p. 197. In the USA context see Fisher, S. Z., 'The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England', (2000), 68, Fordham Law Review, 1379-1452. Fisher discusses the Supreme Court authorities of *Kyles* v. *Whitley* 514 U.S. 419 (1995) and *Strickler* v. *Greene* 119 S.Ct 1936, 1946-47 (1999) in which it was held that the prosecutor has a 'duty to learn of any favourable evidence known to the others acting on the government's behalf in the case, including the police' and that failure to discover such evidence, for whatever reason, will justify the over-turning of a conviction. (See p. 1380). Fisher criticises these authorities for assuming that the prosecution can control the flow of information from the police; 'Do prosecutors actually have this ability?…state and local police agencies generally operate independently of prosecutors, and answer to different constituencies. As a result, prosecutorial access to information known to the police is a matter of persuasion and negotiation, rather than authority. The relationship is governed by informal practices about which little is known.' See p. 1382-1383.

25 Lidstone, K., *'The Reformed Prosecution Process in England: A Radical Reform?'* (1987), 11, (5, October 1987), Criminal Law Journal, 296 – 318, 296.

26 *Id*. p. 311.

27 *Id.* p. 312.

In any event, the division between investigation and prosecution proved to be problematic and the CPS developed a guideline on the prosecutor-investigator divide in 1994. In that document it was noted that there was a divergence between various CPS areas concerning 'the nature and level of prosecutorial assistance to the police'. The guideline attempted to define the relationship between the prosecutor and the police on the basis of function:

The dividing line between the prosecution and investigation is less than distinct. However, this paper endeavours to define that border by indicating the proper function of the prosecutor, rather than referring to, for example, temporal limits, such as charge or court appearance.[28]

Speaking of the CPS in England and Wales, Fionda questioned whether the relationship between the police (with the power to charge) and the prosecutor (with the power over prosecution) was a 'loveless marriage' marked by antagonism and hostility as the CPS 'usurped a major function of the police'.

In Fionda's analysis the retention by the police of the power to charge had the effect of giving the Crown Prosecutor a secondary decision-making power 'to continue proceedings or even institute proceedings where appropriate (Prosecution of Offences Act 1985 (UK), S.3 (2)(b)), change the charge, refer cases back to the police for cautioning, or drop the case.'[29]

In 1987, Sanders argued that if the prosecutor controlled the decision to charge, the police could recommend more cautions and the CPS could do more to control the volume of cases, and ensure consistency of outcomes and the fairness of procedures:

If all decisions on whether or not to prosecute were to go through the CPS, the police could recommend more cautions without taking on a judicial role. This could become one of the roles of the CPS; it could then substantially

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28 CPS Policy Group, Investigation/Prosecution, Crown Prosecution Service, London, 1994, p. 1.

29 Fionda, J., *'The Crown Prosecution Service and the Police: A Loveless Marriage?'* (1994), 110, (July 1994), The Law Quarterly Review, 376 – 379, p. 376. Fionda reviews the case of *R* v. *Croydon* Justices, ex p. Dean [1993] Q.B. 769. In that case, the police made representations to the defendant that were not within their power. In relation to the defendant's involvement in a murder case the police said he would not be prosecuted if he gave evidence against the others involved in the murder. The CPS decided to prosecute Dean in any event. The prosecution following the police representation was held to be capable of constituting an abuse of process and to be stayed for that reason. Fionda quotes the court (from p. 135 of the judgment) 'If the Crown Prosecution Service find that their powers are being usurped by the police, the remedy must surely be a greater degree of liaison at an early stage.' Fionda continues: 'This is cold comfort for a service with an uncertain degree of independence and discretion and which has no supervisory powers at the investigation stage in order to prevent the police giving such undertakings to defendants. If the CPS or the police were confused about the precise limits and extent of their respective prosecution roles before, surely this judgment has only served to enhance such confusion and reopen the old wounds of hostility and antagonism', p. 378.

control the three crucial elements of volume, consistency and safeguards for suspects.[30]

The ambiguity of the role of the CPS was reflected in the demand that it be more independent of the police[31] whilst at the same time there were managerialist pressures on the CPS to work more cooperatively with police.[32] Addison sums up the 'no win' position for the CPS in 1998 in relation to assessing evidential sufficiency:

Nobody, not the legal profession, not the media and certainly not the politicians; nobody has tried to be fair to the CPS, to understand what the service exists to do or to explain the purpose of the CPS to the public. The CPS is put constantly in a no win situation, if it prosecutes someone and they are acquitted then the CPS is criticised for bringing the case to court, but, when the CPS decides that there is insufficient evidence to bring a case to court it is criticised for being weak on crime.[33]

The Narey Report recommended that prosecutors be placed permanently in police stations as a means of ensuring that appropriate decisions are made for the prosecution of cases from the start.[34] However, this reasoning did not take into account the potential for the prosecutor to lose objectivity by working too closely with police and thereby potentially being absorbed into the culture of the police station, particularly as the police retained control of the decision to charge. In reporting on a review of the 'Lawyers at Police Stations Scheme' Baldwin and Hunt concluded that CPS lawyers were being used inefficiently to provide oversight and guidance to police officers that should have been available within the police service. In other words, police were not being required to internalise the demands of the CPS for the preparation of cases for prosecution. Indeed, the authors concluded that the introduction of the CPS prosecutors meant that police prosecution files received less internal police review than had been the case prior to the introduction of the CPS.[35]

In 2001 in England and Wales, in response to the problems of police over-charging and of subsequent failed prosecutions, the Auld Report

30 Sanders, A., *'Incorporating the 'public interest' in the decision to prosecute'*, J. E. Hall Williams (ed. The Role of the Prosecutor, Avebury, London, 1987, p. 37.

31 Baldwin and Hunt, p. 521, referring to McConville, M., Sanders, A. and Leng, R., The Case for the Prosecution, Routledge, London, 1991. and Sanders, A. and Young, R., Criminal Justice, 1994, pp. 219-226.

32 Narey, M., Review of Delay in the Criminal Justice System - A report, Home Office, London, 1997.

33 Addison, N., *'Tell me what you really want'*, (1998), (17 July 1998), New Law Journal, p. 1061.

34 Baldwin and Hunt, At p. 521. In relation to South Africa Ngcuka describes how prosecutors assigned to the Office for Serious Economic Offences were acting in that office as investigators and not prosecutors. See p. 5.

35 *Ibid*. p. 522. In the end, Baldwin and Hunt point out that the role of prosecutors in the decision to charge had been overlooked as an area of study.

recommended that the responsibility for deciding whether to lay a charge should be transferred from the police to the CPS[36] and the British Government has indicated that it intends to implement this recommendation.[37] Once the prosecutor has charge responsibility, the prosecutor can require the police to investigate further before agreeing to the commencement of criminal proceedings.

Another development has been based on a recognised need to co-ordinate investigative and prosecution efforts in relation to certain crimes that are difficult to investigate and prosecute. For example, Hetherington describes how he established 'Fraud Investigation Groups' within the DPP's office to co-ordinate the work of police, prosecution lawyers and accountants.[38] Subsequently, the Serious Fraud Office was established under the Criminal Justice Act 1987 (UK), combining in one office the roles of investigator and prosecutor.[39] In addition to the CPS there are a number of other departments of state that undertake prosecutions in England and Wales and the individual right to bring a prosecution remains current. The CPS and DPP are in no special position to control their investigations or prosecutions except that the DPP may take-over charges already laid and either continue or discontinue their prosecution.

The United States of America – State Prosecutor Control of Charge and Investigation

In the American colonies the right of private prosecution and of investigation by grand jury was well established by the time of the War of Independence. Davis notes that the colony of Virginia had established the post of Attorney-General in 1643 to act as a public prosecutor.[40] In the early years of the Republic, the office of the District Attorney (DA) was modeled on the Attorney-General's office and the DA was entrusted with the power to prosecute criminal offences on behalf of the people and to represent the people in the grand jury process which was retained by many states. The role of the DA was later to be legitimated in many states by requiring that the office holder be elected.[41]

It is suggested that in the USA today, the DA plays a role in investigations through the provision of advice, ensuring access to investigative tools (such as the grand jury), and by 'assuming responsibility for the lawfulness of investigative

36 Auld, R., Review into the workings of the criminal courts, Home Office, London, 2001, p. 399.
37 A pilot scheme is currently being evaluated prior to any wholesale transfer of charge responsibility.
38 Hetherington, at pp 36-7. Hetherington states 'it became apparent that the traditional doctrine of division of responsibility between the investigator and the prosecutor was causing particular problems in this field.' See also Wright.
39 Hetherington, pp. 112-121.
40 Davis, A. J., *'The American Prosecutor: Independence, Power and the Threat of Tyranny'*, (2001), 86, Iowa Law Review, 393, p. 450.
41 Jacoby, J. E., *The American Prosecutor: A Search for Identity*, 1980.

activities.'[42] Where the grand jury process applies, the DA has available a significant capacity to oversee investigations through that mechanism.[43] Typically, the DA has an informal supervisory authority over investigators based on the investigator recognising that ultimately DA sanction will be required to prosecute certain cases or that undercharging may attract the attention of the DA.[44] In recognition of this limited role, it has been argued that the DA should be given greater control over police investigations.[45]

In the USA there is also the Special Prosecutor's Office in relation to the investigation of allegations against the President.[46] The Special Prosecutor's Office is a significant albeit isolated, example of the fusion of investigator and prosecutor to provide a mechanism for the independent pursuit of complaints against high office holders.

More recently, the response to terrorism has led to a new role for US prosecutors in relation to investigations in two ways. The first is by the direct involvement of the prosecutor in investigations[47] and by being responsible for the coordination of prosecution intelligence.[48]

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42 What's Changing in Prosecution?: Report of a Workshop, National Academies Press, 2001, p. 8.

43 *Id.* p. 9. 'The grand jury is a particularly powerful tool at the disposal of prosecutors in about half of US jurisdictions.' Brenner argues that the grand jury has been transformed from 'juries that were once active and aggressive to weak and passive bodies that are utterly dependent upon prosecutors for guidance.' See Brenner, S. W., 'The Voice of the Community: A Case for Grand Jury Independence.' (1995), 3, (Fall, 1995), Virginia Journal of Social Policy & the Law, 67, 68. However, for possible limitations on the capacity of Federal prosecutors to utilise the grand jury process because of ethical rules see Bowman, F. O., 'A Bludgeon by any other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State', (1996), 9, Georgetown Journal of Legal Ethics, 665.

44 Indeed the perception that the DA has a significant role in relation to investigation may be very much over-rated, Johnson, R., Personal communication, Anoka County Attorney, Washington, DC, August 11, 2003.

45 Guerrieri, F., *'Law and Order: Redefining the Relationship between Prosecutors and Police'*, (2001), 25, Southern Illinois University Law Journal, 353. Guerrieri argues for greater power for prosecutors to control investigations on the basis of the need to supervise police behaviour and ensure proper standards of disclosure

46 Treanor, W. M., *'Government Lawyering: Independent Counsel and Vigorous Investigation and Prosecution'*, (1998), 61, Law and Contemporary Problems, 149. Treanor refers to the Watergate and Iran-Contra investigations and discusses the office of 'Special Prosecutor' appointed by the President as opposed to 'more aggressive' 'Independent Counsel' appointed by Federal Court judges. Subsequently we have seen the Whitewater and Monica Lewinski investigations involving President Clinton. See also, Little, for a commentary, see Gormley, K., 'Impeachment and the Independent Counsel: A Dysfunctional Union', (1999), 51, Stanford Law Review, 309. On the demise of the Independent Counsel model in 1999 see Davis,

47 In *re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002)', (2003), 116, Harvard Law Review, 2246. The case affirmed that criminal prosecutors could direct or control 'investigations using Foreign Intelligence Surveillance Act searches and surveillance toward law enforcement objectives.'

48 For example the discussion of the 'Rackets' intelligence management system used in the US Attorney's Office for the Southern District of New York, in Glazer, E., 'Harnessing Information in a Prosecutor's Office', (2000), October, National Institute of Justice Journal, 7.

