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Articles

Book Reviews

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Message from the Patron

The sixth volume of the University Journal titled "NALSAR Law Review" has been published on the eve of Ninth NALSAR Annual Convocation 2011 and it would be in the hands of readers shortly. The contribution of the Journal to promotion of legal studies and research is exhibited by the appreciation of the quality of published articles by the readers. The reader-base of the Journal has increased considerably over the years with successive issues of the Journal. The present volume of the Journal contains contribution by the distinguished scholars. The book reviews provide a bird's eye view of select books helping the readers to make an informed choice.

Quality legal research and standard publications constitute one of the important mandates of a leading Law School like NALSAR. Far reaching changes are taking place in the fields of legal education, legal profession and welfare legislation. The legal research and its publications by NALSAR has made a definite impact on government policy formulation and legislation. As a consequence, NALSAR has been commissioned many times both by Union and State Governments to hold consultations and make recommendations on proposed legislation. NALSAR has also prepared and submitted to the Government draft Bills on many issues from time to time. I hope, readers would find the present issue of NALSAR Law Review interesting and thought-provoking. Our readers response is always a source of inspiration for NALSAR Faculty and students to improve the quality of our research publications.

Veer Singh
Vice-Chancellor

Editorial

The Breadth and depth of the Scholarship in the present issue of NALSAR Law Review are impressive. There are research articles on Environmental Law, Food Security Bill, RTI, Agriculture and Climate Change, Medical Negligence and more. All these research articles deal with issues with far-reaching socio-legal implictions.

Justice Umesh C. Banerjee in his article titled "Sustainable Development in the Indian sub-continent's Jurisprudence and Political theories" has suggested focus on four different aspects: 1) Implementation of one global village theory, 2) Introduction of Model Law, amongst others, on – a) Preservation of Environment, b) Human Rights and c) Economic / Fiscal Law, 3) Adaptation of Model Law, 4) Introduction of Local Municipal Law in line with the Model Law. *Prof. Veer Singh* in his article titled "Combating Counterfeiting and Privacy: An Overview", observed that despite lack of well designed comprehensive laws on IPRs both at national and international levels, and Lack of effective enforcement mechanism, Indian Judiciary has been remarkably creative in controlling and curbing the menace. *Ms. Rachna Reddy,* in her article titled "Crisis in Indian Agriculture a temporary economic phase: Critical analysis of India as a welfare State", has tried to analyze the theory and reality of state welfare in India in the context of crises in the farm sector today. Ms. Roopa Sharma, in her article has assessed as to whether the PDS could be made more effective and result-oriented with in-built accountability instead of its remaining a scheme with only cosmetic significance.

Other research articles in this edition have socio-legal issues on which authors, on the basis of their studies, analysis and research have made definite recommendations.

We thank our contributors for their well researched articles. Our aim is to promote social justice, legal and judicial reforms through scholarship of our contributors.

Editorial Committee

SUSTAINABLE DEVELOPMENT IN THE INDIAN SUB-CONTINENT'S JURISPRUDENCE AND POLITICAL THEORIES*

Umesh C. Banerjee**

The doctrine sustainable development in the Indian sub-continent's jurisprudence and political theories has long-standing recognition. An ancient hymn from the Upanishads reminds us of this. '*Kautilya's Arthashastra*' in 300 B.C. – also refers to preservation of land and its surrounding nature. The concept thus is not new and India has a long cultural tradition of frugality and simple living in harmony with nature. The concept thus is not new and India has a long cultural tradition of frugality and simple living in harmony with nature. All great religions which have traversed in our country have preached the unity of humankind with nature.

Presently however, the doctrine of sustainable development is no longer in the realm of a concept to be shaped and focused differently in different circumstances but now it stands as an established principle and is placed at par even with the very concept of democracy, human rights and sovereign equality of states as stated by Prof. Lowe in his article on "sustainable development and unsustainable arguments."

The doctrine of sustainable development in the present phase though launched initially at the Rio declaration but the same has found its recognition both in major international legal instruments as also in number of judicial decisions since nineties.

In *New Zealand* v. *France Nuclear Test's*[1] case the International Court of Justice was rather categorical that the order was without prejudice to the obligation of states to respect and protect the natural environment. The Court stated that environment represents the quality of life and health of human beings and that includes unborn persons as well.

Similar is the situation in its judgment concerning Gabcikovo and Nagyamaros Projects between Hungary and Slovakia delivered on September 25, 1997 and has been categorical in its findings. It is in this context, it would be worthwhile to note the separate opinion expressed Judge Weeramantry in that decision.

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* Extract from a Lecture delivered by the Hon'ble Mr. Justice Umesh C. Banerjee to the students of NALSAR on February 22, 2011.

** Former Judge, Supreme Court of India and Founder Chancellor, NALSAR University of Law, Hyderabad.

1. ICJ Reports 1995, Para 64.

The Judge said -

> Had the possibility of environmental harm been the only consideration to be taken into account in this regard, the contentions of Hungary could well have proved conclusive.

Yet there are other factors to be taken into account–not the least important of which is the developmental aspect, for the Gabcikovo scheme is important to Slovakia from the point of view of development. The Court must hold the balance even between the environmental considerations and the developmental considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development.

The Court has referred to it as a concept in paragraph 140 of its Judgment. However, I consider it to be more than a mere concept, but as a principle with normative value which is crucial to the determination of this case. Without the benefits of its insights, the issues involved in this case would have been difficult to resolve.

Since sustainable development is a principle fundamental to the determination of the competing considerations in this case, and since, although it has attracted attention only recently in the literature of international law, it is likely to play a major role in determining important environmental disputes of the future, it calls for consideration in some detail. Moreover, this is the first occasion on which it has received attention in the jurisprudence of this Court.

Reference is also made to a decision by the WTO Appellate Body in the notable case of Shrimps and Turtles between United States and India, Malaysia, Pakistan and Thailand. The Appellate Body did express its concern for the maintenance of natural resources and for protection of environment. The acceptance of exception to the GATT Rules under Article XX may not stand in line with my concurrence as below but the fact remains that there was a specific recognition of the concept of sustainable development and protection of environment. It is at this stage I would also like to draw your attention to a judgment of mine when I was a Judge of the High Court of Calcutta in 1993[2] wherein I have stated:

"While it is true that in a developing country there shall have to be developments, but that development shall have to be in closest possible harmony with the environment, as otherwise there would be development

2. *Calcutta Wetland Judgment*, AIR 1993 Cal. 215.

but no environment, which would result in total devastation, though however, may not be felt in present but at some future point of time, but then it would be too late in the day, however, to control and improve the environment. Nature will not tolerate us after a certain degree of its destruction and it will, in any event, have its roll on the lives of the people. Can the present-day society afford to have such a state and allow the nature to have its toll in future – the answer shall have to be in the negative. The present-day society has a responsibility towards the posterity for their proper growth and development so as to allow the posterity to breathe normally and live in a cleaner environment and have a consequent fuller development. Time has now come therefore to check and control the degradation of the environment and since the Law Courts also have a duty towards the society for its proper growth and further development, it is a plain exercise of the judicial power to see that there is no such degradation of the society and there ought not to be any hesitation in regard thereto……"

Global maturity in recent years in regard to this concept is now a practical reality and not in the realm of consideration or mere ideas – but what does that expression 'ecology' mean and imply : 'Ecology' in common parlance means the study of home or the household of nature to be kept in order. George I, Clarke in his 'Elements of Ecology' has stated that every living thing is surrounded by materials and forces which constitute its environment and from which it must derive its needs and contact with the environment is inescapable.

In support of the concept of development, one school of thought, however, considers that industrial expansion ought not to be deterred on the concept of ecology, since ecology, it is argued, is simply a price which has to be paid for industrial development in a developing country. As a matter of fact, this school of thought firmly believes that ecological imbalance is a cost that one should be prepared to pay and not a problem at all. The issue arises on the basis of the aforesaid, however, is for consideration whether it is acceptable in 21st century, when there is a total global awareness in regard to maintenance of ecological balance, one would be justified in keeping their eyes shut in regard to this concept of ecological imbalance. In my view the answer cannot but be in this negative. Ecological imbalance undoubtedly is a social problem and in this context observations of mine in *Calcutta Youth Front* v. *State of West Bengal*,[3] seem to be rather apposite. In that decision, I have stated:-

> "An ecological problem, in contrast, is a special type of social problem. To speak of a phenomenon as a 'social problem' is

3. 1986 (2) CLJ 26.

> not to suggest merely, or perhaps at all, that we do not understand how it comes about; it is labeled a problem not because, like a scientific problem, it presents an obstacle to our understanding of the world but rather because – consider alcoholism, crime, deaths on the road – we believe that our society would be better of without it."

Subsequently, in order to avoid bio-diversity crises, I have had the occasion whilst in the Bench of the Supreme Court of India in *M.C. Mehta* v. *Union of India*[4] to state the law more or less in the similar vein and as such I do not wish to reiterate the same to avoid prolixity.

The Calcutta Wetland Judgment was pronounced on the apprehended danger of a severe bio-diversity crisis and in my view since the Law Courts exist for the society and the rule of law is meant to benefit the society, it is in discharge of that social duty and obligation and as a guardian-angel of the society, it is a duty cast on to the Law Courts to protect the society from environmental devastation but does that mean and imply stoppage of all developmental activities – In 21st century the response of the Courts ought to be assertive though not at the cost of environment – there shall have to be balance proper between environment and development so that both can co-exist without affecting the other and inter and intra governmental actions ought to proceed in accordance therewith and not de hors the same.

Sustainable development is not a fixed state of harmony but rather the process of change in which the exploitation of resources, the direction of investment, the orientation of technological development and institutional change are made consistent with future as well as present needs. It thus involves and requires reorientation of the entire perspective of governance not only in its internal affairs but in the international sphere. The rich and the poor nations exist and the same is a doubtless reality and the reorientation spoken of is to reduce the gap between the rich and the poor since participation of all countries – large, small, rich and poor, cannot but be said to be an invariable requirement to reach the goal of sustainable development in the matter of population, food, security, loss of species and genetic resources, energy, industry and human settlements being part of one goal and cannot thus be treated in isolation from one another.

Our Prime Minister Dr. Singh in a recently held conference on Sustainable Development in Delhi on February 3, 2011 last stated:-

"We have to act at two levels, the local and the global – in

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4. AIR 2011 SC 1544.

dealing with the issue of sustainable development. We require collective action at both levels so that good and global good can be aligned and can reinforce each other. Unfortunately this symbolic relationship weakens as societies develop and as population begins to rise. But modern societies cannot get away from the fact that if they damage the environment in the pursuit of material gains today, they do so by risking the well being of future generations to come. The solution lies in two dimensions. First, we must put in place a structure of regulatory policies which will prevent potentially damaging behavior. This is what we do by setting regulatory standards and enforcing them. I must emphasize that standard are not enough. They must also be enforced which is often difficult. It is also necessary to ensure that these regulatory standards do not bring back the license Permit Raj which we sought to get rid of in the wake of economic reforms of the early nineties. Second, we must deal with residual pollution that may be caused despite regulatory efforts. The principle that should be followed in such cases is that the polluters must pay. This will discourage the polluters and also provide means of financing the corrective steps necessary to counter the pollution caused. We in India are trying to do this by setting appropriate standards in several areas especially in the most energy using industries. As a general rule we are trying to establish the principle that the polluter must pay though that is much more difficult to achieve in all cases. Last year, for example we introduced a cess of 5% on the use of coal both either domestic or imported to build the corpus of a National Clean Energy Fund. Another aspect of sustainability is the management of common pool resources in India, as in many other developing countries, indigenous tribes, cattle rearing groups, as well as cultivators use and access common pool resources like forests, water bodies, pastures and farmland without clearly defined property rights. The traditional wisdom of the management of such commons was that they would tend to get over-used if individuals were left free to exploit them for their individual ends and therefore, these common resources, and related environment matters, should be managed by central authorities and governments. This conventional view is challenged now by new research in economics, ecology and the environment. The Noble Laureate,

> Dr. Elinor Ostrom and her associates have demonstrated that in such situations local action for managing common resources through activities by small user groups can lead to optimal results provided the stakeholders are adequately informed and also empowered to act. This has profound implications for policy makers. In India, we enacted landmarks legislation in 2006 popularly called the Forest Rights Act that seeks to assure the rights of millions of tribal and other forest dwellers by restoring to them both individual rights to cultivated forest land and community rights over common property resources. We hope this will spur local initiative on a sustainable use of resources, conversation of bio-diversity and maintenance of ecological balance."

That was Dr. Man Mohan Singh speaking at the New Delhi Summit on Sustainable Development. Attention ought however to be focused on two specific counts, *viz*., - (i) Population (ii) Human Rights – Conceptually population and development are inter-linked – since the development aspect is dependent on the population, though the latter cannot be said to be dependent on the former. Population is growing at rates out scribing reasonable exploitations of improvements in using health, care, food, security or energy supplies. There are thus, to reach a proper and effective sustainable development, two different dimensions of this theory namely, not only to have the education to manage the resources but to its control as well. Population explosion acts as a deterrent to the theory of sustainable development. To cater to the needs of population there thus must be made available food and shelter, energy and prospect and it is the efficient management of these four elements that can, apart from other factors, bring about a state of sustainable development. Education is a requirement so as to make available the ill-effects of uncontrolled growth of population to the people at large.

The doctrine of Sustainable Development, requires the promotion of values that encourage consumption standards that are within the bound of ecological possibility : Sustainable development requires that societies meet human needs, both by increasing productive potential and by ensuring equitable opportunities for all : Meeting the need should, however, include not only in present but inter-generational future needs as well.

Development thus must be people oriented so as to promote human dignity and welfare so as to provide for the basic needs of the people as regards shelter, food, health, education and financial capability for sustenance.

Human Right is thus the other sphere where proper and effective remedy ought to accrue so as to attain fuller development. While it is true Universal Declaration of human rights did take a concrete shape and stands accepted and adopted throughout the globe but the cry for protection is still on and that too irrespective of major international instruments. It is now time thus to recognize human rights in such a way so as to have it enforced in a manner proper and befitting : Development must also work to eliminate all forms of discrimination against women, both as regards employment, education, services and other entitlements. Empowerment of women shall have to be considered in a method and manner conductive to the 21st Century situations.

My views as regards environmentally sustainable development have been amply stated in two judgments noticed earlier and it be noted that promoting a rule of law is the ultimate objective in the development so that the civic culture gets properly ensured by the enforcement procedure established by a rule of law.[5]

Economic policies of individual countries and international economic relations both have great relevance to sustainable development. The reactivation and acceleration of development requires a dynamic and a supportive international economic environment is crucial. The development process will not gather momentum if the global economy lacks dynamism and is beset with uncertainties. Neither will it gather momentum if the developing countries are weighted down by external indebtedness: If development finance is inadequate, if barriers restrict access to markets and if commodity prices and the terms of trade of developing countries remain depressed the doctrine suffers to the detriment of the entire developing world. The record of the 1980s was essentially negative on each of these counts and needs to be reversed. The policies and measures needed to create an international environment that is strongly supportive of national development efforts on this direction. International cooperation in this area thus should be designed to complement and support – not to denounce domestic economic policies, in both developed and developing countries if global progress towards sustainable development is to be achieved.

The Brundtland Commission asserted that only economic growth can eliminate poverty. It is the UNCED's efforts to put on record that economic growth cannot be based on over exploitation of the resources but must be managed in such a way so as to enhance the resource base and on a global

5. Vide Harward International Law Journals, vol.36, p.307.

consensus. Thus economic growth is the requirement of the day and the need of the hour in order to achieve sustainability or sustainable development.

It is noteworthy; however, that in the pre UNCED period say 1990 there was no call as such for an international participation as regards the sustainable development. The issue mainly was development and environment thus a restrictive one and it is in Rio Conference only that such an extension of the environmental protection has been thought of. Agenda 21 has been the foremost one in such an international participation and this Agenda stands composed of four sessions, namely:-

i) Social and Economic Dimensions:

ii) Conservation and Management of Resources;

iii) Strengthening the Roles of Major Groups;

iv) Means of Implementation

The challenges of environment and development are daunting. The real work of integration of environment and development lies ahead. The survival of mankind rests on the implementation of the concept of sustainable development. The agreements at UNCED mark the beginning of an international political will to take the necessary steps to protect the earth. What the mankind needs is to supplement the framework conventions adopted at Rio with the adoption of specialized protocols. At the first meeting of the Parties to the Convention on Biological Diversity held in December 1994 at Nassau, Bahamas, India demanded immediate and adequate safeguards against hasty experimentation and use of Genetically Modified Organisms (GMOs), since these could have unimaginable repercussions. The indiscriminate and unregulated use of GMOs poses a threat to the mankind which can only be checked through a legally binding agreement. It is, therefore, necessary to adopt clear comprehensive and legally binding international protocol on bio-safety under the convention on bio-diversity.

The Convention on Climate Change does not contain specific targets and timetable for the reduction of greenhouse emissions. In view of the horrifying threat of the extinction of mankind as a result of global warming, the Climate Change Convention needs to be supplemented by a protocol containing specific targets to be followed by the States. This would equip the Convention with necessary authorities to implement the concept of sustainable development.

It is in this context Dr. Singh in the New Delhi convention stated:

> "The growth in environmental awareness and the capacity to manage local environmental problems" is a very positive

development. However, local or national action would be of no avail when the externalities cross natural boundaries, as in the case of climate change. For example, even if India were able to eliminate all its greenhouse gas emissions. We will not make a significant difference to our climate since our emissions account for only 4 % of the global total. The solution for this particular problem clearly lies in coordinated global action. Our view has been that those who have been primarily responsible for the build up of green gases and who have the greatest capacity to act should bear the brunt of the responsibility. Developing nations are obviously much less culpable, and have a much greater need for continued growth. These countries should be helped to achieve sustainable development paths. The most recent Conference of Parties to the UNFCCC at Cancun in Mexico did not resolve these problems, but it did produce some modest results. I compliment Mexico and its leadership for its outstanding leadership and stewardship of the Summit, and for achieving some forward movement. This shows that with collective will, building a meaningful international consensus it still possible even though it is turning out to be more difficult than before. India, China and many other developing countries have all responded with significant voluntary goals and specific plans on emission intensity reduction. But, if we have to tackle global inertia, we need to see clear commitments from the industrial countries on emission reduction targets for 2020 that are consistent with the Copenhagen goal of containing the likely temperature increase to no more than 2 degree centigrade or less. We do not have yet a response from the industrialized countries which is consistent with meeting that objective. So, here is a viable agenda for concerned global action to deal with the problem of climate change".