Australia - A Central Role for the Prosecutor with Limited Influence on Investigation

The British government had learnt from the American colonial experience not to diffuse prosecution power (at least in relation to indictable offences), or investigative power by way of the grand jury. In the Australian colonies the power to initiate criminal prosecutions for indictable prosecutions was entrusted to the Attorney-General and the grand jury process was not established. So in each of the Australian colonies, control over indictable prosecutions was centralised in the political office of the Attorney-General. As police forces developed, the police acquired exclusive control over the investigation process and the Attorney-General controlled the presentation of cases on indictment in the trial court but not the laying of charges or the hearing of cases in the summary courts. Under this scheme it was important to ensure a clear division between the police and the Attorney-General (as the prosecutor) to avoid the politicisation of the police. More recently there has been a transfer of power to independent DPPs in each state to de-politicise prosecution decision making. Interestingly, in answer to the questionnaire used by Bryett and Osborne, the Commonwealth DPP referred to itself as being independent of the political process, whereas state DPPs referred to their independence from the police.[49]

Scotland – Prosecution Control over Police Investigators

The archetypical example of prosecutor control over the investigative agency comes from Scotland, which according to Tetley, is properly described as a mix of common law and civil law traditions. In Scotland the Procurator Fiscal has responsibility for prosecutions and supervisory control over police investigations. The procurator as a government appointee was entrusted with the power to direct investigations and to initiate prosecutions. The active role of the Procurator Fiscal was demonstrated in the Lockerbie investigation and prosecution.[50]

We should bear in mind that McBarnet's 1981 critique of the criminal justice system was based on a study of the Procurator Fiscal's Office in Scotland where the Procurator Fiscal controls police charging and prosecutes criminal charges on behalf of the police in the summary and trial courts.[51] Following a review of summary court proceedings in Scotland, McBarnet asserted that 'due process is for crime control.' Others have criticised this statement,[52] but

49 Bryett and Osborne.

50 Scharf, M. P., *'Terrorism on trial: The Lockerbie criminal proceedings'*, (2000), 6, (1), ILSA Journal of International & Comparative Law, 355-361.

51 For example, Tombs, J., *'Independent Prosecution Systems'*, in G. Zdenkowski, et al. eds.), The Criminal Injustice System: Volume Two, Pluto Press, Sydney, 1987, 90-110.

52 For a review of such criticisms see Dixon, D., Law in Policing: Legal Regulation and Police Practices, Clarendon Press, Oxford, 1997. See also Roach, K., 'Four Models of the Criminal Process', (1999), 89, (2), The Journal of Criminal Law and Criminology, 671-716.

the idea that there are two tiers of justice (that transcend the identity of the prosecutor) has become well recognised[53] and even though the prosecutor may desire to reduce unfairness in the prosecution of summary cases, there is a limited ability to assess those cases for prosecution.

Tombs (referring to the study of prosecutors in the Procurator Fiscal's Office in Scotland conducted by herself and Susan Moody[54]) describes how the prosecutor's independence is circumscribed by dependence on the police for information and how the need to process cases quickly leads to cursory case screening. In Tomb's study, 13% of cases were for speeding or parking matters and 23% for minor road traffic offences:

The amount of independence enjoyed is also severely circumscribed by contemporary values in criminal justice – notably efficiency and economy. There are strong pressures to routinise work in prosecutors' offices. To quote the procurators fiscal … 'a lot of these cases are straightforward'… 'you can't get terribly excited about careless driving when it comes in piles of fifty' … There is a tendency for the process to take over, encouraging a constant flow of cases and leading ultimately to a conveyor-belt system of justice. The inevitable pressure towards uniformity and streamlining which such large numbers create is reinforced by the nature of modern bureaucratic organisations preoccupied with saving time and expense and encouraging order, uniformity and predictability within the system.[55]

Within this emphasis on efficiency, as with the higher courts, the processes of the Local Court rely on trial avoidance, thus emphasising the discretion of the prosecutor, without being able to access the level of information that is available to the prosecutor in indictable cases.[56]

South Africa - The Prosecutor in charge of Investigations in Special Cases

In 2000, South Africa introduced a fused prosecution investigation branch within the South African National DPP's office. The rationale given by Ngcuka is that the fight against organised crime was both vital for South African society and difficult for investigators. In particular, it is said that investigators needed the guidance of prosecutors to avoid falling foul of constitutional guarantees in relation to evidence gathering. If this was not done, otherwise cogent evidence might be made inadmissible and as a result public confidence in the criminal justice system would be undermined.

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53 For example, Brown, Farrier, Egger and McNamara,

54 Moody, S. R. and Tombs, J., '*Prosecution in the Public Interest'*, 1982.

55 Tombs, pp. 101-2.

56 For a critique of the treatment of guilty pleas in the criminal justice system see Baldwin, J. and McConville, M., Negotiated Justice: Pressures to Plead Guilty, 1977. In particular, in relation to the 'sentence discount', p. 109.

Summary Proceedings

The summary jurisdiction deals with crimes revealed by both reactive and pro-active policing. In the summary prosecution of offences revealed by reactive policing a brief of evidence is not required as a matter of course unless a not guilty plea has been entered by the defendant.[57] And yet there may be a brief of evidence being the 'running record' of the investigation that has taken place. Very often though, the information leading to a charge being laid will be contained in police notebook entries and will not be in a format suitable to be submitted in evidence. In addition certain aspects of the investigation will be incomplete (such as the interviewing of civilian witnesses or the verification of background facts). Whether this information is followed up or even recorded, is a matter of discretion for the police officer involved. The net effect is that in the summary court the commonly ascribed nature of adversarial criminal justice is inverted. Instead of 'the search for guilt or innocence according to the law' described by Blake and Ashworth[58] the summary criminal process ordinarily commences with the question whether the defendant admits guilt. The defendant is expected to plead[59] without seeing a prosecution brief of evidence[60] and with no more than a charge sheet and a police 'statement of facts' to indicate the prosecution case. In this setting the prosecutor is not in a position to fully assess whether there is sufficient evidence to prosecute. In most police summary cases there is no brief of evidence, as such, and the prosecutor cannot rely on formal sources of evidence (such as signed statements and physical evidence and forensic reports) but on the statement of facts, and the oral advice and assurances of police. In this situation it is the police officer who exercises maximum control over the flow of information.

When one looks at the relevant law, the Continental prosecutor tends to play a leading role in the investigation process. His formal position depends on whether he is to share this role with the investigating magistrate (*juge*

57 Prosecution disclosure is part of DPP prosecution policy but in the absence of a brief of evidence there is unlikely to be material for the prosecution to disclose. The police informant is required to provide a certificate in relation to disclosure when providing a brief of evidence.

58 Blake, M. and Ashworth, A. J., *'Some Ethical Issues in Prosecuting and Defending Criminal Cases'*, (1998), Criminal Law Review, 16-34.

59 Justices Act 1902 (NSW) section 78, similar provisions apply in other jurisdictions, see 'Chapter 4 General Procedure' in The Laws of Australia, p. 40, para. [35].

60 Dixon refers to the 'legalisation process' that commences with the arrest. See Dixon, However, section 66B of the Justices Act 1902 (NSW) requires that a brief be prepared only after the defendant enters a plea of not guilty. During the course of the Summary Prosecution Pilot at Dubbo Local Court the DPP discovered, in breach proceedings being prosecuted on behalf of the Probation and Parole Service, that police prosecutors routinely did not supply a statement of facts to the defendant until a plea of guilty was indicated. Advice given by the DPP on this practice led to a change of policy within the Probation and Parole Service so as to provide a statement of facts for the defendant to consider before entering a plea. Bailey, C., Pilot Notebook, 1996,

d'instruction in France, *Rechter-Commisaris* in the Netherlands), a judicial officer with a specific mandate to conduct pretrial investigations. But even when that is the case, the prosecutor is entrusted with the investigation of all but the most serious offenses. Although the law describes the prosecutor's role as "conducting" the investigation, the prosecutor generally delegates routine operations to the police. As a result, it is almost invariably the police who are in fact conducting the bulk of criminal investigation.

More specifically, legal arrangements in the three Continental countries treated here are as follows:

In Austria, police and all other public authorities are obliged to report to the prosecutor any suspicion of a criminal offense.[61] The prosecutor must then follow up on such reports by directing police or an investigating magistrate to obtain further information by interrogating witnesses and securing relevant physical evidence.[62] In the most serious cases, which are to be tried before a jury court, the prosecutor will then turn over the investigation to the investigating magistrate, who is responsible for determining whether there is sufficient evidence to make the defendant stand trial. Although the prosecutor is precluded from performing acts of investigation himself, he (as well as the suspect) can request the investigating magistrate to conduct particular acts of investigation.[63] The prosecutor can at any time terminate the magistrate's investigation by declaring that he no longer wishes to prosecute the case, and he can do so even when the magistrate has returned the file after closing the investigation with the indication that there is sufficient cause to proceed to trial.[64] The investigating magistrate, on the other hand, can dismiss the case even against the prosecutor's wishes[65] (Austrian StPO, para. 109). The great majority of cases do not require involvement of an investigating magistrate. In these cases, it is the prosecutor who supervises and guides the investigation.

French Procedure

In the French system of criminal justice investigations are not, as in England and Wales, the exclusive domain of the police (*police judiciaire)*. They are also carried out by public prosecutors and investigating magistrates. Both public prosecutors and investigating magistrates have the right to give the police instructions during investigations. Whether these directives are given by one or the other is determined mainly by the nature of the crime being prosecuted. In France infractions of criminal law are divided into: *contraventions* (minor

61 Austrian StPO, para. 84.
62 Austrian StPO, paras. 87, 88.
63 Austrian StPO, para. 97.
64 Austrian StPO, para. 112.
65 Austrian StPO, para. 109.

crimes which do not normally lead to detention), *delits* and *crimes* (the latter are more serious). It is above all in relation to *crimes* and *delits* that the inquisitorial tradition becomes evident. The investigating judges have both investigative powers (e.g. giving the police instructions and interrogating the suspect and witnesses directly) as well as judicial powers (e.g. decisions about delicate matters such as those concerning the personal liberties of those who are under investigation). However, the investigating judge is not involved in the investigative phase in all cases. His or her involvement is only obligatory in the more serious ones- the so-called *crimes*. In less serious cases, such as the *delits*, the supervision of the police is normally entrusted to public prosecutors. For this type of crime the investigating judge is involved only following a specific request made by the public prosecutors. It must be noted that while the public prosecutor works in the context of a hierarchical structure that is under the supervision of the Minister of Justice, the investigating judge is totally independent of the Minister as far as his work and decisions are concerned. As for their relationship with the police, it can be said that they enjoy a great amount of autonomy in the investigative phase. The investigative autonomy of the police seems to be greater for the flagrant *crimes* or *delits* in which, in the majority of cases, "…the police carry out the investigative functions with verifications which take place only *a posteriori*". However also when the infractions or crimes are not flagrant both the public Prosecutor and the investigating magistrate tend to delegate a good part of the investigations to the police through *commissions rogatoires* that are formulated in such a way as to give the police great discretionary powers. Upon termination of investigations of the more serious and complex crimes the investigating judge decides whether the case should be closed or taken to court. If the public prosecutor, upon receiving the documentation from the investigating judge, deems that the case be judged by the *Cour d'assises*, then it is transferred to the *Chambre de l'Instruction* (this is a judicial office created in 2000 to substitute the *Chambre d'Accusation*). It is composed of a panel of 3 judges who act as a further filter aimed at ensuring that evidence justifies a public trial. For all other violations of criminal law that are investigated by the police under the supervisory powers of the Prosecution Office, that is, for the great majority of cases, the decision of whether to commence court proceedings is taken by the public prosecutor. Criminal initiative in France is, as in England, governed by the principle of opportunity. However, in France, the public prosecutors' discretionary powers to initiate criminal action are not regulated by an organic set of instructions like those contained in the *Code* and in the manuals utilized in England. As concerns the priorities to be followed, the sufficiency of evidence, and the public interest, discretionary powers are regulated from within the organizational structure of public prosecution both through regulations provided by the hierarchical superiors and through the hierarchical supervision of the

actual activity of public prosecution in each prosecutor's office. It is further limited from without by the right of the victims to act as *partie civile.*

However, the French prosecutor can personally perform acts of investigation; he can, for example, interrogate witnesses and, if a suspect has been caught while committing the offense or soon thereafter, conduct searches and seizures on the spot[66]. As is the case in Austria, investigations conducted by magistrates are in practice the exception rather than the rule[67] , and it is thus the prosecutor who is in charge of investigating all but the most serious criminal cases.

New legislation in France, updates the Procedure Code to put it in accordance with the European Convention and the guidelines given by the Strasbourg Court: penal proceedings give more scope to the judicial control of the police, to the defence counsel and to the plaintiff. If a case is not complicated, the public prosecutor (*"Procureur de la République"*) can charge the accused person directly before the court. This is the most common procedure. (*"citation directe"*). The French criminal system still relies on the investigation system under the direction of an instructing judge or *juge d'instruction*. Only major *"délits"* (such as robberies) and all *"crimes"* (such as murders) are brought before the instructing judge by the public prosecutor's office prior to the court hearings. This represents seven percent of criminal proceedings. At the end of the instruction period, at the request of the public prosecutor's office, the instructing judge refers the penal dossier to the *tribunal correctionnel* or *cour d'assises*, if substantial evidence has been gathered on the facts and on the offender's intent. The victim of an offence is also entitled to summon a suspected perpetrator before a court or before the instructing judge in order to vindicate his rights. Prior to court hearings evidence is gathered either by the instructing judge or by the public prosecutor through the police services. Victims can also gather evidence and ask either the instructing judge or the public prosecutor to initiate proceedings. During the instruction process, the accused person and the plaintiff are entitled to ask the judge to investigate points in their interest, the judge must answer their request and if he refuses, an appeal can submit the issue to the review of the *"Chambre d'instruction"*(special section of the appellate court). Mention should be made of the importance of forensic evidence processed by judicial scientists (*"experts"*) appointed by the public prosecutor, the instructing judge or by the courts themselves. The accused person is summoned before the court. The summons states the facts for which he is charged and the legal statues applied. Witnesses and victims are also summoned in their capacity to the court hearings. The accused person and the victim can

66 French CPP, Arts. 54, and 56.
67 *Id.*, p. 667.

choose their counsel. The counsel's mission is to defend the interests of the party he assists. He is free to conduct whatever line of defence he thinks best suited during the instruction phase and during court hearings.

The pre-trial period when managed by the public prosecutor is rather inquisitorial: no proceedings have yet been decided, as there might not be a case. But the 15 June 2000 law has curtailed the prosecutor's discretion: any person submitted to police remand can demand after a six-month period to know what has occurred in the enquiry. The public prosecutor must shelve the inquiry if no charges are brought about[68]. If he wishes to pursue police investigations, he must then ask permission to do so from the *juge des libertés et de la détention.* This occurs after a hearing held in the presence of the person put under police custody at the beginning of the enquiry. Permission to continue can be granted only for an extra six months. When an instructing judge is appointed, proceedings are more open to the defence and to the plaintiff party (*"partie civile"*): access to the dossier, right to ask for different measures, right of appeal. French criminal procedure thus appears to be of a mixed nature. However, under the influence of the European Convention, the law enacted on 15 June 2000 clearly waters down the inquisitorial aspect of penal proceedings, which take a much more adversarial aspect open to the accused person and to the plaintiff. France, most academics and practitioners agree, is moving towards a common European form of penal procedure. The pre-trail phase ends when it appears that the dossier is complete and that sufficient evidence exists to bring a case to court. If not, proceedings are dropped either by the public prosecutor (*"classement d'office"*) or by the instructing judge (*"ordonnance de non-lieu"*). French proceedings had a clear-cut inquisitorial outline due to the long-lasting influence of Napoleonic rules. But since the 1808 Criminal Instruction Code the law has evolved and moved slowly away from the inquisitorial approach. In 1990 a reform commission (Commission Delmas-Marty, called the *"Commission Justice pénale et droits de l'homme"*) drafted far-reaching proposals overhauling the traditional French system in order to introduce a more accusatorial system. The *juge d'instruction* would have vanished and a clear gap would have been set up between inquiring missions and judicial missions in order to guarantee a more definite rule of innocence.

The present situation can be assessed as follows: the law enacted on 15 June 2000 shifts French criminal proceedings towards a less inquisitorial and more accusatorial system. This is clear during the instructing period: the instructing judge is deprived of all power in the field of detention. A new judge called *"le juge des libertés et de la detention"* decides, after a special hearing devoted to the question of detention, whether or not to place a suspect under

68 Article 77(2), Penal Procedure Code.

detention. The law states (provision 46) that pre-trial remand must be the exception. During instructing proceedings, from 1 January 2001 the accused person and the plaintiff and their lawyers can ask the judge to investigate certain points in their interest. If the instructing judge refuses, an appeal on the issue can be submitted to the appellate court. The judge must inform the accused and the plaintiff of the progress of his inquiry. During a trial, since the implementation of the 15 June 2000 law, defense and plaintiff lawyers can put questions directly to the parties, witnesses and experts without submitting them to the presiding judge, as was the case previously. They have a much more active role during hearings, even if the presiding judge plays an active role. This is to ensure an unbiased and free public debate in accordance with the rules set out by the European Convention. As stated above, the French criminal system still relies to a certain extent on the investigation system, where the public prosecutor's office brings cases of crime and major *délits* before an instructing judge or *juge d'instruction,* prior to the court hearings, His mission is to search for the "manifestation of truth". In order to do so he must assess the file and further investigations in order to determine whether or not enough evidence exists to bring the case to trial. To do so, he can instruct the police to undertake further investigations, he can hear witnesses in regard to the facts or the defendant's personality, he appoints scientific experts (psychiatrists) if necessary, and he can search premises. The instructing judge also interviews the defendant and challenges him with witness statements and other evidence. Very often the *juge d'instruction* will confront the defendant in his office with witnesses and victims, asking them to repeat their allegations and taking note of the defendant's statements. The *juge d'instruction* can no longer place a suspect under detention: if he wishes to do so he must request a decision from the new *juge des libertés et de la détention*. A hearing is then held by the *juges des libertés* on the question of detention, which should remain an exception, according to the 15 June 2000 law. At the end of the instruction phase, at the request of the public prosecutor's office, the instructing judge refers the penal dossier to the *tribunal* for most criminal offences (*"délits"*) or to the *cour d'assises* (for serious crimes), if substantial evidence has been gathered. If he comes to the conclusion that there is no case, the dossier is dropped (*"ordonnance de non-lieu"*). The French Penal Procedure Code deals in detail with the organisation of preliminary investigations under the supervision of the public prosecutor and of the judicial instructing phase,[69] the structure of the criminal court system,[70] the different appeal proceedings[71] and the implementation of judicial sentences.[72]

69 The French Penal Procedure Code (Book 1).
70 The French Penal Procedure Code (Book2).
71 The French Penal Procedure Code (Books 3 and 4).
72 The French Penal Procedure Code (Book 5).

It aims at a very clear and precise description of proceedings and therefore seldom states general provisions or principles. However, the Declaration of Rights in Article 1 of the 15 June 2000 law includes the rule of innocence, which is now incorporated in the Penal Procedure Code. One should refer to the Penal Code in order to get an outline of the underlying prescriptions of our criminal system. During a preliminary investigation, police and gendarmerie officers can arrest a person as a suspect for 24 hours, if necessary. After arresting a suspect the police must immediately inform the public prosecutor[73] in order to submit the proceeding to judiciary control. If this is not done immediately, the proceeding is not valid. A witness cannot be held by the police longer than necessary for taking a statement or identifying a suspect. At the request of the police, police custody can be extended for another 24 hours by the public prosecutor[74] . For drug and terrorist offences police custody is possible for six days. The person in custody in a police cell must be told that he/she can call a lawyer during the first hour of detention, then during the 20th hour and, if detention is extended, the lawyer can be called during the 36th hour. In all cases medical care can be demanded. The suspect is informed of his/her right to be silent. He/she can also tell his family that he has been arrested, but this can be ruled out by a decision made by the public prosecutor's office. Any person submitted to police detention can, after six months, ask the public prosecutor what has occurred in the enquiry. The enquiry cannot go on for more than six months without being submitted by the public prosecutor to the *juge des libertés et de la détention*, who then decides whether or not to allow the police or gendarmerie to pursue their investigations.[75] Pre-trial detention has been subjected to a prolonged and heated public debate in France. Many lawyers and academics criticised instructing judges, whom they blamed for placing suspects too easily in detention prior to a court ruling. In recent years many statutes have tried to curb detention. The 15 June 2000 law has radically altered the situation. The examining judge no longer has the right to decide on the question of pre-trial detention: a new judge called *"le juge des libertés et de la detention"* decides, after a special hearing devoted to the question of detention, whether or not to place a suspect under detention. The law states that pre-trial remand must be the exception. The new law toughens legal conditions in order to limit pre-trial detention. The suspect must be accused of an offence punishable by a three-year or- more custodial sentence unless he has been previously sentenced to a custodial sentence of one year. If the suspect is accused of an offence against property (as opposed to an offence against a person), the offence must then be punishable by a five-year custodial sentence. The detention warrant issued by the *juge des libertés et de la détention* must state the reasons for the measure.

73 Article 63, C.P.P.
74 Article 77, C.P.P.
75 Article 77(2), P.P.C.

In cases of *"délits"*, detention before trial has been curtailed to four months but can be extended to one year or at most two years, depending on the suspected offender's criminal record. In cases of *"crimes"* (i.e. major offences such as murder or rape) time limits have also been set to prevent excessively long detentions: two, three or four years, also depending on the criminal record. Pre-trial detention is ordered by the *juge des libertés et de la detention*. In cases of summary procedures, *"comparution immédiate"*, if the court is unable to examine the facts, detention is limited to one month. The court can give a detention order, but it must make its final decision concerning the facts within one month. It is obvious that Parliament had wished for years to restrict pre-trial detention because it was seen as casting a shadow on the rule of innocence (*"présomption d'innocence"*). In the last 20 years statutes have tried to deal with the question in a piecemeal manner: figures showed that from the early eighties to the mid-nineties prisoners on remand or whose sentences are subjected to appeal proceedings had dropped from 50 % to 40 % of the prison population. A radical step has been taken by the 15 June 2000 law, which will reduce the number of people under detention and shorten the length of detention. The 15 June 2000 law has also set up a body called *"Commission du suivi de la détention provisoire"* within the Ministry of Justice[76]. Composed of Members of Parliament, judges, a lawyer and academics, its mission is to monitor the question of detention on the national level and to draw a yearly public report. The detained person and his lawyer can, whenever they wish, ask the instructing judge to set the detainee free. If he does not, the request is then brought before the *juge des libertés et de la detention* (or the court), who can decide to lift the detention warrant or to refuse the request. If he refuses, his ruling can be referred to a special section of the appellate court *("chamber d'instruction"*). . All time spent under pre-trial detention is deducted from the term of imprisonment that may ultimately be served. Detention not followed by a penal sentence entitles the person who has been jailed to claim financial compensation: the claim is lodged before the chief justice (*"Premier président"*) of the appellate court whose decision can be challenged before a section of the *Cour de cassation*[77] French law allows offenders to be sentenced in their absence in the following two situations:

a) When a regular summons has been made and the offender deliberately refuses to appear before the court (*"décision repute contradictoire"*), a final sentence can be passed.

b) If it appears that a person charged with an offence has not received a summons to appear in court, the proceedings can continue and the person declared guilty and sentenced (*"condamnation par défaut"*).

76 Article 72, Penal Procedure Code.
77 Article 149, Penal Procedure Code.

However, the ruling cannot be implemented if the offender is later found, he can demand a new hearing in his presence (*"opposition"*). The ruling made in his absence is erased from the records.

In criminal proceedings, the burden of proof lies on the prosecution. The accused is innocent until found guilty by a court (*"presumption d'innocence"*). This has been a basic rule since the French Revolution and the rule has been included in the statute books of the 15 June 2000 law, which adds a preliminary article to the Penal Procedure Code delineating fundamental rules of procedure, in particular, the rule of innocence.

Most lawyers, academics, judges and Members of Parliament are very concerned about upholding this rule. The new legislation introduced in 2000 goes a long way to foster a truly effective implementation of the rule of innocence and the rules set out by the European Convention and by the Strasbourg Court guidelines. The party bringing the action must supply evidence not only for the criminal facts but also for criminal intent.

Penal Procedure Code states that all forms of evidence are admissible by courts.[78] One can review evidence as follows:

Documentary evidence (statements, deeds, public documents etc.).

Oral evidence by witnesses under oath or statements by the accused person,

- Real evidence: material objects presented to the court; and
- Scientific evidence as established by forensic services and scientists.

In French criminal proceedings there is no classification of evidence. We do not adhere to the notion of "conclusive evidence". The court must weigh all evidence, including circumstantial evidence, in order to form its opinion beyond a reasonable doubt (*"intime conviction"*). City and district courts must state their reasons in writing and are subjected to the scrutiny of higher courts (appellate courts and the *Cour de cassation* on the national level). The *cour d'assises* does not state the reasons on which its decisions have been reached. This system has been criticised and a bill, drafted by Mr Jacques Toubon, minister in the previous government, was to have introduced written reasons in all criminal judgements. The present government has rejected this, however. The law enacted on 15 June 2000 (article 81) has organised a system of appeal for all courts of assizes rulings. All decisions dealt out by the courts of assizes can be appealed and a total retrial is then held. Prior to the new June 15th, 2000 law there was no appeal against rulings of the courts of assizes. The Supreme Court (*"Cour de cassation"*) only submitted them to a legal review on questions of law, not concerning the facts.