The Indian Supreme Court has been for quite some time now dealing with the issue of environment rather candidly with a specific direction as regards the avoidance of bio-diversity crisis. The efforts, starting from the decision of the *State of H.P.* v. *Ganesh Wood Products*,[6] is still on and from the year 1995 at least in 20 doctrine of sustainability but law courts of country cannot formulate an international policy and it is where the concept

6. 1995 (6) SCC 363.

will have to have its stronger and deeper foundations in order to build consensus pertaining thereto.

Thinking Futuristically

It may be a solution or at least attention may be focused on four different aspects:

i) Implementation of one global village theory

ii) Introduction of model law, amongst others, on –

a) Preservation of Environment

b) Human Rights and

c) Economic/ Fiscal Laws

iii) Adaptation of Model Law

iv) Introduction of local municipal law in line with the model law – So that implementation of the model law could be effected as in the model law in the matter of settlement of disputes through arbitration (uncitral model).

Thank you all for your very kind attention. In particular, I must thank the Vice-Chancellor of NALSAR University for his very kind invitation extended to me.

Good luck to you all! God Bless!!

COMBATING COUNTERFEITING AND PIRACY : AN OVERVIEW*

Veer Singh**

Counterfeiting and Piracy along with all cognate expressions like passing off, faking includes wide range of illegal activities linked to IPR infringement. Spread of Counterfeit goods (Commonly called knock-offs) have become Global. Traditionally, counterfeiting was associated with money-laundering, fake documents etc. Counterfeit is an imitation which is fake or sometimes better than the original made usually with the intent to deceptively represent its content or origins, thus, increasing sales appeal due to the reputation of the original brand product.

Magnitude of the Problem

Although adequate and credible research data may not be available, the problem of counterfeiting and Piracy is more prevalent in developing and poor countries. China and India figure very high in the list. Moreover, pirated goods are manufactured and sold more in small towns and villages where surveillance is weak and relatively higher profits make it an attractive proposition. Counterfeiting and Piracy are on the increase the world over via criminal networks and organized crime. The international trade in pirated goods may be in excess of US$500 billion on rough estimate. This amount is larger than the Gross domestic product of more than 100 countries. The threat is more serious in cases of pharmaceuticals, drugs, optical disks, cosmetics, electronics, automobile parts, food and drinks, software, tobacco and house-hold gadgets and garments.

According to European Commission, in terms of overall seizures of quantities, China is the principal source with 79% of all articles seized originating from China. Counterfeit industry accounts for 8% of China's GDP. In Pharmaceutical sector, India and UAE are the principal sources accounting for 31%, followed by China. Together, these three countries account for 80% all Counterfeit medicines.

The Indian Scenario

After China, India figures most frequently in Counterfeiting and Piracy.

a) Fake Medicines constitute 15 to 20% of total market.

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* Extract from keynote paper on "Counterfeiting and Piracy" presented at One-Day Seminar on "Intellectual Property Rights" organized by CII at the SVP National Police Academy, Hyderabad on August 31, 2010.

** Vice-Chancellor, NALSAR University of Law, Justice City, Shameerpet, R.R.District, Hyderabad.

b) 40% of Music Productions are copied and sold illegally and loss comes to 600 crores annually.

c) Likewise, Bollywood makes more films than Hollywood, yet its revenue is only 2% of Hollywood. Counterfeiting and Piracy costs Indian Entertainment industry a loss of US$ 4 Billion and loss of approximately 800,000 jobs annually. India has the highest level of Piracy of films in all the English -speaking countries. Hindi movie "KAMINEY" was down-loaded over 350000 times on BIT TORRENT with 2/3 down-loaders located in India. This is just Online piracy Offline piracy with CDS and DVDs is in addition India ranks Fourth in all sorts of illegal downloads after US, UK and Canada.

d) One in every three automotive parts is fake and this accounts for 37% of the total market share.

e) 10% of major soft drinks and 10 to 30% of cosmetics, packaged food are fake.

A random survey of registered Indian Companies reveals that more than 60 companies start with the word "NIKE", 65 with the name "ROLEX, 217 companies with the word "INTEL". This phenomenon is not limited to multinationals only. 136 companies start with the word "TATA" and over 400 with the word "RELIANCE".

Factors that lead to Counterfeiting and Piracy

a) Generally, people perceive counterfeiting on a victimless crime.

b) Lure of High Profit Margins: Pirated and Counterfeit goods and service are cheap to produce because (i) No taxes are paid (ii) Labour employed is cheap (iii) sometimes child labour are employed with no compliance with labour standards.

c) The buyer and end-user save upto 20 to 60% on the price of branded goods

d) Some consumers buy counterfeit either unwittingly or they can not distinguish between the fake and the genuine.

e) Sometimes buyer buy counterfeits knowingly and deliberately because they are cheap and such fakes do not harm their health and safety. One would willingly buy a fake garment but may not like to buy a fake medicine.

f) Counterfeiters flourish because of lesser risk of detection and lack of certainty of penalties. Police and other authorities have other priorities and treat piracy and counterfeiting as petty crimes. Sometimes, there is lack of political will and enforcement is weak. Unscrupulous counterfeiters may have political protection and can pay hush money.

g) Sometimes, counterfeits are produced in the same factory which produces authentic products, using the same material. The factory owner, unknown to the trade mark owner, orders intentional "OVER-RUN". Identical manufacturing and material make this type of Counterfeiting impossible to detect and distinguish the product from the authentic article.e.g. Production contractor manufactures 5000 articles against an order of only 2000 articles and excess products are of the same quality and standard.

h) Another serious practice which promotes counterfeiting is the manufacture of an entirely NOVEL product, using quality material or incorporating more features in it than in the genuine product and by using prominent brand names and logotypes. The example is the imitation "NOKIA" cellular phones with features like WiFi, touch screens or T.V. which are not available in the original NOKIA.

i) Lack of effective National and International legal framework, lack of effective technological and electronic detection systems and Jurisdictional problems encourage the counterfeiters, particularly, on-line pirates.

j) Some of the companies which are victims of counterfeiting silently suffer because of the fear that their brand name would be impacted adversely with the exposure, sales would go down and consumers may switch to other brand products.

k) Piracy and Counterfeiting in some cases like music, films, perfumes has become a parallel industry and some Governments may be deliberately indifferent because pirated products provide local employment and earn much needed money.

l) Sometimes, unfriendly conditions, unreasonably high pricing, and anti-competition practices at the cost of public interest promotes counterfeiting and piracy and consumers with low purchasing power buy cheaper counterfeit products because they cannot

afford genuine high-priced goods. Anti-competition practices must be curbed with iron-hand through competition laws. Compulsory licensing should be introduced by statutory authorities wherever public interest so demands.

m) Some relate counterfeiting to Globalization. More and more MNCs move manufacturing to third world where labour is cheap and laws are weaker and they earn higher profits. The new producers do not owe any loyalty to the MNC and feel that MNCs earn profits only through advertisement of brand products, and therefore, they see the possibility of removing the MNC as a middleman and reach the consumer direct

n) The advantage of anonymity, flexibility of counterfeit operations from easily movable sites, low investment, lack of legal accountability and quick movement to other jurisdictions where IPR legislation and enforcements are weak are the factors that encourage Piracy and Counterfeiting.

Impact and consequences of Counterfeiting and Piracy on Stake-holders

These illegal activities have multiple adverse direct and indirect effects on various stake-holders.

Impact on National economy, security and welfare

- Loss of Revenue due to tax evasions
- Loss of jobs
- Workers' exploitation, due to low wages, unsafe and unhealthy working conditions,
- Exploitation of women,Child Labour and illegal immigrant workers
- Negative impact on environment and public health
- Criminals, terrorists and the corrupt flourish
- Foreign direct investments flow is lower
- Foreign trade structure and volume may suffer on account of distrust about quality of products.
- Higher costs of anti-counterfeiting operations.

Impact on entrepreneurs, Investors and Manufactures

- Innovation and creativity is undermined
- Damage to brand value and goodwill
- Lower sales and profits of the enterprise
- Costs of litigation for enforcement of IPRs and other Rights.
- Reduced incentive for investment and expansion of business

Impact on consumers / buyer and end-user

- Higher exposure to health and safety risks
- Experience lower consumer utility due to poor quality
- Total or partial loss of money due to very low quality.

Existing Anti-Counterfeiting Systems

Today, counterfeiting is a global phenomenon and in varying degrees, it happens in all countries. India, probably after China, ranks second in manufacturing, marketing and use of counterfeit products. As such, control strategies have been evolved both at international and national levels. As stated above, counterfeiting is increasing for variety of reasons like lack of well articulated policy, legal frame-works and enforcements.

International Legal Framework

Counterfeiting in goods and services happens off-line in the real world and on-line in the virtual world of cyberspace. Inter-governmental initiatives include a comprehensive multilateral legal framework within W.T.O. as well as cooperation in number of specific fields. On enforcement side, WIPO (the World Intellectual Property Organization), Interpol, World Customs Organization, and World Health Organization are supporting specific initiatives. TRIPS (Trade Related Intellectual Property Rights Agreement) contains a comprehensive legal frame-work for protection of various IPRs. TRIPS has evolved certain standardized norms regarding Intellectual Property Rights, has proscribed uniform procedures for ratifying States to implement through their national laws. India, being a signatory of such agreements, is obliged under Article 253 of the Indian Constitution to implement the same through appropriate national laws.

The merit of the TRIPS agreement is that it seeks to universalize the Intellectual Property Rights and to bring about uniformity of basic laws and procedures without undermining the national legal systems. Thus such

agreements enable the nation States to meet the challenges of Counterfeiting and Piracy against Intellectual Property Rights. TRIPS introduced Intellectual Property Law into international trading system for the first time. TRIPs ratification is necessary for W.T.O. membership and all members must enact TRIPS Compliance Law to have access to various International Markets. TRIPS have a powerful mechanism for enforcement through WTO Dispute Settlement mechanism.

However, the ground reality on piracy and Counterfeiting is a matter of serious concern. For example, trademarks of reputed companies and names of well-known personalities have been being registered and misused as domain names. Situation became so alarming that even the US Government had to issue a White paper containing policy statement on management of Internet names and addresses seeking international support in this direction. As a consequence, the Internet Society, Incorporated in the US (ISOC) took initiative and Internet assigned Number Authority (IANA) also joined which led to the establishment of International Adhoc Committee (IAHC).

The International AdHoc Committee (IAHC) which is an international multi organizational body, is specifying and implementing policies, process and procedures concerning Top Level Domain Names.

The main steps taken by the authority which works under the Charter include:

i) Internet Trade Market Domain Name Spaces to be created

ii) User Friendly directories to be published and IAHC Report to be implemented.

However, major burden of enforcement of the IPRs against the counterfeiters lies with National Governments only. At international level, the requisite cooperation and consensus on some critical issues are yet to evolve. Moreover, some National Governments have yet to enact, amend and upgrade their Laws for effective enforcement. Moreover, there is no International Convention so far on extradition of counterfeiters and Jurisdictional problems are a big hurdle in brining Counterfeiter to Justice.

The Indian Scene

India has an excellent track Record of putting together a sound National Policy and Laws on Counterfeiting. At macro-level, the perception that enforcement mechanics in India are ineffective and slow may be only partly true. However, tide is turning against counterfeiter in India. The

important Laws that exist in India which directly and indirectly deal with Counterfeiting and Piracy include:

- The standards of weights and Measures Act 1956
- The Drugs and Cosmetics Act, 1940
- The Copy Rights Act 1957
- Indian Trade Marks Act 1999
- The Patents Act 1970
- The Customs Act 1962
- The Information Technology Act 2000
- The Intellectual Property Rights (Imported Goods) Enforcement Rules 2007

One of the major institutional deficiency in these statutes is that some of these do not treat violation of Intellectual Property Rights (IPRs) as criminal act and wherever they do, they still stress on 'Mensrea' as one of the essential component of such offence. The Indian Patent Act, 1970 and the Design Act, 2000, provide only for civil liability. Though the Copyright Act 1957 and Trade Mark Act, 1999, provide for criminal liability but sanctions are highly deficient and ineffective.

Domain Names is new electronic version of the traditional Trade Marks and the area of conflict is that registration of Trade Mark is governed by the Trade Marks Act, 1999, whereas registration of Domain Names on the Internet is done on the first come first served basis without any direct governmental control. Mostly registration of Domain Names is done by private organizations without any territorial limits and without any prior check of earlier Trade Marks registered under Municipal Laws of different countries.

In fact, Department of Electronics, Government of India, is exercising some control over the registration of Domain Names whereas in US and U.K. Such registration is an easy process which has led to mushrooming of registration of the Domain Names. There was an advertisement in the "Times of India", May 7, 1997 with the heading "Internet Property Auctions". Some important Domain Names which had already been picked up and were later sold back to the owners like BJP**,** Times of India, ONGC, TATAs and others. The advertisement also mentioned that "some Domain Names are still available". The minimum auction bid was stated to be U.S.$ 1500 at the time of closing. In fact, the procedures evolved by the Department of

Electronics, Government of India have been more effective in controlling the misuse of Domain Names on account of some specific requirements like an organization seeking **Domain Name registration should have:**

a) Its office in India

b) An administrative contact in India, and

c) An IP address with specific location in India

Unless these requirements are met, Domain Name can not be registered in India. One of the effects of the aforesaid procedure has been that the volume of registration of Domain Names has been very low in India.

The proposed Indian legislation seeks to strengthen protection of IPRs further. The Trade Marks (Amendment) Bill 2007, tabled in Parliament, seeks to make Trade Mark applications analogous to patent cooperation Treaty Filings. There is a proposal to enact the Optical Disc Law under which a license would be a prerequisite for manufacture of CDs and DVDs with secret coding on each disc for tracking. Again, the Innovation Act is on the anvil to promote research and innovation to evolve cutting-edge technologies including ones to detect and control counterfeiting and piracy.

The Judicial Response

There have been numerous judgments in India on infringement of Trade Marks through Domain Name registration in UK, Spain, Italy, France and others. Depending on the nature of the infringement, these violations have been called, in the absence of any standard terminology, by various names like Cyber-squatting, Passing-off, Name-grabbing etc. Nearer home in India, when a Website called htpp:/marks and Spencer.co. UK came up, Marks and Spencer Private Company Limited had to seek judicial remedy against the British Company named 'One in a Million' for a restraint order. It was held that the name Marks and Spencer could not have been chosen for any other reasons except that it was associated with the well known retailing group.[1] In another case, it was held that the Internet domain names are of importance and can be valuable corporate assets and that a domain name is more than an Internet address. A company carrying on business of communication and providing services through the Internet, carried a domain name "REDIFF" which had been widely published. The defendant company also started using the same domain name transcripting it as "RADIFF". It was found that the only object in adopting this domain name was to trade

1. *Marks and Spencer PLC* v. *One in Million*, 1998 FSR 265.

upon the reputation of the plaintiff's domain name. An injunction was ordered against the defendant in use of the said name."[2]

Despite multiple Laws on IPRs and lack of effective enforcement mechanism, Indian Judiciary has been remarkably creative in controlling and curbing the menace. Indian Courts have been fairly liberal and progressive in granting orders restraining defendants overseas in cases where infringement takes place through a website such as Domain Name infringement or on-line sale of counterfeit. In *Tata Sons* v. *Ghassan Yacoub*,[3] an injunction was granted against registration of Domain Name "Tatagroup.com" where the defendant was in New York. In *Laxmikant Patel* v. *Chetanbhat*[4] and *Microsoft Corporation* v. *Mr. Kiran*[5] order known as ROVING ORDERS on ex-parte injunctions, search and seizure and appointment of Local Commissions and Receiver were passed. In *Time Warner* v. *Lokesh Srivastava*,[6] punitive and exemplary damages were awarded.

Most common problem is that manufacturers often fail to obtain timely relief as identity of defendant is not easily ascertainable. The problem can be overcome by flexible open-ended Orders known as "JOHN DOE" Orders which operate against any potential defendant in regard to seizure of counterfeit products wherever they are. One such order was passed by Delhi High Court in *Taj Television Limited* v. *Rajan Mondal*.[7]

Perspective Planning for Multi-prolonged Anti-Counterfeiting strategy

To meet the challenge of Counterfeiters which has become global with a very large magnitude and intensity, the International Comity of nations and the National Governments have to pool their resources in terms of fullest cooperation to plan for and operationalise multi-prolonged Anti-Counterfeiting strategies at various levels.

Legislative Response

- International Convention on Extradition of counterfeiters.
- Consolidation, review and revision of national laws to make them compatible with TRIPS.

2. *Rediff Communication Limited* v. *Cyberbooth* , AIR 2000 Bom. 27.
3. 2004 (29) PTC 522 Del.
4. AIR 2002 SC 275.
5. 2007 (35) PTC 748 (Del).
6. (2006)131 Comp Lab 198(Delhi).
7. FSR 2003 (407).

- Counterfeiting be made universal cognizable offence.
- Simplification of procedures for detection, prosecution and speedy trial of counterfeiters.
- Anti-competitive practices to be curbed in larger public interest.
- Suspension and denial of licenses for manufacture to counterfeiters.
- Rigorous penalties including exemplary fines to make counterfeiting prohibitively expensive.
- Fines to be used for funding of anti-Counterfeiting operations.