78 Provision 427 of Penal Procedure Code.

In France the prosecution agency, called *Ministère Public or Parquet*, is a body organised on a hierarchical basis. Its members, called *Procureurs de la République and Substituts du Procureur,* are members of the judiciary and are recruited, as are members of the bench (*"les juges"*), but they do not enjoy the same judicial immunity as the members of the Bench. It is not unusual for a *procureur* to join the Bench and vice versa. The *ministère public* is present at all levels of the court system:

- in the Supreme Court, the *Cour de cassation*, the *Procureur Général* and his assistants (*"avocat général"*) are in charge of stating their point of view regarding the right and fair application of law;
- in each of the 33 appellate courts a regional *procureur général* and his staff (*"avocats and substituts généraux"*) are in charge of the prosecution of all criminal cases brought to the court; and
- at the local level in each of the 186 district courts (*"tribunal de grande instance"*) a *Procureur de la République* and his *Substituts* are responsible for the prosecution of criminal cases in all lower courts.

The purpose of the *ministère public* is to represent the interests of society that have been harmed by the perpetration of offences. Its mission is to seek the enforcement of the law throughout the country. When the *ministère public* engages proceedings, it is party to the procedure from its initiation until the final sentence. It must be made clear that the prosecution service has great discretion prior to the initiation of proceedings. When informed by the police or by a plaintiff that an offence has been perpetrated, it chooses the best course of action. The *procureur's* service either instructs the police to continue their investigations (*"enquête préliminaire"*) or if it is a complicated case, refers it to an instructing or examining judge. The prosecutor's office must now, in accordance to the 15 June 2000 law, call for a delay within which to carry out investigations.[79] The prosecutor can also submit the case to a court immediately, either through the ordinary procedure (*"citation directe"*) or, in an urgent case, through the simplified procedure called *"comparution immédiate"*.[80] The prosecution service can also discontinue procedures, if it is felt that there is no case or if a caution given to the offender would be more adequate than full procedures (*"classement d'office"*). Any person submitted to police detention has had the right starting 1 January 2001 to ask the public prosecutor after a period of six months what has occurred in the enquiry. The enquiry cannot go on more than six months without being submitted by the public prosecutor to the *juge des libertés et de la détention,* who decides whether or not to allow the

79 Article 15, Penal Procedure Code.
80 Article 388, C.P.P.

police or gendarmerie to pursue their investigations. The *ministère public* can engage a pre-trial and out-of-court arbitration in the hands of a private *"médiateur"*. Such mediation is strongly recommended for simple cases such as thefts, minor assaults or destruction of property. The offender and the victim are brought together and a compensation arrangement is sought. If an agreement is found between the offender and the victim, the public prosecution service shelves the case. The prosecutor can also appoint a delegate (*"délégue du procureur"*) whose mission it is to caution a petty offender (often a juvenile) and warn him that the file has been shelved but will be reopened in case of reoffence. The *"délégués du procureur"* often deal with petty juvenile offenders. At the end of 2000 there were *600 délégués de procureurs*, a sharp rise in the last few years. When full judiciary proceedings are engaged the *ministère public* is not entitled to drop the case, however. While the members of the Bench have total judicial independence, the *ministère public* is organised on a hierarchical framework. At the top, the Minister for Justice sends out general orders for the implementation of prosecution. These are published in "*circulaires*" or public policy documents. He can also give individual recommendations for specified cases brought before the courts. Such instructions must be in writing[81] and filed in the dossier. They are usually sent down from the Ministry to the Appeal *Procureur Général* and from his office to the local *Procureur de la République*. In all cases the members of the prosecution service must carry out their orders. They comply with these recommendations in the processing of proceedings. However, the public prosecutors are granted total freedom of speech during court hearings. There is a traditional saying summing up the situation: *"la plume est serve mais la parole est libre"*, i.e. the pen is subservient but speech is free. The question of *Ministère Public* status is under debate. A bill to reform its status and grant it freedom from the Minister of Justice (*"projet de loi relative à l'action publique en matière pénale"*) was abandoned in 1999 in the middle of political controversy. The issue remains on the agenda and will have to be settled some day. The members of the bench *("les juges"*) are granted judicial independence and protected by the High Council for Justice (*"Conseil superieur de la magistrature"*). Members of the prosecutor services are closer to civil servants and are under the authority of the government.

Italian System

Also in Italy the public prosecution has the power to direct the judicial police in the course of the investigative phase. As also happens in other European countries the Italian public prosecutor cannot, however, make any autonomous decisions about the personal liberty of persons under investigation. Searches,

81 Article 36, C.P.P.

seizures, telephone interceptions and tapping, pre-trial detention must be authorized or validated within restricted time limits by a judge *ad hoc* (the judge for the preliminary hearing). Unlike those colleagues in countries where the principle of opportunity of criminal action obtains, such as England and France, the Italian public prosecutor may not close a case.

In a regime of compulsory criminal action only the judge has such powers. There are five features that more than others differentiate the Italian public prosecutors from those of other countries in mainland Europe, where the public prosecutor also has the power to carry out investigations. Three of these features have already been dealt with, and are: a) the constitutional obligation to pursue all crimes; b) to pursue them in full independence, i.e. without taking into account the choices of criminal policy that in other countries are made by subjects that are politically accountable; c) to pursue them in the almost total absence of hierarchical controls on the part of the heads of the prosecutors' offices. The other two features that distinguish the Italian public prosecutor are the result of a ten year evolution of informal judicial practices that have been, thereafter, officially adopted in the 1988 Code of criminal procedure. This code in its initial form obliged the police to notify the public prosecutor within 48 hours of Mall reported penal infractions and to wait for instructions from him regarding how to proceed with the investigations. Thus, the public prosecutor acquires *de facto* the role of a higher ranking police official during investigations. Later it was agreed to concede a longer period of time to the police to proceed autonomously in the investigations. This also in order to face the difficulties that the public prosecutors encountered in directing the investigations for all cases that were submitted to them. However, even today the role of the police remains one of complete and direct subordination to the instructions issued by the public prosecutor for all cases in which the latter is interested in personally conducting the investigations. The 1988 code explicitly gave the public prosecutors the power and the duty to initiate the investigation themselves, even in the absence of reports of the police or other parties, whenever they personally deem, for whatever reason, that a violation of the law has been committed.

German System

Germany abolished the Office of Investigating Magistrate in 1975 and since that time places full responsibility for pretrial investigations in the hands of the prosecutor. Police are to undertake those investigative measures which are immediately necessary to avoid loss of critical evidence, but they must then report to the prosecutor without delay[82]. The prosecutor conducts the

82 German StPO, para 163.

investigation, calling upon the police for assistance to the extent necessary[83]. As in other Continental legal systems, acts involving more serious intrusions into citizens' liberty or privacy (e.g., pretrial detention, wiretaps, and searches and seizures) require judicial permission prior to their execution or, if exigent circumstances made immediate action necessary, subsequent authorization by a magistrate.

The legal situation is somewhat different in England. According to English law, investigation is generally the task of the police, and the members of the Crown Prosecution Service are limited to requesting the police to undertake further investigatory acts if that is deemed necessary. The police are not compelled by law to honor such requests. The advantage of the English model is its clear separation of functions: the police investigate and initiate a prosecution, and the prosecutor makes all further determinations. The drawback of that model is that the prosecutor must accept the results of the investigation as presented to him and is dependent on the goodwill of the police for gathering further information he may regard as necessary for intelligent decision-making. The Continental model avoids this problem by casting the prosecutor in the role of "conducting" the investigation as well as directing and supervising police activities. Continental laws describe the police in criminal proceedings as subservient to the prosecutor,[84] and they are thus duty-bound to carry out all investigatory acts the prosecutor demands. The prosecutor's control over police is, at the same time, regarded as a guarantee of the police's adherence to relevant legal rules in pretrial proceedings. In all Continental systems, however, reality differs from the statutory arrangement described above. In practice, the balance of powers established by the legislature is invariably tilted in favor of the police. At least in routine matters, the police clear up cases completely before even informing the prosecutor of their existence, and prosecutors typically defer to the police with respect to the investigation. This does not necessarily mean, however, that prosecutors always accept the findings of the police without further inquiry.

In Germany, it has been found to be quite common for the prosecutor to request police to undertake further investigations if he or she is willing to press charges but perceives a need to obtain additional information to strengthen the position of the prosecution. Yet it is only in very serious or spectacular cases that the prosecutor actually directs the police investigatory activities or takes the investigation into his or her own hands. German prosecutors may sometimes personally interrogate the victim or an important witness - witnesses are under

83 German StPO, paras 160, 161.
84 French CPP, Art. 41-2; German StPO, para. 161.

a legal duty to appear before the prosecutor but need not talk to the police[85] but even such limited involvement in the investigation usually occurs at the request of the police. According to one German study, prosecutors personally conducted parts of the investigation in only 1–5 percent of the cases .The only area in which Continental prosecutors tend to investigate on their own is white-collar crime. Several prosecutor's offices have established departments staffed with lawyers, accountants, and other specialists, which have monopolized the investigation of serious economic crime.

The fact that Continental prosecutors largely abstain from investigation has a significant impact on the allocation of powers in the pretrial process. Although the police lack official authority to dismiss cases, there is strong evidence that they can and do predetermine prosecutorial decision-making by the amount of investigative effort they invest in particular types of offenses. The police, moreover, collect and electronically store large amounts of information on crime and offenders, and they often shield this information even from prosecutors. As most Continental prosecutors are unable or unwilling to counteract such police strategies, prosecutors' impact on the case flow from detection of an offense to its adjudication is merely negative: they can screen out cases previously "cleared" by the police, but they cannot restore cases lost through strategic decisions of the police or through insufficient police work.

To a large extent, this state of affairs is inevitable because the police monopolize the manpower, expertise, information, and equipment necessary for successful investigation. Yet the possibilities of controlling police decision-making in the area of crime detection and investigation ought to be further explored. Because prosecution policy is heavily dependent on the allocation and deployment of police resources, these matters should not be left to ad hoc determination by police chiefs or individual officers. A thorough restructuring of decision-making and control processes in criminal investigations may well be necessary. Such reforms would have to start with accepting the fact that prosecutors do not conduct or even direct investigations. Shedding the fiction of prosecutorial domination of the investigation process might be the key to a realistic and feasible definition of the prosecutor's role. This role should primarily be supervisory. It could have the following features: police inform the prosecutor as early as possible of each prima facie plausible report or complaint of an offense; the prosecutor may give general or specific advice but leaves the conduct of the investigation to the police, who in turn make continuously available all relevant information to the prosecutor and confer with him when major strategic or tactical decisions have to be made. When the police deem the investigation complete, they submit their findings, and the prosecutor can demand

85 German StPO, para. 161a.

further information if necessary. The decision whether to prosecute should be the prosecutor's alone.

Systems in Hong Kong and China

In the criminal justice system of Hong Kong Procuratorates have the sole responsibility to investigate cases involving the misconduct of public officers. These include state functionary taking advantage of his office appropriates public money or property, dereliction of duties, accepting bribes and the offering of brides by any person. Offences involving infringement of citizen's rights committed by public officers in the course of discharging their duties are also investigated by procuratorates. Examples of infringement of citizen's personal and democratic rights are illegal detention, extortion of confessions by torture and illegal search.[86] Public security organs except as otherwise provide by law conduct investigation of criminal cases. Procuratorates oversee investigating of these cases. The arrests of suspects are subject to the approval of the procuratorates or decision by a court.[87] Whenever a public security organ wants to arrest any suspect, written request for approval of arrest has to be submitted to the procuratorate. The procuratorate may send procurators to the investigation organ to participate in the discussion of major cases. Initiation of prosecution Responsibility for prosecutorial work lies with procuratorates. Only they can initiate public prosecutions.

In the present system all cases requiring initiation of a public prosecution shall be examined for decision by the People's Procuratorates.[88] When the public security organs complete investigation and recommend public prosecution, the case will be sent to the prosecutorate. Procuratorates have the power to interview suspects and victims. Prosecutors can reject the views of the investigators. They can carry out their own investigation or direct the public security organ to carry out further investigation.[89] The final decision to bring prosecution is made by procuratorates. A bill of prosecution will be filed to court when it is decided that the case warrants public prosecution. A bill of prosecution contains particular of the accused, the charge, facts of the case, a list of witnesses, and a list of evidence with all documentary evidence attached to it.

When a decision not to initiate public prosecution is made by the procuratorate, the decision will be announced publicly. The procuratorate will ensure that written notices of such decision are delivered to th accused, the

86 Article 18, Criminal Procedural Law of PRC and Articles 163, 184, 185, 127, 272, 382, 384, 385, 389, Criminal Law of PRC.
87 Article 59, Criminal Procedural Law of PRC.
88 Article 136, Criminal Procedural Law PRC.
89 Articles 139, 140, Criminal Procedural Law of PRC.

victim and the investigation body.[90] The procuratorates have full right to appear in court to support public prosecutions. They have the discretion not be appear in court when cases are tried by summary procedure (minor offences with maximum penalty not exceeding 3 years imprisonment), but will provide all information to enable the court to adjudicate the matter.[91]

When a procurator chooses to appear in court, he will discharge his duties by following certain procedure adopted for the hearing. These procedures include reading out the bill of prosecution in court, and questioning of the defendant. Witnesses if called to give evidence will be examined by prosecutor or have the record of their testimony read out in court. With the permission of the judge, the prosecutor and other parties may state their views on the evidence and the case and they may debate with each other.[92] Supervision When carrying out supervision, the procuratorates act as provided under Article 8 of the Criminal Procedural Law. Procuratorates exercise supervision over the public security organs as well as the courts.

When facts of crime are discovered, the public security organs will, depend on the facts found, determines whether they find a case for investigation. If the procuratorate does not agree with the public security organ's decision, the procuratorate has the power under Article 87 of the Criminal Procedural Law to direct the public security organ to state the reason for doing so. If the procuratorate considers the reasons given are not tenable, it directs the public security organ to accept the case and start investigation. When the procuratorate receives from the public security organs any case after investigation, it looks at the merit of the cases for prosecution. The procuratorate also has the responsibility to see if the investigation is carried out lawfully.[93] The procuratorate can direct the public security organ to ratify any irregularity or illegal conduct. In the course of the trial, the prosecutor has the duty to ensure that the procedural rules are followed by the court and supervises the court's assessment of case. If the court departs from the procedures, the procurator has the power to rise with the court and asks for ratification.[94] Whenever there is an error in the court's judgement or order, procuratorates have the power to present a protest to the court of next higher level.

When an order on commendation of sentence or parole made by the court is considered to be improper, the procuratorate also has the power to make written submissions to the court and asks for correction.[95] The

90 Article 143, Articles 144 and 145, Criminal Procedural Law of PRC.
91 Article 153, Criminal Procedural Law of PRC.
92 Articles 155-160, Criminal Procedural Law of PRC.
93 Article 137, Criminal Procedural Law of PRC.
94 Article 169, Criminal Procedural Law of PRC.
95 Articles 203, 205 and 222, Criminal Procedural Law of PRC.

procuratorate also has the responsibility to ensure that the execution of a criminal punishment conforms to law. If there is any mistake or illegalities, the executing organs will be directed to correct and rectify. If the executing organ discovered any error in the judgment, the matter will be referred to procuratorates.[96] Under Article 63 of the Basic Law of Hong Kong, the Department of Justice controls criminal prosecutions. Unlike their counterpart in Mainland, they do not involve in the investigation of crime. Under their system, investigation and prosecution are two separate and distinct functions. Law enforcement agencies including Hong Kong Police Force, Independent Commission Against Corruption, Customs and Excise and Immigration Department are responsible for the investigation of crime. They will not direct investigation but provide advice regarding the legality of conduct of the case. When law enforcement agencies complete investigation, they involve in assessing the sufficiency of evidence and whether they are in conformity with the present state of law. They will also determine the most appropriate charges to be preferred. All matters incidental to trial of the case after commencement of proceedings are responsibilities of prosecution counsel. These include choosing the venue, disclosure of evidence, filing and service of documents. Conduct of the case in court Prosecutor must appear in all level of court and must take part in all trials. Indeed when the prosecutor fails to appear, the court will strike out the case for want of prosecution.

It is provided in the Chinese Constitution that the procuratorates shall exercise procuratorial power independently and free from interference by any administrative organ, public organisation or individual.[97] In deciding whether a public prosecution should be initiated, the procuratorate will first assess the sufficiency of evidence and secondly whether criminal sanction is required. Under Article 141 of the Criminal Procedure Law, the procuratorate has to ascertain the facts of the case, be satisfied that the evidence is reliable and sufficient and the investigation is carried out lawfully before making a decision. The decision to prosecute is restricted by statutory provision under Article 142, which states that the procuratorate shall not initiate prosecution of suspect comes under one of circumstances provided in Article 15. The circumstances are:

a) "if an act is obviously minor, causing no serious harm, and is therefore not deemed a crime;

b) if the limitation period of criminal prosecution has expired;

c) if an exemption of criminal punishment has been granted in a special amnesty decree;

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96 Articles 223 and 224, Criminal Procedural Law of PRC.

97 Article1s 26 and 131 the Constitution, Article 5, the Criminal Procedural Law of PRC, People's Procuratorate Law.

d) if the crime is to be handled only upon complaint according to the Criminal Law, but there has been no8complaint or the complaint has been withdrawn;

e) if the criminal suspect or defendant is deceased; or

f) if other laws provide an exemption from investigation of criminal responsibility."

Procuratorate Law - Whether an act is obviously minor or the harm caused is serious are determined by the prosecutorate. In corruption or theft cases when the sums involved are below the minimum amount for finding a case, the act is considered as minor. The prosecutorate will then examine the harm done, if it is not serious, no prosecution will be initiated. If the sums involved are slightly over the minimum amount for finding a case, and the harm done is not serious, the procuratorate have widen discretion to decide whether to initiate prosecution. Remorse of the defendant is an important factor. The views of the victim will also be considered. For the second type of cases, the prosecutorate may refer the case to other administrative bodies with its recommendation for the case to be dealt with by administrative sanctions. The guidelines for prosecutorates in determining the finding of cases for investigation and public prosecution are issued by the Supreme People's Procuratorate. These guidelines were first published in the form of a booklet in 1998. With the aid of information technology, all these informations and the Supreme Procuratorate's rules and judicial interpretations regarding specific application of law in the handling of cases can now be found in procuratorate's website.

Before the reunification, decisions to prosecute are, under the Royal Prerogative, the sole responsibility of the Attorney General. After the reunification, under the Basic Law, the Department of Justice controls all criminal prosecutions. Secretary for Justice, as the head of the Department, is in the same position as the Attorney General. General principles to be applied are by and large the same as before 1997. It is the Secretary for Justice who is responsible for all prosecutions in Hong Kong. It is for the Secretary to alone to decide whether or not prosecutions shall be instituted in any particular case or class of cases, and his responsibility to control and conduct them. The Secretary is aided in the discharge of prosecutorial functions by colleagues in the Prosecutions Division of the Department. There is no rule that prosecution must automatically take place is a suspected offence is established against an individual. The position is underlined by the Criminal Procedural Ordinance which states:[98]

98 Section 15(1) of the Criminal Procedural Ordinance.

"The Attorney General shall not be bound to prosecute an accused person in any case in which he may be of the opinion that the interests of public justice do not require his interference."

Criminal proceedings will not be initiated or continued unless there is admissible, substantial and reliable evidence to support the charge and there is a reasonable prospect of a conviction. It would not be in the public interest to prosecute a weak or borderline case. In assessing whether it will be in the public interest to prosecute, a prosecutor must consider the gravity of the offence, its practical effects, and the penalty likely to be imposed. Criminal proceedings may be stayed at any stage by the entry of a *nolle prosequi* by the Secretary for Justice, and it is not subject to any control by the court. The entry of a *nolle* stays the prosecution but does not operate as a bar or discharge or an acquittal and the accused remains at risk of re-indictment. Although the circumstances are not exhaustive, in the past, *nolle* was entered in cases where the accused was unable to plead in court or stand trial owing to physical or mental incapacity which was expected to be permanent. Victim's rights are safeguarded at each and every stage of the criminal proceedings. These rights include the right to be informed, to participate in the proceedings and to initiate court action.

The Right to be Informed

When the victim reports crime to the authority, the victim has the right for such information to be kept confidential. When the authority determines that such case does not meet the criteria for finding a case for investigation, the victim has the right to be informed of such decision. The victim may ask the case to be reconsidered, or brought the matter to the attention of the procuratorate.[99] The victim has the right to have his view carefully considered, before the procuratorate makes the decision to initiate public prosecution. The procuratorate has the duty to inform the victim of its decision. When victim refuses to accept the procuratorate's decision not to prosecute, he has the right to petition to the procuratorate at the next higher level or file the case to court directly. If such decision is upheld, the victim may also bring the case to court.[100] The right to initiate action Under Article 170 of the Criminal Procedural Law, the victim or his agent can initiate private prosecution in three type of

(i) cases to be handled only upon complaint as provide in the Criminal Law. These include defamation interference with other person's freedom of marriage, maltreatment of a family member and conversion;[101]

99 Articles 84 to 86, Criminal Procedural Law of PRC.
100 Articles 139 and 145, Criminal Procedural Law of PRC.
101 Articles 246, 257, 260 and 270, Criminal Law of PRC.

(ii) minor criminal cases as defined in 'The Interepartion of the Criminal Procedural Law'[102] issued on 19 January 1998. These include minor offences with a maximum penalty of three years imprisonment listed in Chapter V (Crimes of property violation) and Chapter IV (Crimes of infringing citizen's personal and democratic rights); and

(iii) cases in which the victim's property or personal right is infringed but the authorities find no case for investigation. The victim has the right to file an incidental civil action if he has suffered material loses as a result of the defendant's criminal act.[103]

When such request is made during the investigation stage, the procuratorate will inform the court when the case is transferred. Or the victim can file the case to court directly after the case is transferred. If the court decides to accept this claim, the case will be heard together with the criminal case. Evidence relating to the criminal offence will be led, then any additional evidence relating to the civil claims. Evidence will then be assessed by court and judgment relating to both cases will be delivered at the same time. Parties involved need not pay any extra fees to the court for the civil action. Hearing of the incidental civil action would be postponed only from the purpose of preventing excessive delay in the trial of the criminal case.[104] After the case is passed from the investigation organ to the procuratorate for examination, the victim has the right to appoint as agent to look after his interest. Defence lawyer may collect information pertaining to the case from the victim and witnesses provided by the victim only with the permission of the authority and the consent of the victim. Whenever expect evidence is employed, the victim has the right to be informed of conclusion. The victim may then decide whether to apply for supplementary verification or verification by another expert.[105] In the course of the trial, with the permission of the presiding judge, victim can put questions to the witnesses, including experts and the defendant. The victim may also request witness to be summoned, new evidence or new report to be obtained. And the close of the case, the victim can state his view on the evidence and participate in debate.[106]

If an incidental civil action is filed, the parties have the right to appeal. The victim, however, has no independent right of appeal in the criminal matter. He only has the right to request the procuratorate to present a protest. Although

102 This interpretation was issued joined by Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, Ministry of Justice, Legislative Affairs Commission, Standing Committee of the National People's Congress.

103 Articles 177, Criminal Procedural Law of PRC.

104 Articles 78, Criminal Procedural Law of PRC.

105 Articles 37, 40 and 121, Criminal Procedural Law of PRC.

106 Articles 155 – 160, Criminal Procedural Law of PRC.

a victim cannot stop the execution of a judgment or order of the court, he can present a petition to the court or procuratorate.[107]

Role of Prosecutor in Investigation - Indian System

The investigation and prosecution in Indian system are two separate and distinct aspects of administration of criminal justice. Formation of an opinion as to whether a case can be made out to place the accused for trial is the exclusive function of the police. Under Section 173 of the Code of Criminal Procedure, the "police report"[108] is the finding that an investigating officer draws on the basis of materials collected during investigation. Such conclusion can only form the basis of a competent court to take cognizance and to proceed with the case for trial (police report is sometimes in popular parlance referred to as a charge sheet).

Normally, the role of a Public Prosecutor commences after the investigation agency presents the case in the court on culmination of investigation. Of course, it is open to the police to get the best legal opinion, but it is not obligatory for the police to make the opinion of the Public prosecutor for filing the charge sheet.[109] After the Code of Criminal Procedure was promulgated in 1973, the prosecution agency was expected to be completely separated from the police department. The objective of such separation obviously to ensure that police officers is who investigated a case shall have no manner of control or influence over the prosecutors who will prosecute the case. Under the scheme of Sections 24 and 25 of the code, a police prosecutor (of former times) cannot even become eligible to be appointed as Assistance Public prosecutor on regular basis.[110]

In India legal system investigations are conducted as per provisions of Chapter XII of the Code. Cases are registered under Section 154 of the Code. A police officer is competent to investigate only cognizable offences. No cognizable offences cannot be investigated by the police without obtaining prior orders from the Courts. A police officer can examine witnesses under Section 161. However, the statements are not to be signed by the witnesses. Confessions of accused persons and statements of witnesses are recorded under Section 164 of the Code. A police officer has the power to conduct searches in emergent situations without a warrant from the court under Section 165. A police officer is competent to arrest an accused suspected to be involved in a cognizable offence without an order from the court in circumstances specified in Section 41 of the Code. He is required to maintain a day to day account of the investigation

107 Articles 180, 182 and 203, Criminal Procedural Law of PRC.
108 Result of investigation under Chapter XII of the Code.
109 2000 (4) SCC 461.
110 1995 Supp. (3) SCC 37.

conducted by him under Section 172. After completion of investigation, a police officer is required to submit a final report to the court under Section 173. If a prima facie case is made out, this final report is filed in the shape of a charge-sheet. The accused has, thereafter, to face trial. If no cogent evidence comes on record, a closure report is filed in the Court. The public prosecutor plays the following role at the investigation stage:

(1) He appears in the court and obtains arrest warrant against the accused;

(2) He obtains search warrants from the court for searching specific premises for collecting evidence;

(3) He obtains police custody remand for custodial interrogation of the accused[111] ;

(4) If an accused is not traceable, he initiates proceedings in the court for getting him declared a proclaimed offender[112] and, thereafter, for the confiscation of his movable and immovable assets[113] ; and

(5) He records his advice in the police file regarding the viability/advisability of prosecution.