Technological Response

- Adequate and reliable data collection on counterfeiting.
- IP registration to be made mandatory
- Safety measures like Hall-Marking, Secret Hidden Codes & Bar Codes to be made mandatory.
- Customs surveillance technology be made effective.
- Electronic data pool on identification of counterfeiters (Finger-printing, IRIS and Bio-metric identification)
- Computer forensics and other evidence collection methods to be made scientific and credible

Professional Response

- Computer Forensics should be compulsory subject in Law Schools.
- Specialized training of Judges, Police Officers and Lawyers.
- Special Courts to be set-up.
- Restorative justice to the victims of counterfeiting.

The Social Response

- Legal Literacy and consumer awareness through formal and informal methods
- Social action litigation by social groups
- Initiative by stakeholders, including, Consumer Associations, Chambers of Commerce and Industry and health Organizations.

- Extensive publicity of names of convicted counterfeiters
- Expulsion of counterfeiters from Business and Trade Associations.

CRISIS IN INDIAN AGRICULTURE A TEMPORARY ECONOMIC PHASE: CRITICAL ANALYSIS OF INDIA AS A WELFARE STATE**

Rachna Reddy B.*

Abstract

This academic paper seeks to critically analyze the present state of crisis in Indian agriculture. The startling number of farmer suicides is the ultimate result of a variety of distorted and catastrophic policies. Whether the MSP decided by the government, contributed to the farmers debt with no research on remunerative pricing based on the current market, and production costs, is a controversial issue, needing resolution. This paper analyzes whether India as a Welfare State can be justified in reality or is a mere myth, keeping the present agricultural crisis in perspective?

Introduction

'Farmer's India,' ('*Rythu Bharatam*' or '*Kisan Ka Bharat*') was the catch phrase and a manifestation that India was, not too long ago. But, today the very survival of the farmer who ploughed his land and most importantly fed the masses of India is struggling for his very survival and has knocked on all possible doors and exhausted all his remedies in trying to merely live and earn an honest livelihood. The crisis prevalent in agriculture in India today, did not come about overnight, but has been the result of governmental apathy and ill advised policies over the past two decades at least.

The Constitution of India provides for a socialist welfare state, where the aspirations of the people and what the government should aspire to provide for the people in the very ambitious Directive Principles of the State. But, the present state of crisis in the most primary sector of production in India, i.e., agriculture requires immediate action that possibly cannot be resolved merely by attempting to remind the government of its responsibility on being elected by the people. Their election manifestoes had prominently included removing agriculture from the present state of doldrums.

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Crisis in India's Primary Sector: Agriculture

Agricultural sector continued the negative growth trend last year 2009 while all other sectors showed a positive growth trend. Approximately 118 crore of Indian population depends on agriculture for their food consumption.[1] Further, the Indian agriculture also provides for animals and raw materials for the industries. Approximately 14.5 crore families are involved with agriculture for their sustenance and 12 crore agricultural labourers depend on agriculture and seasonal crops for their daily wages.[2] Furthermore, approximately 9.5 crore families are dependant on other allied aspects of agriculture for their livelihood.[3]

In 2003 when the government thought that food grains were in excess they decided to negligently dispose off 7.5 lakh tonnes into the sea.[4] In a country where a large number of the population is well below the poverty line and a lot of the families are struggling to obtain 2 square meals this kind of massive, large scale wastage shows the utter failure of the government to even comprehend the disaster in the making. M. S. Swaminathan, an acclaimed plant geneticist who heads India's National Farmers' Commission and a pioneer of the 'Green revolution' of the 1960's has said that: "Economic growth averaging 9% a year fuelled by manufacturing and services has masked the crisis in the countryside."[5]

The disastrous state of the agricultural sector and the continuing downward trend of production are exemplified by the following figures. In 2007-2008 our government has imported 60 lakh tonnes of wheat, 35 lakh tonnes of pulses and 80-100 lakh tonnes of cooking oil. The stagnation of food output and the pervasive struggle with lack of credit facilities, crop failures and high debt have been persistent crisis that the Indian farmer and the entire agricultural sector are facing today.[6]

Industrialization Bias and the controversy about Special Economic Zones

The kind of economic input and encouragement that the government is giving to industrialists in comparison to agriculture is indeed worth

1. Nagendranath, Erneni, Handbook published by 'Rythanga Samakhya Andhra Pradesh,' (a farmers' organization) (2010).
2. *Ibid.*
3. *Id.*
4. *Id.*
5. 'Green Revolution pioneer sees crisis in India's agriculture,' Economy and Politics, http://www.livemint.com and The Wall Street Journal, (Jan, 10, 2008) accessed on 24/01/2010.
6. *Ibid.*

reporting and considering. For the development of an industry the government is providing land at a cheaper rate compared to the market rate, providing them with substantial credit facilities at low interest rates, providing concessions on interest, tax benefits and reduction where they are not expected to pay for a specific number of initial years, water and continuous uninterrupted supply of electricity.

Recently, under the controversial SEZ (Special economic zones) the industries get several more benefits for their development. In 2009-2010 government has given concessions in customs duty, excise, corporate and income tax worth 4,98,500 crore reduction and even did away with the surcharges on corporate tax. Recession packages for industries in addition to the above is 1,66,000 crores.[7] Just as the Chinese inspired SEZ's for industry impetus are being championed by the government, M.S. Swaminathan is of the opinion that rings true in the present agricultural crisis is that Special Agricultural Zones to regiment and improve agricultural produce and reduce widening disparities to urgently save the Indian agriculture sector facing extinction, should be the government's urgent priority, along with administrative support, infrastructure and market support.[8]

When it comes to agriculture, there are several restrictions that agriculturists have to follow, i.e., a land ceiling at 25 acres for wet land and 54 aces for dry land, which is not scientific at all, whereas hypocritically the industries have no restrictions on the amount of land they can own. Furthermore, other than the fertilizer subsidy there are no other facilities that the government is ready to give agriculturists. No viable credit facility.

In the midst of widespread protests against the SEZs in the face of stagnation in agriculture, where food grains are being imported, the present global picture that India paints for the world is that of 'Shining and prosperous India,' renowned for its science and technology, but the simmering discontent of the masses involved with the present disastrous state of agriculture is being shrouded and ignored by the government.[9]

The SEZ Act of 2005 notified about 400 economic zones, most of which were fertile agricultural lands for the purpose of commerce and industry. It has been estimated by Khasanoki a writer that about 5 million hectares of land has been acquired by the government for purposes other than agriculture during 1991-2003, which is almost half of what was acquired

7. *Supra n.* 1.
8. *Supra n.* 5.
9. Aerthayil, Mathew,'Agrarian Crisis in India is a creation of the Policy of Globalization,' Mainstream Weekly, Vol. XLVI, No. 13, (March 15, 2008), accessed on 15/10/2010.

in the past 40 years before 1991.[10] This is proof of the blatant manner in which the government is resorting to taking away the right to life including livelihood of the poor farmers by leaving them with no hope of rescue.

The Infamous Minimum Support Price (MSP) and its Negative Implications

Industrialists or even small businessmen calculate the market price of their products based on their cost of production, other expenditures and the market trend all by themselves, whereas, in case of agriculture, the agriculturist is forced to follow the unscientific MSP (minimum support price) which has no relation to the real costs of production of an agriculturist and is completely unviable for the agriculturist who is forced to sell through middlemen, profiting them at the expense of the agriculturist. The MSP is a standardized price predetermined by the government that lays down the price at which the farmers are allowed to sell their produce in the marketplace. It is also an avenue through which the government seeks to procure the produce from the farmers for redistribution. But, since globalization the government is procuring less and less from the farmers, and continues to fix the MSP giving no indication of the data or the statistics based on which it is fixing the price, resulting in a completely unscientific and unremunerative support price to the detriment of the farmers.

The fact that the MSP is inadequate to sustain the farmers and their ever increasing costs of production due to lack of subsidization or any other institutional help or financing is indicative of the fact that the government has to either abandon the concept of the MSP and let the market trends and the real costs of agricultural production decide the prices, or should reinvestigate their data and fix the MSP based on the realities of the situation of the farmers and agriculture in India.

The step motherly treatment of the government towards agriculture is blatantly evident from the fact that the recommendations in the 2006 report of the National Farmer's Commission headed by acclaimed agriculture scientist Dr. M.S. Swaminathan have not been considered by the government to date. In the report Dr. M.S. Swaminathan recommended that the government should add 50% to individual agricultural costs of production and decide the MSP to make it viable and sustainable for the farmers, as support price, but, neither the recommendation nor the report has been heeded by the government.[11] The government is putting severe restrictions on the price of food grains, in order to control inflationary trends.

10. *Ibid.*
11. *Id.*

In the process it is setting an unscientific MSP with no consideration to the real costs of production of agriculturists thus directly depriving them of their right to life and livelihood. The hapless farmer is in a situation where the government is neither supporting his efforts to feed this country but also depriving him of the ability to earn an honest livelihood and care for his family. The MSP is also a mechanism through which the government procures food grains from the farmers. But, post reforms and globalization the procurement of the government has been nominal, hardly 15% to 20%,[12] while it insists on setting the MSP, even if it is unscientific and actually harms the farmer.

Another surprising and blatant hypocrisy of the government is evident from the fact that when a farmer decides to sell his land he is expected to pay a 10% registration fee and food grains are taxed at 10% as well. Whereas, the tax for gold and jewelry is only 1%.[13] A surprising analogy begging for the reader to contemplate!

The annual income of an average farmer is anyways seasonal and just enough to meet his basic needs, being very minimal. Here the farmer has to meet the costs of production, expenditure on agricultural animal breeding and upkeep, family expenses, dependants, education and health expenses, travel expenses and other emergency requirements. Unable to meet all these expenses and repay high interest agricultural loans with his extremely moderate and presently insufficient income the farmer is in dire straits and resorting to extreme steps like suicide.

Globalization- Death Knell to 'comparative advantage?'

60% of the Indian population is dependent on agriculture, but the government keeps ignoring it. India embraced globalization and liberalized its markets in the early 1990s. The signing of the World Trade Organization (WTO) agreements, particularly the Agreement on Agriculture, was the cornerstone that totally transformed Indian agriculture, for better or for worse is anyone's guess.

India has always been a forerunner along with Brazil in all the WTO discussions beginning from the GATT era about 47 years before the WTO came into existence. India was also extremely proactive in negotiating and representing the demands and needs of the developing economies, especially relating to the policy of protectionism in relation to primary products by refusing to engage in agreement negotiations on Services, Intellectual

12. 'Agricultural Crisis and Farmers' Suicides,' www.indiacurrentaffairs.com, (July 8, 2009) accessed on 15/10/2010.
13. *Supra n.* 1.

property etc., until some resolution was achieved on primary products.[14] When the west especially the USA and also EU not only wanted uniform reciprocity and complete liberalization, but also wanted to obsessively protect and subsidize their primary industries, while demanding that the developing countries liberalize their own economies, India was at the forefront negotiating and demanding special and differential treatment to be given to developing countries taking their developing country status into perspective.

India along with Brazil and other developing countries pushed through a hard bargain where they not only successfully managed to open up the western markets for the export of primary products, especially food grains and other allied products into the west along with completely reducing their tariff and non tariff barriers, but also managed to incorporate 'Part IV,' into the WTO final agreement and other measures especially for the benefit of the developing countries to overcome the negative balance of payments.[15]

India, essentially through its negotiations in the WTO managed to get for the developing countries their 'natural comparative advantage,' in producing and exporting primary products all over the world with adequate encouragement and help from the respective governments. Essentially the principle of 'comparative advantage,' was the foundation of the erstwhile GATT and the present WTO, where each country that was part of the WTO would not only grant 'most favoured nation'(MFN) status and give national treatment to every other country, but would also encourage the export and import of products from those countries that had a natural comparative advantage in a particular industry because of their ability to produce in that industry that is complemented by the natural resources and the genuine inclination and ability of the people of the said country to produce.

The Agreement on Agriculture that was part the agreements of WTO that was signed by India required a phasing out of protectionism until 2005, not the complete unabashed opening up of the agricultural sector under the guise of globalization and privatization, without any cover for the Indian farmers, rescinding public investment in agriculture, withdrawing of credit facilities and distribution systems that were not efficient to start out with and leaving the Indian farmer at the mercy of international agricultural corporations that are surely putting a death knell to Indian agriculture as it was.

14. Lowenfeld Andreas F., 'International Economic Law,' International Economic Law Series, Oxford University Press, (2002), pp. 61-62.
15. Ismail, Faizel,'Rediscovering the Role of Developing Countries in GATT before the Doha Round,' (RIS DP # 141), Research and information Systems for Developing Countries, (September 2008), www.ris.org.in/dp141_pap.pdf, accessed on 21/11/2010.

The Indian government has today completely undermined the policy of 'comparative advantage,' as understood in the WTO by adopting policies that destroy the Indian agricultural sector. India as a nation is believed to have an extremely strong natural comparative advantage in the large scale production of basic food grain crops like rice (paddy), wheat, cotton and different kinds of oils. But this comparative advantage and the special and differential treatment that the developing countries negotiated so hard during the WTO negotiations is being eradicated through faulty import-export policy in relation to food grains.

According to Dr. Aerthayil, with the introduction of Structural Adjustment Policy (SAP) in 1991 the Indian government was obliged to follow the directives of the World Bank, International Monetary Fund and the WTO that required uniform MFN status and more importantly trade liberalization, where the economic policy of countries would require drastically reduced tariffs and import barriers.[16]

Today, the government is importing agriculture produce without imposing any duties and at the same time, government is restricting our produce by severely restricting our exports. Due to this the agriculturists are suffering huge losses. An example of this trend is that in 2007 wheat per kilo was exported for Rs. 7.46/- and the very same year due to shortage they have imported wheat at Rs.16/- kg.[17] This shows our government's complete failure and disregard towards farmers' futures. India is today in a shameful position where it is quickly turning into a net food importing nation from being in the envious position of one of the global leaders of agricultural exports.

On account of Globalization and the fact that India is a signatory of the WTO and is as a result bound by its commitments relating to MFN status and other basic principles of WTO, she is not imposing any anti dumping duties even though, it is within the purview of WTO's regime of special and differential treatment as far as developing countries are concerned. On the contrary she is charging no duties on the massive amount of agricultural imports for extremely high prices, thereby debilitating the agricultural economy in India and causing grief to the farmers. This is in stark contrast to the massive subsidies given by the governments of countries in the west, especially the USA and EU to their agricultural sector which

16. *Supra n*.9.
17. *Supra n*.1.

has created an 'artificial' comparative advantage in those countries whereby they are able to produce massive amounts of food grains and other crops even when they were not naturally inclined or positioned to do so and export or dump them into developing countries at excessively high prices, particularly India, being our focus.

The central budget today is 10 lakh crores, but a meager 11,000 crores has been allocated to the agriculture sector.[18] This is the situation when more than 60% of the people in India receive their sustenance from agriculture. During 1950-1980 there was gradual increase in food grain production, leading to self sufficiency and status as a prime exporting nation. But10 years post liberalization, the gradual decrease in food grain production has led agriculture's share of the GDP approximated as part of the tenth five year plan to be less than 1%.[19]

Thus, the WTO that mandated the liberal import of agricultural products and mandatorily obliged import barriers in the form of tariff and non tariff trade barriers removed, resulted in the direct reduction of domestic agricultural production and consumption, as cultivation itself started to prove unprofitable.

Helpless Dependence on Monsoons

Indian farmers' infamous struggle with the rains is well known and continues to be a matter of concern every year in the monsoon season. India is a country with several important rivers that irrigate the lands, but unfortunately these rivers have not been utilized in a manner that will afford Indian farmers certain irrigation facilities even when the monsoons fail them. Even without the full use of the rivers, irrigation facilities in India are not developed to support the growing requirements of the Indian population and if the lack of irrigation facilities are added to the increasing woes of the farmers due to governmental indifference, dangerous policies that are certain to bring about the end of agriculture as an important sector in India, Indian farmer has no other alternative but to commit suicide.

According to the International Water Management Institute's report, an urgent updating of the ancient irrigation system is required to face the challenge of feeding an extra 1.5 billion people by 2050 in Asia and India would most likely have the biggest share of this informed prediction.[20] According to Mr. Colin Chartres,-

> "There's very little land….it's all being used. You cannot expand literally, therefore you have got to increase productivity on

18. *Supra n*.1.
19. *Supra n*.9.
20. 1.Nagpal, Deepak, 'A Dried-up India and an Agricultural crisis, www.zeenews.com, (September7, 2009) accessed on 18/11/2010.

existing land and it is easier to increase productivity with irrigation than it is by rain-fed agriculture."[21]

Erratic power supply only adds to farmers' woes as access to water from water bodies and running of irrigation facilities such as bore wells etc., are all dependant on power supply. The pattern followed by the government is actually biased where new industries are provided with uninterrupted power supply while farmers' do not know in which crucial period of production the power will be cut off. There has been a lot of hue and cry about the unfairness of the erratic power supply where some villages have been forced to go without any kind of power supply as long as almost 15-20 days!

India's south-west monsoons contribute to 1/6th of the country's GDP from agriculture. Therefore failed monsoons mean that approximately 60% of India's farmers depending on rains for agriculture take a severe hit where chief crops like rice, soybean, sugarcane and cotton are severely affected, which has in turn raised the prices of commodities like vegetables or pulses to more than 300% this present year compared to 2008-2009, and has created an ironical situation where in spite of inflation being in the negative, for most of rural and middle class India, choosing to consume vegetables or pulses has become a 'luxury,' followed by the fact that the 2009 drought affected the production of rice, which led to the staggering decline of 10 million tonnes from the previous year's 100 million tonnes.[22]

Vicious cycle of Debt and lack of Credit

The most important factor contributing to the mass farmer suicides in our country over the past at least 12 years that has increased over the past few years is lack of support in the form of viable credit facilities from the government. Farmers are forced to resort to seeking the help of moneylenders who in turn exploit the farmers by demanding quick return of principle investment at high rates of interest.

Financial institutions do not exceed 25% of farmers' credit necessities. The drastic shift in lending patterns of financial institutions has resulted in institutional finance being extended only to high-tech agribusinesses, biotechnology and private companies chiefly owned by wealthy farmers at the expense of small and marginal farmers, who are in dire need of institutional financing and for the government to come forward to help them

21. Director General of International Water Management Institute, while talking about the non feasibility of expanding rain-fed agriculture.
22. *Supra n.* 20.

in some small way, especially since the farmers are in a vicious circle of cyclical debt trap with the virtual extinction of cooperative credit institutions.[23]

Adding to the complete withdrawal of credit facilities is the alarming reduction of government investment in agriculture, with the government choosing to adopt a minimum interventionist approach to coincide with globalization and privatization. The government investment reduced from an average of 14.5% during the period of 1986-1990 to 6% during the period of 1995-2000.[24] Furthermore, from the time economic reforms started, the rate of growth of irrigated lands reduced from 2.62% to 0.5% post reforms, directly affecting the farmers by drastically reducing their purchasing power and standard of living, pushing them further into poverty.[25]

Reduction and Relinquishment of Control in Agricultural Subsidies

Fertilizer subsidy is presently the only minor subsidy that the government is ready to provide for the farmers**,** but it is not without loopholes and extensive corruption. The subsidy provided by the government is at a drastically reduced rate and is hardly enough to cover the costs of obtaining them for large scale use. Pesticides have no subsidy governing them and are obtained by the farmer in the free market at exorbitant prices.

According to Ramesh Chand, an economist, "cutback in subsidy and control of fertilizers over the last few years has adversely affected the agricultural sector. It has increased the input costs and made agriculture less profitable, which is also directly related to globalization."[26] The problems are compounded by the fact that due to lack of proper regulation and oversight by the government departments, the farmers are forced to encounter spurious products especially pesticides that are under the control of multinational corporations, who do not test their effectiveness either in preventing crop damage or from an environmental perspective. Spurious fertilizers and pesticides have been reported to be one of the primary reasons of farmer suicides as farmers spend excessive amounts of money on their purchase, only to find them not being effective.[27]

Right to Life and Livelihood under Article 21 of the Constitution

Article 21 of the Constitution says that: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

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23. *Supra n.* 12.
24. *Supra n.* 9.
25. *Supra n.* 9.
26. *Supra n.* 9.
27. *Supra n.* 12.

After the decision in *Maneka Gandhi*'s[28] case, the right to life and personal liberty of a citizen is protected not only from Executive action but from Legislative action as well. A person can be deprived of his life and personal liberty if two conditions are complied with, *first*, there must be a law and *secondly*, there must be a procedure prescribed by that law, provided that procedure is just, fair and reasonable.[29]

Ironically, the above holding is applicable in the present case, as the deprivation of right to life and livelihood of the farmers is not based on any fair set of directives as the policies under which a farmer is forced to operate are in turn bringing about his abject downfall, pushing him further into poverty and providing him with no compensation or ability to continue to have any kind of livelihood.

In *Olga Tellis* v. *Bombay Municipal Corporation*, a five judge bench of the Supreme Court has finally ruled that the word 'life' in Article 21 includes the 'right to livelihood,' also. The court said:

It does not mean that life cannot be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of livelihood. *If the right to livelihood is not treated as part of the constitutional right to life, the easiest ways of depriving a person of his right to life would be to deprive him of his means of livelihood. In view of the fact that Article 39(a) and 41 require the State to secure to the citizen an adequate means of livelihood and the right to work, it would be sheer pendentary to exclude the right to livelihood from the content of the right to life.*[30]

In a significant judgment in *D.K. Yadav* v. *J.M.A. Industries*,[31] the Supreme Court has held that *the right to life enshrined in Article 21 includes the right to livelihood* and therefore termination of the service of a worker without giving him notice or a reasonable opportunity to be heard, is arbitrary and illegal. Even when there is adequate evidence giving grounds for termination, no worker can be terminated without following a prescribed procedure that should satisfy the requirements of Article 14 and must not be arbitrary, lacking in reason, fanciful or oppressive. In short it must be in conformity with the rules of natural justice, Article 21 clubs life

28. *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597.
29. *Ibid*.
30. AIR 1986 SC 180; (1985) 3 SCC 545.
31. (1993) 3 SCC 258.

with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence.[32]

The above holding is in stark contrast to the Supreme Court's previous holding in the landmark judgment, in *Delhi Development Horticulture employee's Union* v. *Delhi Administration,*[33] where the Supreme court essentially held that although right to livelihood is a logical necessary corollary to right to life, this right has so far not been incorporated in the constitution as a fundamental right, as India has so far not obtained the capacity to guarantee it under the constitution. The court further went on to state that because of the inability of the government to guarantee right to livelihood, it has been placed in the chapter dealing with Directive Principles, Article 41 which puts forth the aspiration that it is the state's responsibility to make effective provision for securing a livelihood, "within the limits of its economic capacity and development."[34]

The above contrasting decisions in a matter of one year by the Supreme Court is evidence of fact of the realization made by the Supreme Court of the importance of the right to livelihood and to earn a dignified living. It is justification of the realization made by the Supreme Court that although in their opinion India may not be able to guarantee a right to livelihood, the very right to life would be by all means incomplete and hollow without the provision that guarantees the right to livelihood that is an inclusive part of the right to life itself. Hence, now the right to life includes the right to livelihood and the farmers are positively being deprived of their right to earn a livelihood with credit facilities withdrawn, forced to sell food grains at an unscientific support price, lack of public distribution channels, deprivation owing to globalization and privatization, erratic monsoons and finally no rescue for the hapless farmer from the government.

Right to Life (livelihood) in present day 'Welfare state'-Myth or Reality?

The Directive Principles are the ideals that our government aspires to abide by and to manifest for its citizens in the form of laws, policy implementations for their welfare. The directive principles are certain political, social and economic ideals that are representative of India as a country based on its history and social fabric, which the government has to consider in every context, be it a legislative or an executive decision for the benefit of the people.

32. J.N. Pandey, 'Constitutional Law of India', 42nd ed.2005, p. 224.
33. AIR 1992 SC 789.
34. *Supra n.* 32, p. 224.

Dr. B.R. Ambedkar aptly describes the objectives of the welfare state as follows in his speech in the Constituent Assembly. He said:

[….Now, having regard to the fact there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used, in the directive principles, something which is not fixed or rigid. We have left enough room for people of different ways of thinking, with regard to the reaching of the idea of economic democracy, to strike in their own way, to persuade the electorates that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act.

…. our object in framing the Constitution is really two-fold (1) to lay down the form of political democracy and (2) to lay down that our ideal is economic democracy and also to prescribe that every Government whatsoever is in power, shall strive to bring about economic democracy.][35]

The above sentiment exemplified by Dr. B.R. Ambedkar during the Constituent Assembly debates is clear indication of the amount of importance he gave to Directive Principles, acknowledging at the same time that though they were aspirational in nature they could not be disregarded as the object of our democracy is not only political democracy but economic equality and democracy as well. He enunciated the importance of describing India as a welfare state where the state strives to implement policies keeping the economic and social progress of the people in mind. Therefore, when India calls herself a Socialist welfare state, it is true indication of its status as such, only when the government's policies are directed towards the welfare of its masses.

In *Maneka Gandhi's*[36] case delivering the majority judgment for the Supreme Court, Bhagwati, J., asked- *Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirement?* He then held that any procedure interfering with the right to life under Article 21 should be in conformity with equality omnipresent under Article 14 and should be reasonable with complete lack of non arbitrariness, where reasons are self explanatory or cogently explained in conformity with Article 17 of the Constitution.[37]

Thus the right to life and specifically livelihood under article 21 is clearly applicable in the present case to farmers due to the fact that their livelihood which is guaranteed by the constitution of India is in jeopardy.

35. Constituent Assembly Debates, Vol.III., pp. 494-95.
36. *Supra n.* 1.
37. Supra *n.* 32, pp. 218-219.

They have been deprived of all benefits, institutional help and are now essentially at the mercy of market forces, coupled with the fact that the country is being flooded with imported food grains when our own domestically produced food grains are rotting owing to lack of public distribution facilities, and corruption of the government officials.

India is essentially an agricultural economy, which has been so since the time of pre independence. Our country's proclivity for agriculture and its natural advantages were well recognized and a golden era in agriculture was assured in the 1960's due to the 'Green Revolution,' where the planting of high yielding wheat and rice resulted in the most dramatic successes in the history of world agricultural economy turning India from a struggling nation to a dominant player in the food export market. But, the fact that today an Indian farmer is not even having his basic needs met, by the government to continue farming, is indication of the dire state that agriculture is in today.

According to Dr. M.S. Swaminathan, "they (farmers) are cynical and diffident about the way politicians and governments deal with them. They are no longer enthused to take farming seriously."[38] Farmer suicides have today become common place and the government has not taken any steps to prevent them by granting the farmers some hope or relief in the form of agriculture friendly policies.

Rural sector employs about 60% of the Indian population and currently that population is left without any means of survival or subsistence. Agriculture is seasonal anyways and the people hit the hardest are farm labourers. Rural employment reduced from 2.07% in the 1980s to 0.66% during 1993-2000, post liberalization.[39] The current crisis in agriculture is in fact adding to the already prevalent unemployment in India. Critics of rural labourers and small farmers are of the opinion that more people than needed are actually involved with farming giving rise to hidden unemployment. But, the fact of the matter is that today even minimal employment through farming and agriculture has become extremely difficult.

An example cited is the launch of the multibillion dollar welfare drive promising 100 days of work for every rural family to battle poverty in the rural sector, which was a miserable failure, where only approximately 3% of households targeted received the in famous 100 days of employment and many for only about 2 weeks. A six month internal audit of the

38. *Supra n.*1.
39. *Supra n.*1.

programme produced several instances of corruption, inefficiency and funds misuse.[40]

Considering all the above circumstances, I respectfully put forth that the idea of India as a welfare state is today indeed a myth and not a reality. The reality of seeing India as a true socialist-welfare state where all the citizens are adequately provided for was far from reality to start out with, but the present crisis does not bode well to achieving that aspiration even in the distant future, if urgent measures to rectify the situation are no taken by the government.

According to P. Sainath, an eminent journalist and writer, on changing nature of development debate on food, hunger and rural development-

> "An incentive to repay loans on time - which millions of farmers cannot do - is being passed off as an additional subsidy to the *aam kisan* in this budget. And there is still an air of self-congratulation on the Rs. 70,000-crore farm loan waiver of 2008. A one-off waiver that comes once in so many decades. Yet revenue foregone in this budget in direct tax concessions to corporate tax payers is close to Rs. 80,000 crores. It was over Rs.66,000 crores last year. And Rs.62,000 crores the year before that. In all, Rs. 2,08,000 crores of direct freebies in 36 months."[41]

Mr. P. Sainath rightfully stresses on the injustice meted out to agriculture when the industries get the bulk of financial support at the expense and sacrifice of the most primary sector in India- agriculture. It is indeed astounding that there should be any question as to the necessity of the farm loan waiver of 2008, which was in fact late in coming. The growth rate of industrial sector, information technology and other allied sectors is approimately12% to 16% whereas agriculture sector is 0.2%. Industrialists and other businessmen are sanctioned indiscriminate amounts of money in the form of loans or grants as and when they require by the government, but agriculturists get only Rs. 10,000/- for an acre and that too only after the government or the loan sanctioning authority has taken title deeds to the land as security, essentially forcing the farmer to mortgage the land. In the last 10 yrs., approximately 2 lakh farmers committed suicide, and there is no one to hear their cry for help or merely to have a chance to lead a

40. *Supra n.*1.

41. P.Sainath,'Yet another Pro farmer budget,'www.indiatogether.com (March 4, 2010) accessed on 18/11/2010.42. Question propounded by Mr. Bollu Narsimha Reddy, a farmer 's rights activist, during a speech given in November 2010, as part of the 'Lok Satta' enabled farmers movement in Andhra Pradesh.

decent life and make a decent living. Is it premature to say in the face of so much evidence of governmental apathy that the government is essentially abetting farmers' suicides?[42]

Concluding Recommendations

The provision for seeds is extremely important to the farmers, especially high yielding and hybrid varieties that increase production. Government is supplying not even 10% of the seeds required owing to liberalization and privatization, and the prior supply of seeds by State Agricultural Universities and departments in crops like cotton, chillies and vegetables have become extinct.[43] Private suppliers sell them at exorbitant prices added to the fact that the seeds are spurious and adulterated, and the farmers were not given any form of compensation when the seeds they were forced to buy from private suppliers turned out to be spurious and damaged crops. Corruption, black marketeering is rampant and good seeds hardly ever seem to be reaching farmers. It is recommended that the government should revamp their seed distribution machinery and provide for government subsidized seeds that reach the farmers through proper distribution channels, with no middlemen and to stem the corruption that has become prevalent and provision of the seeds should be in time for the farmer to use them.

Credit facility for all farmers at low interest rates through institutional finance is absolutely necessary to remove the ongoing dangerous crisis in agriculture in India. According to M.S. Swaminathan, the interest charged should be at a low 4%.[44] Appropriate credit facilities through financing at low rates of interest by nationalized banks giving farmers enough time to be able to repay them from the sale of their harvest is crucial to saving the farmers from more suicides owing to vicious cycle of bad debts.

Fertilizers and pesticides should be provided by the government at subsidized rates so that the farmers do not have to go through private sellers and be defrauded and stranded with spurious materials. The government should set up proper machinery to enable farmers to obtain good seeds, fertilizers and pesticides without having to worry about corrupt practices or spurious products, through international standardization of products and a strict oversight and regulatory body to over see their functioning.

42. Question propounded by Mr. Bollu Narsimha Reddy, a farmer's rights activist, during a speech given in November 2010, as part of the 'Lok Satta' enabled farmers movement in Andhra Pradesh.
43. *Supra n.*12.
44. *Supra n.* 9.

Agriculture mechanization, starting with proper irrigation facilities should be a priority for the government to increase production and reduce dependence on uncertain monsoons.

The Public Distribution system (PDS) is in dire need of overhauling and fresh impetus from the government. The PDS is divided into 'Below poverty line' (BPL) and 'Above poverty line,' (APL). This differentiation has in recent times made agricultural goods expensive, when sold even through ration shops and subsidized owing to the staggering increase in costs of production in agriculture.[45] This has led to accumulation of food grains in godowns with no buyers, where the food grains are rotting and the government that procured them is not open to distributing it to the hungry masses not able to afford the food grains. A systematic and detailed system of distribution of food grains should be reintroduced, so that the farmers do not have to deal with middlemen or be forced to sell their food grains in open markets at prices much lower than their investment.

Crop insurance or lack of it is an important issue that the government has failed to address or implement in India. There is hardly any crop insurance and the barely available crop insurance covers hardly 10% of the crops.[46] This year there has been an excess of rainfall with flooding in several states, where the rains actually destroyed crops ready for harvest. The farmers lost tremendously due to this event with the government not coming to their rescue anytime soon. Farmers need to absolutely be protected from such calamities as drought that has plagued India for the past few years and the floods that have been evident this year. Crop Insurance schemes should be religiously and effectively implemented to protect against declining productivity, crop failures from droughts, floods and other calamities. This is an important means to stop farmer suicides as he will have been protected in any eventuality.

Either MSP has to be done away with, or it should be decided on scientific basis based on practical implications of cost of production, which will enable the farmers to get remunerative prices, and the recommendations of MS Swaminathan and his Commission should be implemented. Importantly, agriculture is the most primary and essential sector in India and the government cannot ignore that or take the approach of 'a horse with blinkers,' anymore. Merely because in the past few decades information technology and industries have afforded more profits does not mean that the most primary and basic sector should be undermined. Had agriculture

45. *Supra n.* 9.
46. *Supra n.*12.

47. *Supra n.* 9.

48. *Supra* n.1.

been given similar incentives and impetus as IT and industry, we would have seen the same kind of booming profits that marked the golden era of the 'Green Revolution.' Therefore, it is high time that agriculture be given the same kind of impetus as industry through various government sponsored programs.

The ill effects of globalization and WTO should be reversed and implemented in the manner that was actually the initial aim of WTO, i.e., to safeguard the natural comparative advantage of member countries. The special and differential treatment provisions in favor of developing countries should be utilized and our natural comparative advantage in agriculture sustained and renewed. Restrictions in the form of tariff and non tariff barriers should be reinforced and the agenda of the WTO should be carefully introduced keeping India's special interests in mind. WTO required restrictions to be 'phased out,' over a period of time, but the special needs of India as a developing country should be considered and the policy of special and differential treatment should be used to increase and encourage export and reduce imports of primary products.

According to Dr. M.S. Swaminathan

In a country where 60% of people depend on agriculture for their livelihood, it is better to become an agricultural force based on food security rather than a nuclear force.[47]

If you compare an employee in any sector and a farmer there is a lot to be wanted. Employees get benefits and raises based on inflation, have fixed hours, credit facilities and housing loans, retirement at 58 years of age, pensions thereafter, provident funds, gratuities and all kinds of other benefits while working, in the form of traveling allowance, scheduled number of holidays that only increase with the number of years of service etc. But, a farmer has none of these.

The UPA government came to power just as very previous government on the manifesto of 'Garibi Hatao,' 'Aam Aadmi and Kisan' slogans, but our Prime Minister Manmohan Singh himself at a recent press conference was of the ill informed opinion that the dependence on agriculture for employment should be reduced from 60% to 15%-20%.[48] In a country like India where the very sector of agriculture is today in dire crisis, where will the 'barely employed' farmers go? A farmer who sweats and slogs in the fields to feed us and his family, can lay claim to no such luxuries as other employees. In fact he has to deal with seasonal

uncertainties, crop failures, small incidental expenses of modernization like travel or modern implements for better production, deaths in the family, education, and sustenance of family and can never retire…Is it fair that we deprive him even of the basic necessities to make a decent livelihood? 2009) accessed on 18/11/2010.

DRAFTING A FOOD SECURITY LAW FOR THE FASTING AND THE FEASTING INDIA

Roopa Sharma*

Abstract

It is well known that the UPA has proposed to introduce the National Food Security Bill in November 2009. Without doubt, a country that has been languishing way down at 96 among 119 developing countries on the Global Hunger Index cannot wait longer to have an effective food security law enacted.