After the completion of investigation, if the investigating agency comes to the conclusion that there is a prima facie case against the accused, the charge-sheet is filed in the court through the public prosecutor. It is to be noted that the opinion of the public prosecutor is taken by the police before deciding whether a prima facie case is made out or not. The suggestions of the public prosecutor are also solicited to improve the quality of investigation and his suggestions are generally acted upon. However, the ultimate decision of whether to send up a case for trial or not lies with the police authorities. In case there is a difference of opinion between the investigating officer and the public prosecutor as to the viability of the prosecution, the decision of the District Superintendent of Police is final.

In terms of private investigations there is a greater involvement of victims required by prosecutors in domestic violence cases.[114] Apart from individual complainants we can see an increasing role for private investigations on behalf of corporate interests, particularly in the area of trademark infringements or other intellectual property cases.[115] Private policing also constitutes a significant

111 Section 167, Code of Criminal Procedure 1973.
112 Section 82, Code of Criminal Procedure 1973.
113 Section 83, Code of Criminal Procedure 1973.
114 Hanna, C., *'No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions'*, (1996), 109, Harvard Law Review, 1849.
115 An example of this is the very active investigative profile adopted by the Australian Recording Industry Association (ARIA) in relation to the making and sale of bootleg recordings. Recently

aspect of social regulation with the growth of the private security industry. The role of the private citizen and corporate entities in investigation and prosecution will continue to be contentious and the concerns in many instances will be significant in terms of the money involved or the personal safety of individuals.

Conclusion

There is no common law requirement for a prosecutor-investigator divide. It is arguable that the police should work under the direction of the prosecutor in relation to cases revealed by reactive policing. In contrast in proactive policing, where offences do not require investigation, there is a problem of immediate police imperatives dominating their decision-making. In these cases the prosecutor cannot react within the time frame required by the exigencies of policing. In cases arising from pro-active policing there needs to be a definite point of transfer and an opportunity for the review of police action necessarily after it has taken place.

The prosecutor is acquiring an increasingly important role in investigations spurred on by two main factors, which of themselves reflect underlying tensions between the often competing imperatives of fairness and efficiency in common law criminal procedure. The first factor is the desire for efficiency and the need to coordinate investigation and prosecution efforts for the pursuit of crimes that are complex, or that are particularly difficult to regulate or investigate.[116] This has already been recognised for some time in relation to environmental prosecutions which have also been managed without necessarily relying on criminal sanctions.[117] The second is the increasing demand placed on the prosecutor to objectively provide full disclosure of the prosecution case and objectively assess the prosecution case. Increasing attention must therefore be paid by prosecutors to examine exculpatory evidence in the hands of the prosecutor and to consider the nature of the investigation.[118] In both these respects, existing procedures have been shown to be inadequate and the prosecutor is being made responsible for maintaining the integrity of the justice

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Australian Universities have been the target of investigations looking at the activities of students on University computer networks. ARIA is in a position to commence private summary prosecutions under state law and link with police investigations.

116 White collar crimes involving complex accounting transactions, war crime allegations (which led to the establishment of a Special Prosecutors Office in Australia to investigate and prosecute alleged Nazi war criminals), charges against public officials and terrorism offences.

117 For example, Blabobil, S., Cho, I., Haenni, S., Kuffler, J., Leach, S. and Little, K., *'Environmental Crimes'*, (1997), 34, (2), American Criminal Law Review, 491.

118 Singband, L.R.,'Note: *The Hyde Amendment and Prosecutorial Investigation: The Promise of Protection for Criminal Defendants'*, (2001), 28, Fordham Urban Law Journal, 1967. Singband comments, p. 1967, 'because federal prosecutors have considerable involvement in the pre-charging investigation and virtual free reign over the charging decision, it is reasonable to expect that they adhere to some basic principles in conducting these investigations and in deciding what and whom to charge.' See also Fisher.

system. The questions that then remain are whether the trust placed in the prosecutor is deserved, whether prosecution decision making is open and transparent and to the extent that it already is, whether it will remain so,[119] and whether there are sufficient accountability mechanisms in place. Certainly, there is a need for guidelines for the investigative prosecutor as that office takes on an increasingly important role.

119 Particularly if the prosecutor is drawn into close association with investigations that involve national security or other sensitive matters from the initial stages of investigation.

GREEN CONSUMERISM AND PACKAGING WASTE MANAGEMENT: INDIAN LEGAL SCENARIO

K. Vidyullatha Reddy*

The linkages between consumer and environment are a matter of growing concern for trade, health and economic sectors besides social and political. The fact that business interests necessitate competition and the State interests in fair and equitable distribution of wealth there is always need for regulatory measures.[1] Marketing emerged as a profession due to business interests and consumer protection is the States response to maintain public welfare. Consumer rights are recognized across the world with the efforts of United Nations and others. Consumer protection is a matter of concern for the administration and policy makers across the world today.

It was perceived that consumer behavior is influenced largely by prices of the commodities and the bargaining power of the purchaser. The protection of consumer was often linked to the duty of the buyer (Buyer be aware). Today the consumer is more conscious of his rights besides his duties. Consumer behavior is also influenced by his societal duties besides other factors. The concept of Green consumerism, Ethical consumerism etc. has evolved as a response by the informed people as a matter of their concern for the deprived, abuse of human rights and environment protection etc. Consumer awareness and consumer rights are mutually supportive. Consumerism is now firmly established and the notion that he who defaults must compensate is the accepted norm. Consumer movements have gained wide acceptance in view of growing awareness amongst consumers.

When consumer behavior started being influenced by factors other than prices then standardization, advertisements, process of manufacture and labeling has been changing to suit the demand. Packaging norms that take care of consumer concern in matters of contents, price and ingredients now also express process and others to inform the consumer about environment protection etc. This trend was intended to generate consciousness among manufacturers and service providers to be more eco friendly and adopt acceptable practices also turned out to be a marketing strategy. Green Consumerism is a concept which

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1 Article 47 of Indian Constitution: The State shall endeavor to protect and improve the standard of living of its people and the improvement of public health as among its primary duties and in particular the State shall endeavor to bring about prohibition except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health

essentially considers the environmental costs involved in the process of any product manufacture. Green consumerism makes the conscious citizens to make informed choices while buying any product. International organizations found the potential in this and have developed tools such as eco labeling which will act as an authentication for these informed consumers. This have sometimes turned out to be marketing strategies rather then being environmental friendly.

Societal duties of citizens demand them to adhere to responsible behavior. This behavior has impact on trade resulting in encouraging or discouraging certain products on ethical or environmental grounds. This resulted in compelling manufacturers to produce products adopting environmental friendly practices. This resulted in competing for auditing, standardizing products and advertising for a different objective. As a result of this packaging norms have changed wherein there is greater emphasis to exhibit the ingredients and the process involved. This has not influenced the packaging as such. Packaging of commodities needs a major reform to reduce the amount of waste generated.

Waste generated from packaging is very huge and constitutes an important component of waste management. Packaging waste is often debated in an isolated sphere rather than analyzing in a comprehensive manner. Law relating to waste management does not consider green consumerism as an integral component nor as a possible measure to minimize generation of waste. A comprehensive approach to the problem would evolve sustainable practices suitable for the civilized Nations adoption.

Conceptual understanding and implementation of green consumerism are not the same even among the literate people. Hence though as concept green consumerism is acceptable it is not really adopted. This may be due to lack of awareness of the methods employed or unconscious of the repercussion at the particular movement. Hence an effort is made to study the possibility of integrating green consumerism concept into actual decision making**,** Indian consumer law and Municipal solid waste law shall be analyzed in isolation and then an effort will be made to integrate to explain how they can be made more effective.

Consumer Law in India

There are various legislations dealing with consumer rights such as Indian Contract Act, 1872; Drugs Control Act, 1950; Indian Standards Institution (certification marks) Act, 1952; Drug and Magic Remedies (Objectionable Advertisement) Acts, 1954; Prevention of Food Adulteration Act, 1954 now yet to be replaced by Food Safety and Standards Act, 2006; Essential commodities Act, 1955; Trade and Merchandise Marks Act, 1958; Hire purchase Act, 1972; Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975;

Prevention of Black marketing and Maintenance of Supplies of Essential Commodities Act, 1980: Essential commodities (Special Provisions) Act, 1981; Standard of Weights and Measures (Enforcement) Act, 1985; and Narcotic Drugs and Psychotropic Substances Act, 1985. Some significant consumer protection enactments of pre-independence time are the Sale of Goods Act, 1930; Agriculture Produce (Grading and Marketing) Act, 1837 and Drugs and Cosmetics Act, 1940. However, these legislations are enacted with a different purpose and incidentally they deal with consumer rights.

Consumer Protection Act of 1986 is the comprehensive legislation enacted with the purpose of consumer protection. The Act is in addition to the existing legislations hence it does not repeal the existing remedies. The Act is amended in 1993 and 2002 to extend its scope and application. The Act is intended to provide speedy and inexpensive remedy to the consumers. It has drastically changed the existing formal mechanism of grievance redressal. The remedy under the Consumer Protection Act can be sought from the redrassal agencies set up under the provisions of the Act. The Act contemplates three tier quasi-judicial redressal agencies:

- *District Consumer Forum*
- *State Consumer Dispute Redressal Commission (SCDRC)*
- *National Consumer Dispute Redressal Commission (NCDRC)*

The Consumer Protection Act has done away with the concept of locus standi to greater extent by liberalizing the accessibility to these forums. This legislation is one of the unique legislations in this context and has turned out to be beneficial to the downtrodden public as informed citizens can help them. A complaint can be made by[2] :

A) Consumer

B) Legal heir of the Consumer

C) Non-Governmental Organization (NGO)

D) Government

E) Any one on behalf of group of Consumers

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2 Section 2 (b) "complainant" means-
(i) a consumer; or
(ii) any voluntary consumer association registered under the Companies Act, 1956 (1of 1956)or under any other law for the time being in force; or
(iii) the Central Government or any State Government,
(iv) one or more consumers, where there are numerous consumers having the same interest;
(v) in case of death of a consumer, his legal heir or representative; who or which makes a complaint

A number of NGOs have been registered with the purpose of consumer protection in India after the enactment of the Consumer Protection Act in 1986. As per the Consumer Protection Act a complaint is maintainable in consumer forums if it relates to any of the following[3] :

1) Unfair trade practice

2) Restrictive trade practice

3) Defective goods

4) Deficiency in service

5) Excess price being charged

6) Hazardous goods or services being offered

The definition of consumer is also very broadly defined it includes not only a purchaser but also user and also any person who promises to pay in future. As the service sector grew extensively in India the cases under deficiency of service also increased. The sectors which were not earlier coming under the purview of Consumer Protection Act such as medical,[4] housing construction[5] etc. were brought under its domain by judicial interpretation and amendments. The District consumer forum is the first level dispute redressal agency it shall decide cases involving up to rupees 20 lakhs. There shall be appeal from the District Forum to the State Commission[6] and from the State Commission to

3 Section 2 (c) "complaint" means any allegation in writing made by a complainant that-
(i) an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;
(ii) the goods bought by him or agreed to be bought by him; suffer from one or more defects;
(iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;
(iv) a trader or service provider, as the case may be, has charged for the goods or for the service mentioned in the complaint a price in excess of the price –
(a) fixed by or under any law for the time being in force
(b) displayed on the goods or any package containing such goods ;
(c) displayed on the price list exhibited by him by or under any law for the time being in force;
(d) agreed between the parties;
(v) goods which will be hazardous to life and safety when used or being offered for sale to the public,—
(A) in contravention of any standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force;
(B) if the trader could have known with due diligence that the goods so offered are unsafe to the public.
(vi) services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety.

4 *Indian Medical Association* v. *V.P. Shantha* (1995) 6 SCC 651.