The "lofty" promises of the Bill have rightly drawn criticism from all quarters. In fact the drawback of the Bill lies in its effective implementation through the present porous Public Distribution System. Considering that large amounts of food grains and sugar are routinely siphoned off from the PDS, leaving the genuine BPL and other ration card holders to starve under different welfare schemes of the government, the UPA government has shown restraint over passing of the bill with a directive to the respective state governments to plug loopholes in the system.

The study traces in detail the structure and the authorities that run our PDS and its operational and legal framework in order to understand how this so called "largest system of public distribution in the world" actually works. Given the country's large size, varied terrain and large scale poverty, it isn't difficult to understand the plethora of possibilities that the PDS offers to its operators to make a quick buck. This brings the author to analyse the effectiveness of the legal framework of the PDS which is supported by the Essential Commodities Act, 1955 and the Prevention of Black Marketing Act, 1980.

Modes of contraventions of Centre and State Orders issued under these Acts are studied on a micro level. This is followed by the statistics of the Planning Commission and other research papers that reveal these contraventions at the macro level.

It is disquieting to know about the large scale diversions, the collusion and apathy of those who run the PDS and the enormity

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of the problem at hand.

What needs to be seen is whether the UPA would take concrete steps to streamline the PDS to make it more accountable and transparent or merely announce this Bill with fanfare as a populist measure with an eye on the next elections.

Introduction

Seeing the popularity of the National Rural Employment Guarantee Scheme (NREGS) which helped the Congress to win the 2009 parliamentary elections, the newly constituted Government has thought of bringing out the National Food Security Act and has been working on it. Without doubt, a country that has been languishing way down at 96 among 119 developing countries on the Global Hunger Index cannot wait longer to have an effective food security law enacted. The Index ranks countries on a 100-point scale with zero being the best score (no hunger) and 100 being the worst.[1]

As top officials from multiple ministries sat working over the crafting of the draft legislation on food security aimed at delivering food to the poorest of India, a grim reminder of the depth of deprivation in India emerged from its most populous state, Uttar Pradesh (UP). Frail, malnourished children eating moist lumps of mud laced with silica—a raw material for glass sheets and soap[2]to overcome hunger.

"It tastes like powdered gram, so we eat it," said Soni, 5, a listless girl with a protruding belly, dry whitish hair and ashen skin. With most families working at village Ganne's (in UP) quarries reduced to one or two daily meals of boiled rice and salt-with a watery vegetable on a lucky day-the mud is a free but deadly option at the 20 stone quarries sustaining the poorest villagers.

Similar stories like these continue to emerge from different parts of India every alternate day.[3] These stories are the latest indicator of the frailty of India's vast but inefficient and corruption-ridden social-security

1. Global Hunger Index 2008 released by Washington-based International Food Policy Research Ins titute in October 2008.
2. Not enough food, so children learn to eat mud, Hindustan Times, Allahabad (UP), April 5, 2010.
3. Govt.wakes up to hunger deaths, Hindustan Times Mumbai, December 14, 2010, where tribals kill hunger with flowers, Hindustan Times, Banda (Uttar Pradesh), April 18, 2010, Hot rod horror brands children in Jharkhand, Hindustan Times, Ghatsila, (Jharkhand), April 20, 2010.The dying heart of India Hindustan Times, Satna (Madhya Pradesh), May 4, 2010, Straight from cradle to grave Hindustan Times, MP, June 10, 2010,India's safety nets collapse in Balangir Hindustan Times, Orissa, March 29, 2010, What India's growth story conceals, Hindustan Times, Delhi, October 14, 2010.

systems. A commonality in all these stories is that their dead, starving people had no access to the five major national schemes (subsidised food, child health care, mid-day meals, jobs for work and old-age pensions each targeted at the poorest of India)[4] on which India is slated to spend Rs 118,000 crore($ 261 billion) in 2010-11.Most of them had not even heard of them. Those among the dead who did happen to be the beneficiaries of one or more of these State sponsored schemes starved to death because of inadequate implementation in their area[5].

Contrast the above stories of starvation deaths with the following, "As prices soar, tonnes of grain rot"[6], "In India the granaries are full but the poor are hungry"[7], "Food meant for poor diverted to Nepal, Bangladesh, admits Government[8],"1.3 lac tonnes of grain wasted"[9].The Supreme Court's diktat to the Government recently speaks volumes about India's Public Distribution System that nullifies all State endeavour to tackle hunger in the country. "People are dying of hunger. 67,539 tonnes rotted in godowns of Punjab and Haryana during 2009-10.You are not providing them grain. This litigation has been going on for the past 10 years…. It is an "extremely serious matter"[10]In fact the Court ordered distribution of grains free of cost to the poor instead of leaving it for rats. These contradictory stories of starvation and excess grains rotting in our warehouses necessitate immediate improvements in the distribution of foodgrains through our present Public Distribution System.

Inter-Relationship between Poverty and Hunger

Poverty, food insecurity, malnutrition, and hunger are inter-related concepts. Poverty is caused by assetlessness, low income levels, hunger, poor health, insecurity, physical and psychological hardship, social exclusion, discrimination, and political powerlessness.

Indian poverty is predominantly rural, where landless labourers and casual workers are the worst-off economic group. But even within this

4. The PDS deals with distribution of subsidised food grains, child health under the ICDS or Integrated Child Health Development Scheme targets child health and malnourishment, Mid Day Meals are targeted at tackling malnutrition and illiteracy for school going children of State schools, the NREGA is an employment guarantee scheme for the rural poor, supra note 1, pension to the destitute is provided under the Annapurna Yojana translated as the National Old Age Pension Scheme (NOAPS).
5. www.foodjustice.net Hunger Alert Update: AHRC-HAC-005-2009.
6. Times of India, July 27, 2010.
7. Guardian Weekly, September 7, 2010.
8. Times of India, December 12, 2010.
9. Times of India August 31, 2010.
10. Grain rot deeper than govt. claim: SC Hindustan Times, New Delhi, October 19, 2010 the litigation relates to Right to Food by the NGO People's Union for Civil Liberties.

group, households headed by women, the elderly and ethnic or religious minorities constitute the poorest of the poor. In India and Nepal there is the added dimension of caste. In India persons from 'scheduled castes' and 'scheduled tribes' constitute 25% of the rural population but account for 42% of the poor.

The rural poor are primarily those with limited ownership of assets – including land. The vast majority of the rural poor in India are engaged in agriculture (including fishery and livestock) either as agricultural wage labourers or marginal farmers. The urban poor are characterised by extremely poor living conditions – in slums, or often on the road itself. They are generally first generation migrants with no security of jobs.

It is estimated that one-third of the world's poor reside in India, and there are more poor people in India than in all of Sub-Saharan Africa. The definition of the poverty line varies from country to country, but the most common measure is the 'head count index' which is expressed in terms of the number of people or percentage of the population falling below either (a) a given level of daily energy intake, or (b) the income level required to purchase these needs.[11] In India households are categorized into two main categories - Below Poverty Line (BPL) and Above Poverty Line (APL) households. Defining BPL & APL families is based on the criteria like annual income, land holding, type of dwelling etc., and their quota of subsidised foodgrains is fixed accordingly. The different State Governments undertake the responsibility to identify the eligible households/ beneficiaries and issue a ration card also known as household supply card which enables them to avail the prescribed quantity of foodgrains from the government run Public Distribution System.

The Issue of Food Security

"Food security" refers to the ability of a community, family or individual to be able to eat sufficiently, in terms of both quantity and quality, as prescribed by international standards.[12] It is conventionally viewed in terms of three components, food availability, food access and food utilisation.

Food availability is the sum of domestic production, imports (both commercial and food aid) etc. to meet demands of a growing population and changing dietary needs;

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11. *Ibid*, p. 3.
12. 'Setting a Palestinian National Food Security Strategy' by John Ashley and Nedal Jayousi: Palestine-Israel Journal Vol.13, 2006.

Food access is a measure of people's entitlement to food, which is the amount they can either produce (net of feed, seed and losses) or purchase or otherwise receive (e.g. through public food distribution systems).

Food utilisation relates to the capacity of an individual to absorb and utilise the nutrients in the food s/he consumes.[13]

Food availability

The component of food availability as a function of production of foodgrains in India is discussed first. Policy in India since Independence has focused on reaching self-sufficiency in domestic food production. The government has pursued vigorous policies of agricultural development through a range of instruments, including public sector research, provision of agricultural infrastructure such as irrigation systems, subsidies on inputs such as electric power, water and fertiliser, increasing the minimum support prices of main crops and the operation of a buffer stock.

This policy has resulted in unacceptably high levels of food stocks in recent years. India produces around 80 million tonnes of wheat. Given that procurement and subsequent stocking is far in excess of what is required, the government ends up hoarding food grains quite inadvertently in the process.[14] The current government has proposed in the Food Security Bill that it would need 60 million tones of grains to meet the ambitious targets of the proposed bill. This means greater precision in identifying the poor and reaching them.[15]

Food Access

Almost all commentators, including the citizens and governments of developing countries, identify chronic and pervasive poverty as the most basic cause of food access problems. Five year development plans laid down by governments throughout Asia have for many decades taken poverty reduction as their central purpose.[16]

Government intervention to tackle hunger

Two basic approaches are used in India to improve poor people's access to food: the direct approach of public distribution of subsidised food,

13. Working Paper 231 Food Security and the Millennium Development Goal on Hunger in Asia Gerard J. Gill, John Farrington, Edward Anderson, Cecilia Luttrell, Tim Conway, N.C. Saxena and Rachel Slater http://www.odi.org.uk/resources/download/1266.pdf.
14. Revamping food procurement and pricing policies. By Madan Sabnavis. Yojana, p. 1, October 10, 2010 issue.
15. Amar Ujala Newspaper , August 25, 2010.
16. *Ibid*, p. 12.

and the indirect approach of developing and implementing poverty reduction strategies.

Since Independence, the main pillars of the Government of India's food security strategy have been these three:

(a) **Productivity-enhancing investments in agriculture**

The policy approach to agriculture, particularly in the 1990s, has been to secure increased production through subsidies on inputs, increasing the minimum support price discussed herebelow and through building new capital assets in irrigation.

(b) **Price support, buffer stock and subsidised provision of food**

Minimum Support Price, procurement and distribution are three extremely critical government policies.

Minimum Support Price (MSP): The objective of having an MSP programme is to ensure that the farmers get a remunerative price for their produce. The scientific basis for calculating this MSP involves looking at various factors including cost of production, cost of living, price parity etc. It tells the farmer that he is assured of a minimum price at the time of harvest and hence can cultivate the crop of his choice. From the point of view of the farmers this is an excellent scheme as they are assured of a price for their produce and a buyer.

The MSP issue is linked with procurement, which is an enormous exercise undertaken by the government. There are three motivations for procurement from the point of view of the government. The first is to provide for food security so that there are stocks that can be used in times of a crisis. The second is to provide for subsidised grains so that the poor have access to cheap food grains either directly or through specific government schemes and the third is to stabilise prices. This is done by selectively releasing stocks into the market through the open Market Schemes to augment supplies and lower prices.

Presently procurement is mainly in rice and wheat and to a very minimal extent in coarse cereals. This encourages farmers to grow more of rice and wheat and deliver to the government which is represented by the FCI or the Food Corporation of India, the main agency for handling foodgrains on behalf of the Central government responsible for procuring, storage, and release of grains in the PDS. The fact that the procurement is an open ended scheme means that there are no limits to what the FCI can pick up. While procurement is open ended, distribution through the PDS

and other schemes is more or less fixed and grows marginally every year being related to population growth and development schemes being pursued by the government. The result has been the build up of high quantities of food stock.[17]

c) **The third area is in distribution where procured food grains are distributed across the states under various schemes**

The Public Distribution System and its variants focus on the subsidised distribution of basic (mainly food) commodities to some 75 million poor households through some 0.5 million Fair Price Shops nationwide. The Government also operates a large number of Centrally Sponsored Schemes (CSS), some of which involve payment or transfer 'in kind', e.g. in the form of food for work or midday school meals.

Cash transfers of various kinds also form a (currently very minor) part of social protection and food security policy. They are made to 'deserving' categories of the population (such as old age pensioners, and, in some States, widows), e.g. The Annapoorna Yojana translated as the National Old Age Pension Scheme (NOAPS) was introduced as a 100 per cent Centrally Sponsored Scheme on August 15, 1995. Under this scheme about 60 lakh old people get monthly pension ranging from 100 to 250 Rs per month.

Chronic Food Insecurity, Nevertheless

Despite various government related donor actions, almost every national social security programme, theoretically serving as cradle-to-grave buffers against destitution and hunger has failed. The irony is that every national anti-poverty and anti-hunger plan, on which the Centre had budgeted Rs1.18 lakh crore ($2.61 thousand billion) nationwide in 2010-11, is in place in every district of the country. It is enough to stave away famine and official starvation deaths, yet hunger continues to take its toll. Of the current total population of 1.15 billion people[18], India's hungry stand at 237.7 million at the last count of which the government is able to target merely 75 million poor households.

The Proposed National Food Security Act, 2010

The draft Food Security Bill has proposed 25 kg of wheat/ rice to BPL households at Rs. 3/- per kg. For some, it is just old wine in a new

17. India's mountains of shame, Hindustan Times, Ludhiana, March 30, 2010.
18. Current Population of India in 2010 is around 1,150,000,000 (1.15 billion) people. http://www.indiaonlinepages.com/population/india-population.html

bottle and would rely excessively on existing infrastructure and logistical support of the public distribution system (PDS). There are possibilities of increased food subsidies amounting to Rs. 70,000 crore per annum if the Bill becomes a law.The Government has been increasing the annual food subsidy from Rs 2,450 crores($0.54 billion) in 1990-91, Rs. 13,675 crores ($3.03 billion) in 2001-02, to 58,000 crores($ 12 billion) in 2010-11. A further increase is likely to put the government in a tight corner.

The Bill has been criticized on how effectively would it disburse foodgrains to the targeted families through the present Public Distribution System (PDS), to achieve cent percent food security.

As pressure builds up on the government to finalize the draft food security bill, a top priority of UPA is reforming the TPDS as a part of the draft food security bill, so as to include the vulnerable sections of society. In fact the dilemma exercising the current government is not the proposal and framing of a Food Security Law for India but its effective implementation through the nation wide network of the PDS.

No doubt the UPA government has shown great caution and restraint on the issue of passing this bill. It has also announced its plan of setting up of a "monitoring system" to strengthen the PDS[19] by making it more transparent and accountable. This step alone will render the proposed food bill useful to the country's masses.

In order to plug the loopholes in our PDS, we must understand its structure, the authorities and agencies that run it and the people who man it.

India's Public Distribution System (PDS)

The task of achieving a fool proof PDS is a stupendous one as we have been living with an incredibly leaking PDS since pre independence days (from World War II onwards) However, it was only in 2005 that the Planning Commission reported that the vast network of 480,000 (almost 0.5 million) Fair price Shops delivered only 42 per cent of grains meant for the BPL families

Not only have leakages and pilferages been consistently overlooked, no one has been held accountable for siphoning off 58 per cent of the subsidized food meant for the poor year after year![20]

19. Government plans "monitoring system" on food subsidy Monday, June 7, 2010 3:23:34 PM by IANS.
20. Food Security Act: Implementation, not intention, holds the key by Sudhirendar Sharma 09 Jul 2009 http://www.d-sector.org/article-det.asp.

Rationale of a Public Distribution System

Distribution provides a vital link between the producer and consumer by making available goods and services. It encompasses all movement starting from the transportation of raw material to the delivery of the finished products to the customers. The distribution system owned and controlled by the government or any public agency is termed as public distribution system.

The PDS in India is basically a retailing system supervised and guided by the state to ensure ready availability of essential goods at reasonable prices to the common people at household level, especially the weaker sections of the society who cannot afford to depend upon the market forces to get their supplies.[21] This requires a long term strategy for continuous supply of essential commodities to the common man through a public procurement and distribution system at fair prices in urban and rural areas.

The PDS as it stood earlier, was however widely criticised for its failure to serve the population below the poverty line, its urban bias, negligible coverage in the states with the highest concentration of the rural poor and lack of transparent and accountable arrangements for delivery. Realising this, the government streamlined the PDS, by issuing special cards to families Below Poverty Line (BPL) and selling foodgrains under PDS to them at specially subsidised prices with effect from June 1997.This new PDS was named the Targeted Public Distribution System (TDPS). Its network of about 0.5 million Fair Price Shops (FPS) across the country makes the TPDS the largest distribution network of its type in the world[22]. It is the most far reaching in terms of coverage as well as public expenditure on subsidy.

The Framework of the PDS

The PDS in India may be looked at from three angles

1 The policy framework

2 The operational framework

3. The legal framework

1. The policy framework

It consists of (a) the broad policy guidelines and directions given by the central and state governments to the PDS ever since the inception of

21. Production and management of State level public enterprise. by Atmanand. Mittal Publications, 1997, p. 633.
22. Food Security through Identity Management by Dr. Lakshmi Tripuraneni, p. 1.

planning in India. It covers government subsidy per year on essential foodgrains and sugar, distribution of food at reasonable prices to the common people.

(b) A system of monitoring production of essential commodities and their rational distribution.

2. The operational framework

The operational aspects of the PDS range from production and procurement from farmers from all corners of the country, to the ultimate distribution to the customers through the Fair Price Shops.

At the procurement stage the FCI and the Civil supplies ministry's co ordination in different states[23] plays a dominant role in the procurement of agricultural commodities. The FCI was established under the Food Corporation Act of 1964 and started functioning in January 1965. It acts as a main agency for handling foodgrains on behalf of the Central government and functions as a major instrument for achieving the following objectives

1. to procure a sizeable portion of marketed surplus grains at incentive prices from the farmers on behalf of the Central and State governments (ensuring to forego some portion for the personal use the farmers);
2. to ensure timely release of stocks through the PDS so that consumer prices do not rise unduly;
3. to minimize inter regional price variations; and
4. to build up buffer socks of foodgrains by internal procurement and imports.[24]

3. The legal framework

The legal framework of our PDS is made of the Essential Commodities Act 1955 (ECA) and the Prevention of Black Marketing Act 1981. Also are various Orders and Rules passed by different states relating to essential commodities?

From this doctrinaire structure, we come to the real picture of the PDS as it functions in the country.

The Operation and Logistics of the TPDS

The PDS is largely the responsibility of state governments which

23. India is a union of 28 States and 7 Union Territories (UT).
24. *Supra n.* 19, p.643.

comprises of procuring, storing, allocating and transporting food grains to State warehouses to ensure uninterrupted supplies of essential commodities to consumers through a network of Fair Price Shops. In order to reduce excess stocks lying with the Food Corporation of lndia, the Government initiated the following measures under the TPDS, w.e.f. 12.7.2001:

1. Under the new scheme, *viz*., the Targeted Public Distribution System (TPDS) each poor family is entitled to 25 kgs of foodgrains per month (w.e.f. July 2001) at specially subsidised prices.
2. The Government has decided to allocate foodgrains to APL families at the discounted rate of 70% of the economic cost.
3. Further, under the Antyodaya Anna Yojana[25], 25 kgs. of food grain are provided to the poorest of the poor families at a highly subsidised rate of Rs 2 ($0.04) per kg. for wheat and Rs 3($ 0.06) per kg. for rice.

1.Distribution System

TPDS is operated under the joint responsibility of the Central and the State Governments. The procurement of food grains is mainly done by the Central Government which are then stored in the Food Corporation of India (FCI) Godowns from where it is disbursed to the States & Union Territories. The FCI issues food grains to different States based on allocations made by the Central Government.

The State Governments undertake the operational responsibilities of identification of families below poverty line, issue of ration cards, allocation within the State, and distribution of commodities through the network of Ration Shops or Fair Price Shops. (FPS).

The supply chain showing the movement of food grains from the farmers to the end consumers is shown as :

FARMERS k PROCUREMENT k FCI GODOWNS k STATE k STATE GODOWNS k RATIONSHOPS - CONSUMERS

2. Ration Cards

The State Governments undertake the responsibility to identify the eligible households/ beneficiaries into the BPL or APL categories and issue a ration card also known as household supply card which enables them to avail the prescribed quantity of foodgrains and/or other commodities. Out of the BPL families, the poorest of the poor to the extent of the target are

25. Translated, it means "Food Scheme for the ultra poor".

selected for Antyodaya Anna Yojana (AAY) Scheme and Annapoorna scheme. For each of these categories, the states issue rations cards of different colors to the beneficiaries to easily differentiate between them. The supplies given to the BPL families through ration shops on a monthly basis are more in quantity and lesser in price as compared to those earmarked for APL families.[26]

This entire system of procurement of food grains from the producer farmer to its movement to state owned godowns and then to the respective districts and then to the FPS to be delivered to the consuming public constitutes our PDS system.

The FCI transports foodgrains from surplus states to deficit states. It procures stocks from grain markets (anaaj mandis) and purchase centers. This is stored in the nearest state depot and then dispatched to the recipient state within a limited time.

An average of 12, 00,000 bags of 50 kg weight of food grains or sugar are transported from the producing states to the consuming states by rail, road, inland waterways etc. everyday.

The State Civil Supplies Corporations make advance financial arrangement with the FCI to procure the centrally allotted quantity of food grains and sugar from the rail and road connected Principal Distribution Centres (PDC) of the FCI. (e.g. at present 35 PDC are functioning in the state of HP , one each in the 12 districts of the state and 23 in other towns) Under the TPDS the state governments must lift grains from the PDCs of the FCI and transport it to wholesale godowns for further distribution to the FPS according to their requirement.

The entire chain leaves myriad possibilities of diversion of foodgrains meant for the PDS into private hands, or acceptance of bribes by officials of the PDS from private traders and producers for their ends and similar contraventions that have riddled our PDS with big loopholes.

It is here that the legal aspect of the PDS comes into picture of the PDS[27] the legal framework of the PDS is made by the ECA, 1955, its amendments, the PBMA and the hundreds of Orders passed by the Centre and different state governments through the ECA from time to time to ensure smooth and effective functioning of the PDS[28]

26. *Ibid*, p. 2.
27. Jai Prakash, Essential Commodities Act, 1955, 3rd ed., p.1. Also see Appendices-I and II at the end of the article.
28. Jai Prakash, Essential Commodities Act, 1955.

In fact these Acts and orders issued there under render an air of "Rule of law" to the actions of different Centre and state agencies controlling our PDS. They lay down what acts or abstentions would amount to offences under these Acts and their punishment etc. A brief perusal of the provisions of the ECA along with case studies is a must to understand how effective they are in containing those that abuse our PDS.

The Essential Commodities Act, 1955

The Act ensures availability of commodities essential for the common man by empowering the government to regulate by licences, permits or otherwise the production, transport, storage, disposal or acquisition of any essential commodity coupled with price regulation through a large number of Central and State Control Orders which form the backbone of this legislation.[29]Alongside central control there is provision for regional control through delegation of powers to the State Government or state officers at the spot for expedient action and better appreciation of regional or local problems.

A study of cases decided under the Act reveal the ease and impunity with which these control orders are violated for personal gain and the difficult task of containing the violations given the country's huge geographical area and our natural penchant for cheating.

Regulating Storage and Stock Limits by Issuance of Licences or Orders

Regulation of stock limits of foodgrains and sugar is carried out by different states of India by issuing licenses to food grain dealers under various Orders passed under the ECA 1955 The very purpose of the Act and the order passed there under would be defeated if condition of the License is held to mean that dealers in foodgrains can store them for considerable lengths of time at places undeclared and hence beyond official supervision and thus keep them back from consumers, Form "D" of the U.P. Foodgrains Dealers Licensing Order, 1964 prohibits storage of foodgrains by a dealer at places other than the godowns disclosed in the Licence. Thus the applicant was rightly found guilty of having committed breach of condition no. 2(b) of the Licence in so far as he has stored them for sale at places not mentioned in the Licence.[30]

To keep more property in possession than that prescribed by an order made under Section 3 of the Essential Commodities Act, 1955, is an offence

29. P. Leela Krishnan, Consumer Protection and Legal Control, 1984, p.2.
30. *Ramesh Chand* v. *State* 1974 All.Cr. C. 310.

punishable under Section 7 of the said Act.[31]

In another case contraband rice which had been seized by the Police, belonged to the Fair Price Shop of G. As such the rice should have been sold and stored at that FPS. The rice, as a matter of fact, was seized while it was being negotiated for sale in the market. It was held that its sale at a place other than the Fair Price Shop was a clear contravention of the provisions of U.P. Grain Dealers Licensing and Restriction in Hoarding Order, 1976.[32]

From the above cases we can infer that imposing limits upon stocks helps contain hoarding and black marketing of essential commodities. They vary according to the severity of supply shortfalls and price rises. The State wise position relating to stock limits is given in Appendix-II.

Similarly under Section 3 of the Act various orders with respect to Restrictions on movement of foodgrains have been made by the central and state governments from time to time. These Orders/Notifications restrict movement of goods from surplus States to deficit States. See Appendix-I

Regulating by Issue of Transport Licences and Movement Control Orders

Under the Inter-zonal wheat and wheat products (Movement control) order (1964), it was held that the offense of attempting to export wheat to another zone was complete when the accused were arrested at a place very close to inter-state boundary.[33] Transport of wheat outside State without Licence and without selling it to State Government or Food Corporation of India as required by U.P. Wheat (Levy) Order, 1982 is violative of Section 3 of the Act.[34]

Prosecution for Offence under Haryana Coarse Grains (Export Control) Order, 1972

Under Clause 3 of the above Order; not only the actual taking of Bajra from out of Haryana State to a place outside but also attempting or abetting such export is an offence. From the evidence of prosecution witnesses, it was clear that the tonga[35] in which the petitioner was carrying Bajra was stopped by the authorities at a distance of about two paces from Haryana Delhi border. Therefore, the petitioner was rightly convicted under

31. *Garsi Lal* v. *State of Bihar* 1967 Cr LJ 1439 (Pat.).
32. *Balram Lal Srivastava* v.*State of U.P.*, 1982 Excise of Food Adulteration Reports, 112 (All).
33. 1971 Cr.L.J. 1804.
34. 1985 EFR 515.
35. Horse driven cart.

Section 7 of the Essential Commodities Act, for contravention of the Order.[36]

The District Supply Officer, Ramanathapuram at Madurai organised a night patrol, at Kannirajapuram, during the night between July 6 and July 7, 1976 and was watching the movement of vehicles along the border of the district, when the lorry belonging to the petitioner was seen at about 3:30 A.M. proceeding towards Tirunelveli district. The lorry was intercepted near the border of Ramanathapuram district and the driver was interrogated and the lorry was searched, sixty-five bags of rice and 30 bags of paddy were found in the lorry. The district Supply Officer came to the conclusion that there was an attempt at transporting the paddy and rice to Tuticorin in Tirunelveli district in contravention of the provisions of Clause 4(1) of the Tamil Nadu Paddy and Rice (Movement Control) Order, 1970. Therefore, he seized the lorry with the rice and paddy. The collector upheld this seizure and ordered that the seized lorry and rice bags be confiscated to the Government under Section 6-B of the Act.[37]

From these cases we see how government's authorities restrict inter state movement through notified orders. Largely State implemented and enforced to help implement the orders issued as per the ECA, they come down harshly on the farmers and traders trying to sell their produce in the form of harassment by the local authorities.[38]

A common practice followed by the local officials at state borders is, to stop and check trucks carrying goods. Though on the excuse of a routine check, trucks normally get held up for days on end yet the results in unnecessary harassment and imposes a heavy price on private traders, in the form of lost time and the bribes paid.[39] Traders reportedly operate at high margins and share a part of these with the inspectors.

Regulation by Distribution Orders through Fair Price Shops and Co-Operatives

Appointment of retailers and authorisation of Government Fair Price Shops, Sahkari Bazaars and Co-operative Stores etc. are achieved by the Government through Licences and orders issued under Section 3 of the Essential Commodities Act.

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36. *Balbir Singh* v. *State of Haryana* 1979 Chg. LR 272.
37. *V. Natarajan* v. *The Govt. of Tamil Nadu* AIR 1978 Mad. 390.
38. Parking Space for the Poor: Restrictions Imposed on Marketing & Movement of Agricultural Goods in India by Mayank Wadhwa http://www.ccsindia.org/ccsindia/policy/live/studies/wp0009.pdf p.2 (viewed June, 2010).
39. *Ibid*, p. 4.

Fair Price Shops are state government shops allotted after issue of a license to sell subsidized foodgrains.

It is necessary that wide publicity should be given to notices inviting applications under Section 3(5) for the allotment of Fair Price Shops and merely pasting of notice inviting applications only in the building of the Municipal Council cannot be sufficient to serve the purpose as only few people would come to know of such notice.[40]

These shops are usually one room tenements wherein the license holding shopkeeper keeps gunny bags of subsidized items for sale to the ration card holders. He has to display the rate list of each item and has to keep his shop open till stocks last. He must also sell foodgrains to anyone holding a ration card.

Regulating by Inspection of Accounts and Display of Price Lists

Apart from the power to regulate by licences and permits, the production, storage, transport, and distribution of essential commodities, Section 3 also empowers the government to inspect books and accounts of traders in essential commodities.

The Essential Commodities Act: An Assessment

The Act works on Central Control Orders and notifications which are followed by State Orders thereby authorizing state officers of a reasonably high rank like the District Collector or the Sub-Divisional Magistrate or the Deputy Commissioner of Civil Supplies or District Revenue Officer to supervise the carrying out of such orders. These officers have powers to release quotas of various essential commodities or to appoint licensed vendors or Fair Price Shops or Co-operative Societies or to fix or control prices etc. They are assisted by various junior officers in other civil departments of the State like tehsildaars, patwaris, Food and Supply Inspectors, Industry inspectors, ISI[41] authorities as well as police officers for checking contravention of such orders. So many different Control Orders under which substantial powers are given to different authorities of different departments as well as private agencies, result in an equally large scope of contravention of such orders at various points.[42]

A study of cases decided under the Act reveal the ease and impunity with which these control orders are violated for personal gain and the difficult

40. (1989) 1 Goa LT 283.
41. Indian Standards Institute.
42. Economic & Political Weekly, Apr. 6, 1986 "An Experiment in Foodgrains Procurement Producer levy in Andhra" by K.V. Natarajan, p. 101.

task of containing the violations given the country's huge geographical area and our natural penchant for cheating.

The Digests of High Court Cases over the year on this Act show that the Act and its control orders are not as frequently challenged by aggrieved parties as compared to other pieces of legislation even though the Act affects a much larger section of the population, much more than any other piece of law.[43]

This shows that our manufacturers, millers and growers understand the language of being hand in glove with our bureaucrats for their personal gain. The low incidence of such orders being challenged on ground of partiality or discriminatory allotments speaks for itself it is also clear that this Act is barely successful in plugging the leakages in our PDS.

Besides the effectiveness of this Act can also be gauged from the following data:

The results of enforcement of the Essential Commodities Act, 1955 in the States/UTs during the year 2004 as reported up to 31.12.2004[44] are as under:-

i) No. of raids conducted	:	83848
ii) No. of persons arrested	:	2401
iii) No. of persons prosecuted	:	1171
iv) No. of persons convicted	:	109 (8%)
v) Value of goods confiscated	:	Rs.1704.01 lakhs

For the three years 2006-2008, state and union territory governments prosecuted 14,541 persons under the provisions of EC Act, 1955 and secured conviction in 2,310 cases. In 2009 as on 31 August 2533 persons had been prosecuted and 37 convicted.[45]

Under the Essential Commodities (Special Provisions) Act 1981, against 80,927 raids only 2,719 persons were convicted (3.36%) in 1995, and 45,500 raids resulted in 2,177convictions (4.78%) 4. during the year 1996.

From an assessment of prosecutions and convictions under t the ECA 1955, it is clear that these Acts are barely successful in plugging the leakages in our PDS. Those who divert supplies big time from the PDS lie

43. *Supra n.* 12. p. 294.
44. Ministry of Consumer Affairs, Food & Public Distribution Government of India.mht.
45. ET classroom: Essential commodities act 15 Jan 2010, 0435 hrs IST,ET Bureau.

much beyond the reach of these two measures.

The Planning Commission Report on Our PDS

According to the Planning Commission Report on our PDS,[46] complaints of large scale diversions of foodgrains and sugar mar the new TPDS (1997).

At the national level, it was found, there was a diversion of 36% of wheat supplies, 31% of rice and 23% sugar. Diversion is more in Northern, Eastern and North Eastern regions; it is comparatively less in Southern and Western regions.[47]

A study in Bihar has reported the following:

Delivery System for PDS in Bihar

- Dealership and even membership of vigilance committees set on the PDS are seen as positions where money can be made
- The procedure to appoint them is highly politicised, and mostly clients of MLAs are appointed
- Sub-district infrastructure to handle food grains is poor; Ranchi had only 11 godowns for 20 blocks
- The Civil Supplies Corporation has no working capital to buy from Food Corporation of India; vans are in poor condition or have no money for petrol, staff does not receive salaries for months
- On the whole, only Government staff, agents and retailers benefit from the scheme

Problems of lack of infrastructure and shortage of funds with Government

Agencies are not unique to Bihar; most States especially in the NE suffer such handicaps except for a few in the West and the South. One study claimed that each fair price dealer has to "maintain" on an average nine government functionaries. Other problems associated with the scheme are:

- The poor do not have cash to buy 20 kg at a time, and often they are not permitted to buy in installments.
- Weak monitoring, lack of transparency and inadequate accountability of officials implementing the scheme

46. http://www.planningcommission.nic.in/plans/mta/mta-9702/mta-chapter8.pdf (viewed July, 2010).
47. This study was conducted by the Tata Economic Consultancy Services.

- Price charged exceeds the official price by 10% to 14%.[48]

Conclusion

In the wake of this doctrinaire study on the loopholes in our PDS in this essay the most meaningful suggestion of reform comes from Sh. NC Saxena *chairperson of the ministry of rural development's committee on BPL (below poverty line) surveys*,in an interview given to the Times of India on Friday, April 16, 2010, reproduced here below:

What is the biggest drawback of the proposed National Food Security Act?

The Act is to be enforced through the public distribution system (PDS) which is notorious for its leakages and flaws. The Planning Commission report says that 60 per cent of ration cards/BPL cards are with the non-poor. Only 36 per cent of the poor have any card. And about 20 per cent have no cards at all, and this must be the poorest, which have been left out altogether.

How has the PDS worked well in Chhattisgarh?

In Chhattisgarh, the CM himself had a meeting with MLAs and told them not to make money out of PDS if they wanted to win elections. He replaced all private dealers with panchayats. The panchayats were given an advance of Rs 90,000 to ensure they had enough funds. Almost 500 people were put behind bars for blackmarketing and other similar crimes. A toll-free number and call centres were set up to take complaints on PDS and calls were monitored to ensure that action was taken. The state government recruited 500 motorbike riders to go out and check if foodgrains have reached the people.[49]

Suggestions

Complaints instituted by the public generally relate to mismanagement and corruption of persons officiating in the State Civil Supplies Departments, FPS owners etc. Mismanagement and curt behaviour of persons in charge of these agencies do not receive serious attention for the reason that persons responsible for the outrage have contacts in the higher echelons of administration. There is almost complete unanimity that essential commodities supplied through these agencies are not of desired quality. It

48. *Supra n.*45.
49. N C Saxena, is one of the food commissioners appointed by the Supreme Court to monitor the implementation of orders related to the right to food. Saxena, a member of the previous National Advisory Council, spoke to Rema Nagarajan on the proposed National Food Security Act (NFSA).

is suggested that the panchayati institutions and consumer associations must actively involve themselves with the public distribution programme to make it a success.[50]

It is also suggested that the Government must open up fairer price shops and supply all essential commodities. It must also supply sufficient quantity. Efficient supervision by the superior officers can alone make the working of these fair price shops a success.[51]

Gram Panchayats and Gram Sabhas must identify the ultra poor in the villages with no land, livestock or assets to make them immediate beneficiaries of State action for tackling hunger. Also the pradhans of these bodies must be made responsible to give information to the rural poor about the place of implementation of Centrally Sponsored Schemes like the location of the FPS of that area or the address of the school where the Mid day Meal Scheme is working etc. The UP government has proposed that important information like the arrival of PDS supplies at the local FPS would be SMSed to the Pradhans and the ration card holder's mobile number so that people can avail of the subsidised food. This is after the jolt it received from the UP grain scam of December 7, 2010.[52]

It is not enough merely to make the allocations to the PDS by accommodating the requirements of grains and sugar of different States. The Food Secretary himself should follow it up by monitoring in weekly meetings with the FCI and the Railways at high enough levels the progress in the movement and delivery of the quantities allocated.