5 Amended by Act 50 of 1993, w.e.f. 18-6-1993.

6 Section 15. Appeal - Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of thirty days from the date

National Commission. The State Commission shall exercise original jurisdiction to decide cases involving up to 1 crore rupees and exercise appellate jurisdiction to decide cases appealed from the District forum. The National Commission shall exercise original jurisdiction to decide cases involving more than 1 crore rupees and exercise appellate jurisdiction to decide cases appealed from the State Commission.[7] The composition of these forums consists of a judicial officer as its president besides two members. It was held by the Supreme Court of India that the presence of non judicial members as the presiding officers of these redressal forums would act as a check against excessive technicality which judicial members generally employ.[8] Even the fee payable in the consumer forums is nominal, the Act originally contemplated no fee at all, however, to control vexatious litigations a nominal fee is introduced. The nominal fee is so nominal that it cannot check the frivolous litigation either. This is the spirit with which consumer rights are protected in India. The Act retained its image as a poor mans relief provider by providing inexpensive and speedy remedy.

Packaging Waste Law in India

India is a country with huge population, diverse economic back ground, vast geographic area and many of its country men are still illiterate and below the poverty line. The marketing strategies of the producers obviously do consider these aspects while designing their products sale and supply. Certain products are sold for less than a rupee also even today in this country. In view of this and to reach out to every one many products are packed in small sachets with small quantities as well. There are various products which are packed to retain their quality and quantity. Packaging is an accepted need however to give impetus to sale many times packaging generates more waste than required for packing a product due to added marketing strategies. All the waste generated through

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of the order, in such form and manner as may be prescribed:

Provided that the State Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not finding it within that period. Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner fifty per cent. of that amount or twenty-five thousand rupees, whichever is less.

7 Section l9. Appeals- Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 17 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:

Provided that the National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited in the prescribed manner fifty per cent. of the amount or rupees thirty-five thousand, whichever is less.

8 *Indian Medical Association* v. *V.P. Shantha* (1995) 6 SCC 651.

packaging by and large generally joins the bulk of municipal solid waste. Municipal solid waste is referred as house hold waste or non-hazardous waste. Certain amount of packaging waste constitutes hazardous waste however the bulk of packaging waste generally joins the municipal solid waste stream.[9] The major problem with the municipal solid waste is its quantity and continuity. Municipal solid waste envisages number of problems or nuisances in the form of odors, visual amenity, the airborne release of pathogens, ground and surface water contamination from leachates etc. Per head generation of waste in cities is far higher than in rural areas. There is a huge problem in identifying the space available for disposing this waste. Countries like Germany, France and others started realizing the problem as the territory of land is less the problem is even more acute in those countries. The law relating to municipal solid waste in India is the Municipal Solid Wastes (Management and Handling) Rules, 2000. These Rules are notified from the Rule making power vested in the Central Government under the Environment Protection Act, 1986.[10] The Municipal Solid Wastes Rules imposes the responsibility on municipal authority to manage the waste in

9 Municipal Solid Wastes (Management and Handling) Rules 2000, Rule 3(XV) defines "Municipal Solid Waste" as including commercial and residential wastes generated in a municipal or notified area in either solid or semi solid form excluding industrial hazardous waste but including treated Bio – Medical wastes

10 Section 6. Rules to Regulate Environmental Pollution

(1) The Central Government may, by notification in the Official Gazette, make rules in respect of all or any of the matters referred to in section 3.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the standards of quality of air, water or soil for various areas and purposes;

(b) the maximum allowable limits of concentration of various environmental pollutants (including noise) for different areas;

(c) the procedures and safeguards for the handling of hazardous substances;

(d) the prohibition and restrictions on the handling of hazardous substances in different areas;

(e) the prohibition and restriction on the location of industries and the carrying on process and operations in different areas;

(f) the procedures and safeguards for the prevention of accidents which may cause environmental pollution and for providing for remedial measures for such accidents.

Section 25. Power to Make Rules

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely-

(a) the standards in excess of which environmental pollutants shall not be discharged or emitted under Section 7;

(b) the procedure in accordance with and the safeguards in compliance with which hazardous substances shall be handled or caused to be handled under Section 8;

(c) the authorities or agencies to which intimation of the fact of occurrence or apprehension of occurrence of the discharge of any environmental pollutant in excess of the prescribed standards shall be given and to whom all assistance shall be bound to be rendered under sub-section (1) of Section 9;

(d) the manner in which samples of air, water, soil or other substance for the purpose of analysis shall be taken under sub-section (1) of Section 11;

accordance with the Rules.[11] The Government shall oversee the working of the municipal authority with regard to the management of waste.[12] Waste has to be collected, transported, stored, segregated and disposed of according to the Rules[13] .

Packaging waste management *vis-a-vis* Consumer Law

Consumer Law in India is rights oriented. The preamble of the Consumer Protection Act, 1986 makes it clear as it states:

An Act to provide for better protection of the interests of consumers and

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(e) the form in which notice of intention to have a sample analysed shall be served under clause (a) of sub section (3) of Section 11;
(f) the functions of the environmental laboratories, the procedure for the submission to such laboratories of samples of air, water, soil and other substances for analysis or test; the form of laboratory report; the fees payable for such report and other matters to enable such laboratories to carry out their functions under sub-section (2) of Section 12;
(g) the qualifications of Government Analyst appointed or recognised for the purpose of analysis of samples of air, water, soil or other substances under Section 13;
(h) the manner in which notice of the offence and of the intention to make a complaint to the Central Government shall be given under clause (b) of Section 19;
(i) the authority of officer to whom any reports, returns, statistics, accounts and other information shall be furnished under Section 20;
(j) any other matter which is required to be, or may be, prescribed.

11 Rule 4. Responsibility of municipal authority .-
1. Every municipal authority shall, within the territorial area of the municipality, be responsible for the implementation of the provisions of these rules, and for any infrastructure development for collection, storage, segregation, transportation, processing and disposal of municipal solid wastes.
2. The municipal authority or an operator of a facility shall make an application in Form-I, for grant of authorization for setting up waste processing and disposal facility including landfills from the State Board or the Committee in order to comply with the implementation programme laid down in Schedule I.
3. The municipal authority shall comply with these rules as per the implementation schedule laid down in Schedule I.
(4) The municipal authority shall furnish its annual report in Form-II,-
a. to the Secretary-incharge of the Department of Urban Development of the concerned State or as the case may be of the Union territory, in case of a metropolitan city; or
b. to the District Magistrate or the Deputy Commissioner concerned in case of all other towns and cities, with a copy to the State Board or the Committee on or before the 30th day of June every year.

12 Rule 5. Responsibility of the State Government and the Union territory administrations
(1) The Secretary-incharge of the Department of Urban Development of the concerned State or the Union territory, as the case may be, shall have the overall responsibility for the enforcement of the provisions of these rules in the metropolitan cities.
(2) The District Magistrate or the Deputy Commissioner of the concerned district shall have the overall responsibility for the enforcement of the provisions of these rules within the territorial limits of their jurisdiction.

13 Rule 7. Management of municipal solid wastes .—
(1) Any municipal solid waste generated in a city or a town, shall be managed and handled in accordance with the compliance criteria and the procedure laid down in Schedule-II.
(2) The waste processing and disposal facilities to be set up by the municipal authority on their own or through an operator of a facility shall meet the specifications and standards as specified in Schedules III and IV.

for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith.

The Consumer Protection Act, 1986 is mainly intended to protect the following Rights of the consumers[14] :

1) Right to Safety

2) Right to Information

3) Right to Grievance redressal

4) Right against Unfair and Restrictive trade practices

5) Right to access and education

Consumers are conceived to be exploited by the mighty corporate houses with their professional marketing strategies. Hence there is no responsibility on the consumers except those related to the terms of the contract wherever they might arise.

Other legislations such as The Standards of Weights and Measures Act, 1976 defines false package as: Section 2 (f) "false package" means any package which does not conform to the provisions of this Act or any rule or order made there under in relation to such package;

The provisions of The Standards of Weights and Measures Act relate to base units, weight, measurement etc. but do not consider waste generation as false package. Efforts are made to develop packaging norms sector wise such as norms for tobacco manufacturers, norms for drugs etc. however they relate to other issues such as health, safety etc. Waste management is not considered an issue while developing packaging norms in India.

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14 Section 6 Objects of the Central Council.—The objects of the Central Council shall be to promote and protect the rights of the consumers such as,—
(a) the right to be protected against the marketing of goods and services which are hazardous to life and property;
(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to protect the consumer against unfair trade practices;
(c) the right to be assured, wherever possible, access to a variety of goods and services at competitive prices;
(d) the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate forums;
(e) the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
(f) the right to consumer education.

Municipal Solid Waste Rules impose the responsibility on the municipal authority leaving the generator of waste. Polluter pay principle which is an accepted concept in International Law[15] and in Indian environmental jurisprudence[16] is not followed in the notification of Municipal Solid Waste Rules.

Conclusion

Consumer Protection Laws empower consumer without any corresponding duty towards waste management. Waste Management Laws do not empower the administration to act on generators of waste. It provides for softer approaches such as awareness creation, develop proper habits of waste collection etc.[17] Non point source generation of waste adds to the problem of regulation besides the fact that the regulation is hardly sufficient. The trend in India is moving towards privatization of services in waste management, private players may intend stricter enforcement of waste management regime without concern for consumer rights. Green Consumerism is the only proper alternative provided consumers are made aware and are influenced to adopt to waste management strategies. In country like India with huge human resource informed market behavior shall certainly bring in the desired change.

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15 Principle 22 of the Stockholm declaration:
States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.
The principle is accepted in more clear terms in the United Nations Conference on Environment and Development.
Principle 16 of the Rio declaration adopted by the parties at the United Nations Conference on Environment and Development is as follows:
National authorities should endeavor to promote the internalization of environment costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

16 *Indian Council for Enviro Legal Action* v. *Union of India* (AIR 1996 SC 1446)

17 Schedule II of the Rules : Organising house-to-house collection of municipal solid wastes through any of the methods, like community bin collection (central bin), house-to-house collection, collection on regular pre-informed timings and scheduling by using bell ringing of musical vehicle (without exceeding permissible noise levels);
In order to encourage the citizens, municipal authority shall organise awareness programmes for segregation of wastes and shall promote recycling or reuse of segregated materials. The municipal authority shall undertake phased programme to ensure community participation in waste segregation. For this purpose, regular meetings at quarterly intervals shall be arranged by the municipal authorities with representatives of local resident welfare associations and non-governmental organizations.

COMMENTS ON PROPOSED AMENDMENTS TO RIGHT TO INFORMATION ACT, 2005: NO IRON CURTAINS BETWEEN PEOPLE AND PUBLIC INFORMATION

Madabhushi Sridhar*

Holding file notings is nothing but stalling all the public information to the people. The bureaucracy and the other public officials should realize that information is key for every negotiation, more so in governance and decision making process.

The Right to Information Act, 2005 (RTI) is facing turbulence from the bureaucracy even before it celebrated its first birth day. The powerful lobby of the bureaucracy and other sections is successful in prevailing over the coalition government at the center and convince it to amend the law, which ultimately take the effect and purpose of the enactment. Termed as retrograde step, the proposed amendment, if succeeds, would be victory of forces interested in secrecy and kills the spirit of the access law because it envisages barring 'file notes' from access by citizens. File notes is every thing in the process of a decision making, and if that is blocked, it drops iron curtain on public records, which RTI aims to make available to people in general.

What is proposed to amend?

The amendments proposed to this Act are:

1. All file notings should be exempted except for social and development projects.
2. No cabinet paper would be disclosed even after a decision has been taken.

Both the amendments are fatal to the letter and spirit of the main Act of 2005. These amendments dilute the law much weaker than the earlier Government's Information legislation.[1] File notings were not exempted from disclosure even under Section 8 or any where else[2] . Confining it only to social and development projects is another pathetic limitation. Any file note be considered as not pertaining to social or development project, just to deny the access. It virtually blocks all the files of social life. The Cabinet papers were allowed to be disclosed if the decision is taken, which would include file notings,

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1 National Democratic Alliance Government's Freedom of Information Act 2002, which never came into force was repealed by United Progressive Alliance Government's Right to Information Act 2005.

2 This was also stated by Central Information Commission, in Appeal No. ICPB/A-1/CIC/2006.

deliberations in the cabinet and the material papers over which the decision depended. The UPA Cabinet attempted to deviate from earlier commitment by excluding every cabinet paper through the Proposal No.2 mentioned above.

What is file and file noting?

A file in public office is nobody's private affair.[3] Any such file contains various documents including file notings which indicate the process and steps involved in making a decision. It is not an individual officer's opinion note, but a compilation of different opinions and analysis of all the positions and application of rules to a particular situation so that a final authority takes an appropriate decision in public interest. File note is life of the file and source of the decision. File note is generally the part on which officers of different rank will write their comments and it is for the final authority like chief secretary or Chief Minister or Council of Ministers to take a decision. File note offers the reasons for the decision. Though the government takes a decision, it is taken for the purpose of people and their welfare. The claim of the government that it would 'reveal the decision but not the reason for it' is anti-democratic and against the norms of administrative law. If the file note is out of access, the reasons for the decisions become 'classified'. In democracy people need the reasoned decisions, reasons for decisions and not just decisions without reasons. To deny the reasons for decisions is an unreasonable decision of the UPA executive.