The Centre should ensure adequate infrastructural capacities in districts and at block levels to plug leakage of scarce resources which reportedly helps only contractors and corrupt government staff and keeps the poor and the needy away.

Very often, difficulties are created for the States by the Food Ministry acting on his own without keeping the States in the picture. Delays and cuts in the allocations for PDS can bring the situation in the affected States to near crisis. Once the even tenor of allocations, transportation and supply at the doorstep of fair price shops is disturbed by the Centre's dilatory or thoughtless actions, it takes a long time for the States to get back to the normal rhythm.[53]

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50. D.N. Saraf, Law of Consumer Protection in India, 1990, p. 357.
51. *Supra n.*12, p.182.
52. Times of India, New Delhi, December 8, 2010. Tuesday, February 9, 2010.
53. Food inflation : Onus wholly on Centre, THE HINDU, Tuesday, February 9, 2010.

Food inflation : Onus wholly on Centre, THE HINDU,

Another suggested reform is that the PDS must focus on: locally bought grain, ensure PDS documents be made public and provided on demand within seven days, at costs prescribed by the Right to Information Act (RTI); Fair Price Shops management must be given to the village councils and women's groups[54] etc. instead of patrons of local politicians.

54. Govt.tack on food bill bySamar Halarnkar, Hindustan Times,New Delhi, April7, 2010.

Appendix - I

State-wise position on restrictions imposed by State Governments/ Union Territories on movement of food and agricultural produce State Status

A.P Paddy (Restriction on movement), 1987: According to this order no person shall attempt to move or abet the movement of paddy from any place in the state to any place outside the state except under a permit issued by the State government or an authorised officer. The order gives the implementing authority the power to enter, search and seize. *M.P Rice Procurement (Levy) Order, 1970:* It imposes restriction for rice milled in the state, by forcing the millers to give a prescribed percentage of their production in levy to the State government. For the remaining quantity they have to obtain release order and transit permit from the concerned district collector for movement to other districts or states.

Orissa Restriction on movement of rice and paddy from one district to another within the state. The producers/cultivators can move their surplus stocks of paddy outside the state with permission of concerned sub-collectors.

Tamil Nadu Restriction imposed on of paddy/rice out of the state, which is conditional to 100% levy.

U.P Rice and Paddy (Levy & Regulation on trade) Order, 1985: This applies to the whole of U.P, including the border areas. As per this Order, every licensed miller shall sell and deliver to the government, at the notified price, 60% of each variety of rice. The movement or sale of rice can be done only after obtaining a release certificate from the Centre In-charge/Senior Marketing Inspector/Marketing Inspector (after having to sold to the State government as per the levy).

*Pondicherry Paddy and Rice Procurement (Levy) Order, 1996:*According to this, every trader who wishes to transport paddy/rice outside the state shall have to obtain a permit and measure transport levy at 20% of the quantity transported. The traders are also to pay 10% as purchase levy to the government.

Appendix - II

State-wise position on restrictions imposed by State Governments/ Union Territories on storage of food and agricultural produce State Status

A.P Rice & Paddy (Storage Control) Order, 1981: It imposes restrictions on stock limits of rice and paddy.

Assam Stocking of food and agricultural produce is regulated through: *Assam Trade Articles (Licensing and Control) Order, 1982; Assam Public Distribution of Articles Order, 1982 and Assam Rice and Paddy Procurement Order, 1955.*

H.P Trade Articles (Licensing and Control) Order, 1981: Traders possessing foodgrains and other food articles more than the specified limits are required to obtain a license.

M.P Scheduled Commodities Dealers (Licensing and Restriction on Hoarding) Order, 1991: Under which Stock limits imposed on wheat for flourmills.

Meghalaya Foodgrain (Rice) Licensing and Control Order, 1985; Meghalaya Pulses, Edible Oil seeds and Edible Oils (Licensing and Control Order), 1979 and Meghalaya Sugar Dealers Licensing Order, 1973 have been issued to regulate purchase, storage and sale of essential commodities.

Orissa Rice and Paddy Control Order 1965: It authorises the State Government to issue any direction to a license with regard to purchase, sale or storage for sale in wholesale quantity of rice and paddy.

Orissa Wheat and Wheat Products Control Order, 1988: It authorises the State Government to fix up the maximum limit of storage of wheat or wheat products or both taken together on wholesaler or producer.

Punjab Trade Articles (Licensing and Control) Order, 1992: A license has to be obtained by the dealers before carrying on business in the commodities specified in the Schedule-III of the Order. Stocking of more than specified limit of wheat, paddy and its products requires a license.

Sikkim Rice and Wheat (Storage) Control Order, 1992: Stock limits imposed on rice and wheat.

Tamil Nadu Essential Trade Articles (Regulation of Trade) Order, 1984: Stock limits fixed paddy/rice, sugar and pulses *Chandigarh Food Articles (Licensing and Control) Order:* Stock limits imposed for wheat, rice and pulses.

Pondicherry Essential Trade Articles (Regulation of Trade) Order 1989: Stock limits fixed on rice.

THE SOFTWARE PATENT CONUNDRUM AND OPPORTUNITIES FOR LEGAL COMMUNITY

Saurabh Prabhakar*

Introduction

The rapid growth of Digital Computers has marked the advent of a new chapter in the development of human society. It has been instrumental in vaulting mankind from the Industrial Era into the Knowledge Era. The Digital Computer has produced a profound and largely benevolent impact on all aspects of human society. It has been a key driver of economic prosperity in all parts of the world. The success of IT revolutions in developing countries like India, China and Eastern Europe has enabled alleviation of poverty in societies which are home to almost 40% of the world's population. The development of the borderless World Wide Web (www) and new medium of communications like voice-chat, email, social-networking etc. have made physical separation moot and have led to increased global interaction. This has resulted in greater understanding of cultural uniqueness and global bonhomie between civilizations. Increased computerization has produced significant change in the political landscape as well. The barrier-less access to information and development of concepts like e-governance has led to the creation of a well-informed and therefore empowered citizenry. This has resulted in increased accountability in government and has strengthened the foundation of democratic institutions. Therefore, whether it is economic, cultural, political or social, it is impossible to exclude any realm of human society which has not been revolutionized since the advent of the Digital Computer.

If the Digital Computer can be proclaimed the physical carrier of the knowledge revolution, then it would not be an exaggeration to claim that the software that drives the Digital Computer is the proverbial soul of this revolution. Without the ability to conveniently program the computer to carry out tasks as mundane as adding two numbers or as sophisticated as launching a space shuttle to Mars, this revolutionary invention of man would have been nothing more than a fascinating box of transistors and wires. Thus the contribution of the Computer Software industry towards the development of society is by no means smaller than the Semiconductor industry which created the Digital Computer.

In order to expand and prosper, the Computer Software industry, like any other industry, requires an ecosystem which is conducive to innovation

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and protective of property rights. However the relationship between the Intellectual Property Rights (IPR) regimes and the Computer Software industry has been marked by inflexibilities and inconsistencies. On one had the IPR regimes in European Union (EU) and India have refused to grant patents for software programs. On the other hand the regime in the U.S. has vacillated between blanket refusals[1] to that of categorical acceptances[2] on matters of software patents. This wide variance between various IPR regimes across the globe has weakened the protection of inventions in the software industry. Additionally, the ambiguity in application (copyright vs. patent) and interpretation of statutes (patentable or not-patentable) within the same regime is embroiling software manufacturers in expensive and time-consuming litigation. As the pervasiveness of computer software in human lives increases, this environment of indifference and ambiguity towards the protection of the IP of software industry would eventually impact growth thereof.

The uniqueness of Computer Software industry has also played a part in confounding the problem of software patents. Firstly, the products of software industry have no physical form as they exist inside digital computers as series of 1s and 0s. Their function is to program the computer to execute a series of instructions i.e. an algorithm. This raises serious challenges for the patenting regimes which were developed to protect inventions in the form of machines or physical processes which have well-defined form and application. Secondly, unlike industries like Manufacturing, Pharmaceuticals, Bio-technology etc. which have high entry costs and require long time to develop inventions, the software industry has low cost of entry and rapid rate of development. Thus the volume of IP that needs protection is very high. Thirdly, the low cost of entry and high profitability has created an industry which is an eclectic collection of large corporations, small start-up companies and a vibrant open-source community. This has created conflicting demands on the IPR regimes from the opposite ends of the spectrum, both in matters of grant and enforcement of protection.

This paper intends to present that how different yardsticks have been used by the U.S. Courts in deciding certain cases pertaining to granting and infringement of patents. It discusses how these judgements and the role of USPTO (United States Patent & Trademark Office) have created serious challenges for the software industry. It also invites the Indian legal community to take up the opportunity to initiate meaningful patent reform

1. *Gottschalk* v. *Benson*, 409 U.S. 63, 175 USPQ 673 (1972).
2. *Diamond* v. *Diehr*, 450 U.S. 175, 209 USPQ 1 (1981).

based on judicial interpretations of the presented cases. This paper then seeks to raise questions for the legal community involved in the development of the jurisprudence of Intellectual Property Rights on how existing IPR regimes can be reformed to provide consistent patent protection for computer software inventions and at the same time appropriately limit its scope in order to meet the constitutional mandate of IPR i.e. to promote the progress of Science and Useful Arts.

Patents: Definitions and Constitutional Objective (US)

A patent constitutes a limited time grant to the patentee, his heirs or assigns, a right to exclude others from making, using, offering for sale, selling or importing the invention for the term of the patent in the jurisdiction of the granting state. A patent is not the grant of right to make use or sell, only the right to exclude others.[3]

A patent can be obtained for the invention or discovery of a new and useful process (process, art or method), machine, manufacture, or composition of matter, or any new improvement thereof.[4]

The word "Patent" originates from the Latin word *patere*, which means "to lay-open" (i.e., to make available for public inspection). A patent is a set of exclusive rights granted by a state to an inventor or their assignee for a limited period of time in exchange for public disclosure of an invention. The motivation for patent grants is captured in the US constitution as follows:

"To promote the Progress of Science and useful Arts, by securing for Limited Times to Authors and Inventors the exclusive Rights to their respective Discoveries and Writings."[5]

The intention of Patent Law is to promote the progress of Science and Technology by encouraging inventors to publicly disclose their novel inventions to society. The public disclosure of an invention serves the following purposes:

1. It enables the use of the invention by society by building required machinery or processes
2. The disclosed invention can be used as a building block for future inventions by other inventors.

As an incentive for full disclosure the state grants the inventors a limited period right by which only they can commercially exploit their invention by selling, licensing, transferring or mortgaging.

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3. *Herman* v. *Youngstown Car Mfg. Co.*, 191 F. 579, 584-85, 112 CCA 185 (6th Cir. 1911).
4. 35 United States Code S. 101.
5. U.S. Constitution Art. I, § 8.

Hence the yardstick to measure the success of any patenting regime is whether its implementation encourages innovation in society and whether the innovations are subsequently disclosed thereto. Justice Breyer observed in his dissenting opinion in *Laboratory Corporation of America Holdings* v. *Metabolite Laboratories Inc.*,[6] "… too much patent protection can impede rather than 'promote the Progress of Science and Useful Arts,' the constitutional objective of copyright and patent protection."

Software Program: Definition and Applications

A software program (also a computer program) is a sequence of instructions written to perform a specified task for a computer.[7] The Oxford Advanced Learner's Dictionary defines a program as a set of instructions in CODE that control the operation or functions of a computer.[8] An algorithm on the other hand is defined as a set of rules that must be followed when solving a particular problem.[9] Therefore, a software program is an algorithm which is used to solve a problem using a computer. The "set of rules" of an algorithm correspond to the "set of instructions in CODE" of a computer program. The distinction between the two terms is important as it would be used when determining the patentability of a software program.

Modern software programs can be quite sophisticated with code spanning over millions of lines. Therefore, a standalone software program which itself is an algorithm can consist of several other algorithms which work together to produce the desired result. For e.g. a word processor like Microsoft Word is an example of a computer program whose objective is to represent textual information in an organized manner. Within the word processor there can be sub-programs whose objective might be to carry out smaller tasks for e.g. spell-check or grammar check. Therefore, a single innovation in a software product can actually consist of several other innovations. Additionally, inventions in software may require combining several existing inventions in a bottom up fashion. These characteristics place demands on the scope of patents.

A software program can be used for a variety of purposes. The execution of a program can result in a tangible physical transformation for example Computed Numerically Controlled (CNC) machines[10] which are

6. *Labcorp* v. *Metabolite*, 548 U.S. 124, slip op. at 2 (2006), (Stephen Bryer, dissenting).
7. Stair, Ralph M. *et al.*, PRINCIPLES OF INFORMATION SYSTEMS, 6th ed. 2003, p. 132.
8. Oxford Advanced Learner 's Dictionary of Current English, 7th ed. 2005, p. 1206.
9. *Ibid*, p. 36.
10. Siegel, Arnold, "Automatic Programming of Numerically Controlled Machine Tools", Control Engineering, Volume 3 Issue 10 (1956), pp. 65-70.

run using a software program. Some other category of programs may not produce any tangible physical transformation or movement for example a word processing application which simply captures user provided data. In more sophisticated programs, an artificial intelligence program may itself create a software program without the intervention of a human operator. These different characteristics pose serious questions for patenting regimes when determining patentability of inventions.

There are two distinct concepts involved in the development of a software program:

1. The algorithm designed for the implementation of the desired task, i.e., the idea.
2. The manner in which the designed algorithm is implemented, i.e., the code.

The cognizance of these two concepts of developing a software program are important as the former can be protected by Patent regime and the latter can be protected by the Copyright Regime. Therefore effective protection of a software program requires protection using both the regimes.

Understanding the Software Patent Conundrum: U.S. Patent Laws and Court Rulings

The criteria for patentability of software programs vary across jurisdictions. The EU does not grant patents for Computer Program or Computer Implemented Business Methods.[11] Even India which is the epicentre of the world's software development industry does not grant patents for software programs.[12] The stance of the U.S. on software patents has however been ambiguous. Their patent laws have a very broad definition of patentability which does not explicitly refer to software program. However it is the very ambiguity of U.S. patent regime which makes it an excellent candidate for gaining vital insights in the procedural and jurisprudence issues involved in patenting software programs. There are valuable lessons to be learnt from understanding the judgement of U.S. Courts on some of the landmark cases involving patents by both software and legal professionals.

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11. EPC, Art. 52 para. 2, which describes "what is not regarded an invention," section (c) describes "schemes, rules and methods for performing metal acts, playing games or doing business, and program for computers," as ineligible for patent grants.
12. The Patents Act 1970 (as amended on 2002), Chapter II, §3, which refers to "what are not inventions", clause (k) describes "a mathematical or business method or a computer program *per se* or algorithms," as a non-patentable invention.

The U.S. Code Title 35 Article 101 (35 U.S.C. §101) defines patentable inventions as follows:

"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title."

Software programs cannot be defined as machine, manufacture or composition of matter. Therefore, they fall under the category of new and useful processes or new or useful improvements over existing processes for the purposes of requesting patents.

The first challenge to the validity of software programs as patents was captured in *Gottschalk* v. *Benson*.[13] This 1972 case involved a claim for a patent on a method of programming a general purpose digital computer to convert signals from Binary Coded Decimal (BCD) form to pure binary form. The claims were not limited to any particular art or technology, to any particular apparatus or machinery or to any particular end use. In deciding the case, the Court introduced a benchmark test for evaluating the eligibility of a process patent claim, now known as the "Machine or Transformation Test". The Court ruled that:

"…a process patent must either be tied to a particular machine or apparatus or must operate to change articles or materials to a different state or thing."

The Court ruled that the mathematical formula involved in the patent claim had no practical application except in connection with a digital computer. This meant that if the patent is granted it would wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself. The Court defined "algorithm" as a "procedure for solving a given type of mathematical problem," and such an algorithm is like a law of nature which cannot be the subject of a patent.

This decision generated serious implications for patenting compute software. The decision that algorithms cannot be patented struck at the very definition of computer software, thereby rendering any invention which involved only a computer program and no machinery or transformation, ineligible for patent under the statutes. The decision also gave rise to subjectivity in evaluation of software patents as terms like transformation, articles and state change were not explicitly defined. Since the decision of

13. *Supra n.* 1.

Benson case implied that articles had to be physical objects, it created severe restrictions in accepting transformation of electrical signals by software programs as eligible under the statutes for patents. Therefore, the Benson case loaded the patent regime of the U.S. against granting patents for software programs.