The 'Parivarthan', a voluntary organization, obtained 'file notings' of privatization of water management in Delhi, during 2005. The file notings revealed that Price Waterhouse Coopers did not even qualify in the preliminary round, but he World Bank twisted the arm of the Delhi Government to cancel bids, force rebidding and ultimately changed the selection criteria. File notings also revealed that some honest officers protested it. If Parivarthan did not expose it, the deal would have made the Delhi people to shell down more than ten times to present rates of water. It also revealed that how a son of VVIP was appointed as consultant by Delhi Jal Board without any advertisement or interview.

The file notings can save thousands of crores for a nation like ours. Enron is the example of a disastrous deal for a high cost electricity between Dhabol Power Company (of Enron) and Maharashtra Electricity Board, guaranteed by Government of Maharasthra and Government of India, which ran into trouble and ultimately closed down. All this could happen because the terms of agreement were kept secret and not revealed in spite of the demand from NGOs in Maharastra. The people need right to such information which will be hidden in invisible folds of file notings.

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3 Government of India appointed a working group on Promotion of Open and Transparent Government, the Report of Working Group, Ministry of Personnel, Public Grievances and Pensions, New Delhi, May 1997, p. 3.

Why bureaucracy loves their File notings?

The steel frame of the country, the bureaucracy loves their file notings and prefers to keep them close to their chest, because the file notings reveal them totally. So, they do not want it to be known on request. According to present RTI Law, file notings are not exempted from disclosure unless they fall under general clauses of exceptions and exemptions. However, the state machinery wanted protection to file notes. The Government first announced that the file notes will be made available only when decision is taken, but now reversing the decision.

Information under Section 4

If this amendment is passed, the definition of 'information' under the access law suffers a dent. "Information means any material in any form including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force".[4] The filenotings are covered under the expressions 'any material in any form" and 'opinions, advices'. The nature of file notings is inevitably that of advice, opinions, recommendations or suggestions etc., which are specifically covered by the above definition of 'information'.

Exempting file notings will limit the expressions such as 'file', 'information', 'opinions' and 'advice' in Section 2(f) in the Act. Similarly exclusion of notings would completely nullify the operation and the import of Section 4(1)(c) and (d) which requires every public authority to proactively "publish *all relevant facts while formulating policies* or announcing the decisions to affected persons" and "provide reasons for its administrative or quasi-judicial decisions to affected persons."

Section 4(1) (b) of the Act makes it mandatory for every public authority to publish amongst other things - "the procedure followed in the decision making process, including channels of supervision and accountability" and "the norms set by it for the discharge of its functions."

Section 8: File Notings and Cabinet Decisions

The category of 'file notings,' does not figure under Section 8 (1) of the RTI Act, which lists out the types of information that the government is under "no obligation to give any citizen. Thus, the file notings come firmly within the access as per the RTI Act. These notings,- unless they satisfy the criteria for exemptions under Section 8, which lay out the limited occasions on which

4 Section 2(f) of the Right to Information Act, 2005.

information can be withheld, - must be made public on request. Even where these falls within the Section 8 criteria file notings can be made public where the greater interest is served in disclosing the information.

Already the list of exemptions is too long and general under Section 8 of Right to Information Act, 2005 in India, which mentions "cabinet papers including records of deliberations of council of ministers.." but adds, "Provided the decisions and the material on the basis of which decisions were taken shall be made public after the decision has been taken". Even Cabinet papers which are exempt from disclosure, under Section 8(1)(i) of the Act are also subject to disclosure. The Act requires that not only these decisions be made public but the reasons and the material on the basis of which these decisions have been arrived at be made public after the matter is complete and over.

It is now proposed to amend so that the "material on the basis of which decisions were taken" is deleted from clause 'F' of Section 8. This would put cabinet notes, records and other documents based on which the decisions are taken, also out of the reach of access and out of Central Information Commission. Because the proposed provision says: "No cabinet paper would be disclosed even after a decision has been taken."

Power to Amend

The Government has every authority to amend this access legislation. Apart from this general power, Section 30 of the Act empowers to remove difficulties, hindrances and obstacles to give full effect to the goals and objectives of the law. As per the law Ministries can also recommend amendments for enforcing the right to access information.[5] The proposed amendments are neither initiated by ministries nor intended for removing any difficulties, but to destroy the accessibility to a maximum extent. If the amendment is really needed, it should have been based on the practical experience. The Indian access law also needs to be made difficult to amend as any political party at the office might me interesting in hiding any sort of information from the people. Finally, it is for the people to secure the hard-earned right to information.

It is a principle of administrative law that the Cabinet decisions and debates should be revealed to the people, unless they disclose any sensitive and security information. Government should understand that the secrecy or classification of information must be confined to security interests, confidential matters, privacy issues and trade related rights, and no more than that. In fact, the information is generated for the people as those files pile up on the initiative of a representation or complaint or requirement. A file in public authority is not compilation of documents containing trade secret or pieces of poetry copyrightable

5 Section 25(3)(g) of the Right to Information Act, 2005.

to the writer. It is the data generated, opinions sought, precedents analyzed, pros and cons discussed and impact on public exchequer examined, for advancing the public interest or answering a vociferous public demand, etc. In any democracy the discussion should precede the decision. That information is neither the property of the officers who express opinion based on their experience and performance of a legal obligation, nor the property of the Government. If the cabinet has preferred not to decide on a particular item of agenda, why should it not reveal the reasons for deferring the decision? Why not the people know who said what on that vital issue connected to the welfare and development of the people?

The Central Information Commission has held, in an appeal regarding TCIL, which unless the public authority clearly specifies that the file notings relate to commercial confidence or trade secret or intellectual property or available to TCIL in its fiduciary relationship, appellant should be given file noting on the document specified.

On December 1, 2005 Prime Minister Manmohan Singh had instructed the Department of Personnel and Training (DoPT) to exempt file notings on identifiable individuals, organisations, appointments, and matters relating to inquiries and departmental proceedings from the purview of the RTI Act. However, the Government had said that "substantive file notings" relating to plans, schemes, programmes and projects of the Government related to development and social issues could be disclosed. Reacting to this, Mr Kejriwal, the CIC wrote a letter to the center opposing the order. He described it as the first blow to the Act widely seen to be one of the most important pieces of legislation to have been enacted in independent India[6] .

As the backdoor methods did not work, and rulings from Information Commission are apparently opposing these attempts, the Union Cabinet on July 20, 2006 has announced decision to amend the law to exclude notings on files by officials from the ambit of this law so that the CIC's decision becomes ineffective.

The Union Information and Broadcasting Minister, Mr PR Das Munshi said: "Decisions can be conveyed, not in terms of details about what the under secretary or joint secretary wrote or what the secretary disapproved", he said, making it clear that details of the notings "who said what" at various stages of the decision-making would be out-of-bounds for the public. A proposal, which accedes to the UPSC's request that the sensitive area of its selection process be put out of the RTI purview, is also included in the proposed amendment.

6 See the author's book on *Right to Information Law and Practice*, 2006, Wadhwa Nagpur, pp. 85-96.

Unfortunately the Union is not hesitating to sacrifice the 'life' of access law to secure 'file' of decisions. There is a satiric remark on files in Secretariat, where the 'not approved' becomes 'note approved' at a later point of time, without any substantive reasoning. To add that letter 'e', what transpires under the table or behind the curtain is anybody's imagination. If the file notings are 'covered', the reasonless changes of the final decisions will never be 'discovered' and discussed. Hiding files and file notes amount to encouraging or hiding corruption, and allowing the official and non-official public servants not to be accountable.

Neither UK, USA nor Australia have exempted the 'file notes' from the access to public. In India, both the Judiciary and Parliament have been functioning without any adverse effects and it is only the bureaucracy that presently functions under this unnecessary veil of secrecy. Amending the law to take away file notings from the public domain, is a retrograde measure that may appease only that miniscule part of officialdom, that stands to get undue benefit from such secrecy and denies the people, the benefit of their own information, their empowerment and active participation in democratic decision making process.

The character of State and sovereignty is manifest in three important wings- Executive, Legislature and Judiciary. As the open trial is the basic norm of judicial enquiry, the courts always function in public, while every aspect of proceedings in legislature is reported in media or recorded and made available to all. Most of the legislative proceedings are being telecast live. The only wing that runs in secrecy is the executive. Neither the decisions at Council of Minister level or secretary level are not available to common people, which leads to absence of accountability of decision makers. Cabinet discusses and decides any issue for the purpose of people, but not inclined to disclose it, unless they are interested in making some decisions. Even if the decisions are made available by spokesperson of the cabinet, the reasons for decision, and different opinions expressed before they arrived at that particular decision are beyond the access.

The promotion of "transparency and accountability" in the working of public authorities - the stated object of this landmark legislation - does not stop merely with making the decisions of government public. It also lies - and critically - in making it possible for people to know on what grounds these decisions were taken. Access to file notings by officials is necessary to evaluate the process of decision-making, to understand such things as which options were considered, which were not, and why some were rejected. It is not proper to close the doors before they are fully opened and the 'enlightenment' transformed into empowerment.

BOOK REVIEW

LANDMARKS IN INDIAN LEGAL AND CONSTITUTIONAL HISTORY**

K.V.S.Sarma*

I have immense pleasure in writing a book review for 9th edition of V. D. Kulshrestha's 'Landmarks in Indian Legal and Constitutional History' which was revised by Prof. B. M. Gandhi and published by Eastern Book Company, Lucknow. This popular book encompasses within its pages up-to-date information with relevant case law up to October, 2009. The author also gave at the end six appendices and they contain: a) The Gentoo Code, b) The Union Territories, c) Alphabetical table of Indian Legal Periodicals and Law Reports, d) Index to Indian reference materials, e) Legal Research and Methodology in the Indian Legal System, and f) Instrument of Accession of Jammu and Kashmir to India. The author has divided the subject into twenty one chapters. The book contains latest information about: 1) Establishment of High Courts, its seat, jurisdiction, benches and its strength, 2) Supreme Court's observation about taxability of salaries of judges, 3) index of Supreme Court's right from 1947 to date, 4) Reports of Law Commission, 5) Life and work of Nani Palkhivala, a gem of the legal profession, 6) CLAT examination for entrants in law courses, and 7) SCC online's case Finder.

The material has been arranged systematically and with great care. The treatment of the subject is comprehensive and up-to-date. The author has presented the subject in a readable form. This book is a valuable addition to the literature on legal history. Although several books have been written by others on the subject, this one excels and is incomparable.

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** Author: B. M. Gandhi, 9th Edition 2009, Publisher: Eastern Book Company (P) Ltd., Lucknow, Page No. I–XLVI, 1-698, Price Rs.350/-

LAW & SOCIAL TRANSFORMATION**

K.V.S.Sarma*

I have immense pleasure in reviewing the first edition of P. Ishwara Bhat's book on "Law & Social Transformation" which was published by Eastern Book Company, Lucknow. A perennial topic of sociological inquiry is social change. Indeed, the formative period of sociology as a distinct discipline was characterized by large scale economic, political and social transformation. Certainly, the development of law and sociology occurs within different institutions and bodies of knowledge. Both are concerned with social relationships. Any aspect of social life can be subject to legal regulation. Jurists are concerned primarily with the activities of the Court. Sociologists are more interested in the inter connection between law and social institution.

This book adopts a very wide conception of law. It does not restrict attention to the activities of the Courts or to legal doctrine. It examines various sociological theories of law. The author divided the subject into four Parts. Part I contains four chapters and it deals with the theory, history, alternatives and the Constitution. Part II deals with the "Multiculturalism and social transformation". It is divided into six chapters. It deals with the religion, language, region and ethnicity. Part III deals with the "Social transformation by empowerment". It is divided into four chapters. It deals with empowering the backward classes, women and children. Part IV deals with "Modernization and social transformation". It is divided into six chapters. It deals with concept, family law, economic reforms, justice delivery system and participative democracy.

The author's writing style is outstanding. The author has masterfully crafted each chapter finding balance between laconic and loquaciousness. This text book is comprehensive in coverage and very well written. It treats an extensive number of topics in a clear and concise manner. This book is written in a lucid language for a simple man to understand and reader friendly. At the same time the book can be treated as a classic reference and a source material of study. The book is bound to be a tremendous source of information, guidance and reference to the researchers, teachers and practioners.

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I, Prof. (Dr.) Veer Singh hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
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