The categorical acceptance of patent claims involving software programs was provided by the 1981 case *Diamond* v. *Diehr*.[14] The case involved determination of whether a process for curing synthetic rubber which includes in several of its steps the use of mathematical formula and a programmed digital computer is patentable subject matter under 35 U.S.C. § 101. The patent examiner invoked the Benson judgement stating that involvement of a computer program in a patent claim constituted non-statutory subject matter. The Court ruled that a physical or chemical process for moulding with precision synthetic rubber falls within the 35 U.S.C § 101 categories of patentable subject matter. Thus a subject matter otherwise statutory does not become non-statutory simply because it uses a mathematical formula, computer program or digital computer. The Court noted that the Benson decision does not preclude a patent for any program servicing a computer. This decision relaxed the constraints on filing patent claims which involved a combination of computer software and physical phenomena. This opened the doors for filing patents in the embedded systems domain but still precluded a large segment of software industry inventions from being eligible for patents. In the absence of clear definition of articles and transformation, computer software which did not involve any physical transformation was still considered as non-statutory subject matter under 35 U.S.C. § 101.

The expansion of statutory subject matter to include computer software which did not involve any physical transformation of an article was achieved in 1998 vide the United States Court of Appeals, Federal Circuit decision in the case of *State Street Bank* v. *Signature Financial Corp*.[15] The case involved the eligibility of a patent entitled "Data Processing System for Hub and Spoke Financial Services Configuration" under 35 U.S.C. § 101. The Court ruled that a process patent which involved no physical transformation of an article was a statutory subject matter under 35 U.S.C § 101 if it produces a "useful, concrete and tangible result." The impact of this decision was to bring under the gambit of statutory subject matter a broad spectrum of software and business method inventions which

14. *Supra n.* 2.
15. *State Street Bank* v. *Signature Financial Corp*, 149 F. 3d 1368 (1998).

were previously considered as non-statutory. Expectedly this decision was a major impetus behind the boom in software and business method patents in the late 90s and early 2000. Coincidentally this time period also overlapped with the rapid growth in the computer software and internet industry.

The honeymoon period for software patents however was short-lived. In a 2008 case of *In re Bernard L. Bilski and Rand A. Warsaw*,[16] the United States Court of Appeals, Federal Circuit reiterated that the "machine-or-transformation test" introduced in the Benson verdict as the applicable test for statutory matter under 35 U.S.C § 101 and stated that the "useful, concrete and tangible" test in State Street Bank verdict[17] should no longer be relied upon. Though the Court conceded that "…the more challenging process claims of the twenty-first century are seldom so clearly limited in scope as the highly specific, plainly corporeal industrial manufacturing process of Diehr; nor are they typically as broadly claimed or purely abstract and mathematical as the algorithm of Benson.," it also established the primacy of the "machine-or-transformation test" to determine whether a process claim is tailored narrowly enough to encompass only a particular application of a fundamental principle rather than to pre-empt the principle itself. The Court also commented that "…future developments in technology and the sciences may present difficult challenges to the machine-or-transformation test, just as the widespread use of computers and the advent of the Internet has begun to challenge it in the past decade. Thus, we recognize that the Supreme Court may ultimately decide to alter or perhaps even set aside this test to accommodate emerging technologies. And we certainly do not rule out the possibility that this Court may in the future refine or augment the test or how it is applied." While this comment kept the possibility of refinement or rejection of the "machine-or-transformation test" in the longer term, in the short term it firmly shut the door on the wider interpretation of statutory matter to include software patents of all kind.

Thus, over a period of more than four decades the attitude of the U.S. Patent Regime has varied from conservative (Benson), to categorical acceptance (Diehr), to extremely liberal (State Street Bank) and finally back to the conservative stance but with the possibility of a liberal stand in future in acknowledgement of developments in the field of computer and internet technologies. However this vacillation in attitude and jurisprudence of the Patent Regime towards patents involving digital computer processes

16. *In re Bernard L. Bilksi and Rand A. Warsaw*, 545 F. 3d 943, 88 USPQ 2d. 1385 (2008) (en banc).
17. *Supra* n. 15.

has raised serious questions and challenges for the Computer Software Industry.

The Software Patent Conundrum: Challenges for the Software Industry

The challenges that the computer software industry has faced in filing of patents for its inventions has been on two axes:

1. Establishment of the invention as statutory subject matter;[18] and

2. Demonstration of novelty[19] and non-obviousness.[20]

The origin of the first challenge has been on account of changing definition of statutory subject matter based on the various judgements made by the U.S. Court s from time to time. This has impacted the manner in which software patents have been drafted, inconsistency in the type of patents granted and lack of clarity when challenging the eligibility of patents.[21]

The origin of the second challenge has been the inability of the US Patent and Trademark Office (USPTO) in consistently applying the novelty and non-obviousness tests on patent applications for computer software. This has resulted in the grant of some poor quality patents which have generated barriers to innovation in the industry[22] and consequently development of strong resistance within the industry towards the granting of patents for software patents. The impact of both challenges is discussed in this section.

Establishment of the invention as statutory subject matter (35 U.S.C § 101)

The Benson judgement by U.S. Supreme Court established the "Machine-or-Transformation" test as the benchmark for evaluating the statutory eligibility of process patents. However the Benson Court's inability to provide a clear definition of terms like transformation, article and state change has introduced significant amount of subjectivity in interpreting process patent applications. The cognizance and understanding of the test in the software community is quite low. In fact, the first time software

18. 35 United States Code S. 101.
19. 35 United States Code S. 102.
20. 35 United States Code S. 103.
21. See Federal Trade Commission, "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy" (2003), p. 163, available at www.ftc.gov/os/2003/10/innovationrpt.pdf , last visited Apr 1, 2010.
22. *Supra n.* 18.

engineers encounter this test is when they discuss their patent application with their attorney. At a very high level all software implements an algorithm but the Benson judgement does not allow patenting of algorithms. But the overwhelming requirement for protecting their invention forces inventors to obfuscate the language of the patent which as such is not apparent from the application that the patent is sought on an algorithm. Richard Stallman describes such a patent: A software patent for application of "topological-sort" algorithm for carrying out recalculation in spreadsheets was filed as "compiling formulas into object code,"[23] thereby making it difficult for a developer of spreadsheet software to be familiar with inventions in his related field. Another example of invention obfuscation is the patent for reverse auction where buyers announce their price and sellers are allowed to bid in response. This patent held by Walker Asset Management is described as "methods and apparatus for a cryptographically assisted commercial network system designed to facilitate buyer-driven conditional purchase offers.[24]" This practice of obfuscation is extremely worrisome for the industry as it potentially broadens the scope of protection than what was actually sought and at the same time it makes detection of infringement (wilful or innocent) very difficult. Additionally, it also raises the cost of drafting as well as protecting the patents as special legal skills are required to obtain software patents. The cost factor may exclude smaller corporations or start-ups from appropriately protecting their inventions.

Another key aspect of the Benson judgement was that the Court determined that the patent claim was abstract and sweeping as to cover both known and unknown uses of the invention. This was found to be tantamount to protection of basic tools of scientific and technological work. Therefore, a vital guideline to applicants of software patents must be that their claims must not be overtly broad in the protection that they seek. Many a times this criterion creates a paradox for software inventors. Sometimes in software industry a lot of R&D effort and investment is directed towards the development of an idea. The application of that idea to various domains might be obvious but the novelty is in the idea itself. For example Monte Carlo Simulation[25] is applicable in numerous fields like

23. Richard Stallman, "The Dangers of Software Patents", Speech by Richard Stallman at Cambridge University, March 25, 2002, p. 3, available at http://www.ftc.gov/os/comments/intelpropertycomments/stallmanrichard.pdf, last visited Apr 1, 2010.
24. Edward J. Black,"Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy", March 20, 2002, p. 5, available at http://www.ftc.gov/opp/intellect/020320black.pdf , last visited Apr 1, 2010.
25. N. Metropolis and S Ulam, "The Monte Carlo method", Journal of the American Statistical Association, vol. 44, 1949, pp. 335-341.

physics, mathematics, biology, semiconductors, finance etc. The applications of Monte Carlo Simulations are obvious but the real intelligence is involved in developing the method. Hence it may be desirable for an inventor to protect the idea rather than its application. In such cases filing a patent for all possible applications may not be feasible and protecting a specific application may lead to disclosure of the algorithm which may be counterproductive to protection. Hence the paradox is that if a patent is not applied for the invention is unprotected but at the same time the act of patenting the invention would lead to loss of protection. This paradox is responsible for various inventions in the software domain remaining in private domain and society is unable to benefit from the use of such inventions.

Demonstration of novelty (35 U.S.C § 102) and non-obviousness (35 U.S.C § 103)

The software industry is a rapidly changing industry. The rate of innovation in the industry is high and is one of the most important factors in ensuring commercial success. The State Street Bank decision resulted in increasing the number of software inventions which were eligible for patents. The impact of this judgement was the deluge of patent applications related to software and business method at the USPTO. As a result the quality of patents granted has been impacted. The increase in number of questionable patent grants combined with the legal and financial difficulties in challenging of patents has impacted innovation in the software industry and has created a strong lobby of vocal critics of software patents within the industry.

In an October 2003 Federal Trade Commission (FTC) report[26] on patent regime's impact on innovation, several participants from the Software Industry acknowledged the existence of questionable patents in the industry. They also mentioned in the report that subjective and ambiguous process of construing claims makes avoiding infringement uncertain and deters innovation. They further identified the failure of the USPTO to examine all prior art (35 U.S.C § 102) and as a consequence grant of patents that are overtly broad or obvious (35 U.S.C. §103). A few key factors determined as the cause of the USPTO to inaccurately examine all prior art were: (1) the rapidly changing and complex nature of software and internet industries; (2) the absence of legal requirement for patent applicants to disclose source code; and (3) the relatively recent recognition of the validity of business method patents by the Courts.

26. *Supra n.* 21.

The record of USPTO in determining obviousness of the patent claim has also been questionable. Open Source Software pioneer Richard Stallman disparagingly stated that 90% of the software patents issued in the U.S. would not have passed the "Crystal City test", which meant that if the USPTO went outside to the news stand and got some computer magazines, they would see that these ideas are already known.[27] The sarcasm of Richard Stallman is not without merit. In September 1999, USPTO issued a patent to Amazon.com for "one click purchasing,"[28] which allowed customers to purchase items by just clicking once on an icon, permitting the website to access pertinent personal information previously stored in their database. It is hard to believe that such a concept was not obvious to a person having ordinary skill in the field of e-commerce. In fact barnesandnobles.com already had a similar feature on their website and was sued by Amazon.com for infringement within 3 weeks of obtaining the patent.

It would be appropriate not to pass judgement on the competence without acknowledging the challenges they face in carrying out due diligence. The technique of obfuscation used by inventors when drafting patent applications makes it difficult for the patent examiner to determine the right area for initiating prior art search. Additionally, various federal Court decisions like *Northern Telecom* v. *Datapoint Corp.*[29] and *Fonar* v. *General Electric*[30] have allowed filing of software patents without any obligation to disclose the source-code. This further complicates the determination of prior art. The software industry evolves rapidly and combined with an instant delivery via the World Wide Web (www) new technologies are adopted almost right after development. Thus the boundary of obviousness is being tested everyday and hence to make an objective call on the obviousness of a patent application is more difficult that it seems to seasoned and up-to-date software professionals.

Regardless of the root cause, the inability of USPTO to rigorously apply the criteria of novelty (35 U.S.C § 102) and obviousness (35 U.S.C. § 103) has resulted in patent grants which are having a negative impact on innovation in the software industry. In the rapidly changing software industry the 20 year validity of a questionable patent could severely impact innovation

27. *Supra* n. 20.
28. United States Patent 5960411,"Method and system for placing a purchase order via a communications network", available at http://patft.uspto.gov/netacgi/nph-Parser?patent number=5960411, visited April 2, 2010.
29. *Northern Telecom Inc.* v. *Datapoint Corp.*, 908 F. 2d 931, 15 USPQ 2d. 1321 (1990).
30. *Fonar Corporation* v. *General Electric Company*, 107 F. 3d 1543 (1997).

in the industry. The lack of effective mechanisms for third party challenges to patents compounds the harm to innovation caused by questionable patents.

Unique Opportunity for the Indian Legal System

The Indian legal system currently does not allow patents on computer software. The Indian Patents Act 1970 (as amended in 2002) explicitly defines computer software as non-statutory subject matter for obtaining patents. In chapter II of the act which defines "what are not inventions," section (k) states "a mathematical or business method or computer program per se or algorithms." However upon careful inspection of the act it can be determined that the Indian interpretation of non-statutory subject matter is similar to categorical acceptance of the *Diamond* v. *Diehr*[31] decision rather than the strict exclusion as determined by the *Gottschalk* v. *Benson*.[32] However the interpretation of Indian patent law is moot as Indian software companies have traditionally sought protection under the U.S. Patent system due to the demands of their business and interest in obtaining Indian patents has been negligible. This trend could however change on account of rapid growth in the Indian market and recession in the US market. Therefore, there is a unique opportunity for the Indian Legal System to steal a march over other international legal systems in developing the jurisprudence for dealing with the conundrum of patenting a broader spectrum of software patents as per the relaxed application of the State Street Bank decision.[33] Such reform of our patents law is in our national interests for two reasons. Firstly, it protects and promotes the progress of our burgeoning software industry which is not only a top foreign exchange earner but also a significant employer for the skilled population of India. Secondly, such a reform would generate unique growth opportunities for the nation by forming a symbiotic relationship between our highly skilled and experienced legal community and our globally focussed Computer Software industry.

The absence of interest of Indian software companies in India should not be seen as a deterrent to reform. In fact, the rigid stance of our patent laws in matters of Computer Software and the lack of interest of software industry in seeking Indian patents is actually a blessing in disguise for initiating meaningful reform. The reform of the U.S. patent regime is complicated by the fact that there are already several existing software patents granted at various times under different definitions of statutory eligibility. Hence reform in either direction (exclusion or inclusion) cannot be carried out as

31. *Supra n.* 2.
32. *Supra n.* 1.
33. *Supra n.* 14.

it impacts several existing patents in favourable or unfavourable ways. Thus any meaningful reform would be tied down by significant litigation activity by either existing patent holders or unsuccessful patent applicants. Indian legal regime can however initiate reform conveniently as it has a clean slate due to blanket refusal of software patents. We can benefit from the existing legal jurisprudence already available on this matter in various other jurisdictions for example U.S. and EU. Additionally we have a globally focussed Computer Software industry which can provide intelligent inputs on this issue based on their technical and business expertise. This unique amalgamation of factors could enable our legal scholars and practitioners to develop sophisticated and innovative jurisprudence which can address the requirements of protecting the inventions of 21st century. This would allow us to evolve from a leader in IT technology to a pioneer in offering a complete IT ecosystem.

Unravelling the Conundrum: Questions for Legal Community

The investigation of the judgements in some landmark cases in the U.S. Court's enunciate clearly the need for reform in the Patent Regime in order to address the challenges faced by Computer Software industry in obtaining patents for their inventions. The unique legal and technological environment in India puts us in an excellent position for analysing these challenges and initiating suitable reform.

The most pronounced requirement for reform is in the area of defining the statutory eligibility of software patents. This issue does not have a binary yes or no answer as an overly broad or restrictive definition of eligibility would have consequences at both ends of the spectrum. A highly restrictive criterion for eligibility as recommended by the Benson judgement would render a large cross-section of the industry incapable of effectively protecting its inventions. A liberal criterion for eligibility in context of the rapid growth and unique nature of software inventions can very easily overwhelm the system resulting in insufficient scrutiny before granting of patents. This can have an exactly opposite impact on innovation than intended by the law. A fine balance between the two approaches is required and it would require excellent synergy between legal and software communities to come up with right answer.

It is important for the legal community to address the paradox that software inventors face when deliberating the disclosure of their inventions to society. Though the patent regime does not allow protection of abstract ideas, sometimes it is the abstract idea which is the actual intellectual property. This is a profound question where there are strong arguments

which can be put forth by both sides. Is there an innovative legal solution to this conundrum?

Finally, there is requirement for reform in the area of balancing the rights of the IP owners and society. Just as the lack of proper incentive from society can deter the inventor from disclosing his work to society, the absence of appropriate rights to society against inventors who stand in the way of innovation can deter society from granting such exclusive rights thereto. The instances of questionable patent grants and their hindrance to innovation make a strong case for visiting this issue.

ANALYSIS OF TAKEOVER DEFENSES AND HOSTILE TAKEOVER

A.S.Dalal *

Introduction

A takeover bid is an acquisition of shares carrying voting rights in a company in a direct or indirect manner with a view to gaining control over the management of the company. Such takeovers either take place through friendly negotiations or in a hostile manner.

When the takeover takes place in a hostile manner, i.e. against the wishes of the target company, the target company often adopts certain measures to prevent or discourage the acquirer from taking over the target company. In practice, these defenses often also serve as leverage that target companies could use in negotiating higher offers. Most of these defenses have evolved over the past 50 years. Some of them are required to be approved by the shareholders before they are carried out while others are not. Moreover, some are very strictly regulated in India while others are not. These defenses provide benefits such as stalling for time, providing direct competition to the bidder and threaten high transaction costs.

Most countries regulate these defenses by enacting laws. These defenses are challenged in court of law many times by the acquirers. The use and regulation of these defenses in India vary from those in other countries.

Takeovers and their Regulation in India

Takeover of companies is a well-accepted and established strategy for corporate growth. In India, there is a trend among the promoters and established corporations towards consolidation of market share, and diversification into new areas through acquisition of companies and in a more pronounced way through mergers, amalgamations and takeovers.

Regulation of takeovers in India

The first attempt at regulating takeovers was made in a limited way by incorporating a clause viz. Clause 40 in the listing agreement, which provided for making of public offer by any person to acquire 25% or more voting rights in a company. This was later brought down to 10%. Then came the SEBI Takeover Regulations of 1994 which was followed by the

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setting up of Bhagwati Committee in 1995 to review these regulations. The SEBI Takeover Regulations,1997 were based on the report of Bhagwati Committee. The Second Amendment Regulations were notified in 2002.

Regulation 23 of the SEBI Takeover Regulations 1997 deals with the general obligations of the target company. The Bhagwati Committee desired that the regulations should have definite provisions making it obligatory for the target company to transfer the shares and allow changes in the board of directors once the acquirers fulfill their obligations under the regulations.

The Committee Recommended that[1]

- Till the offer formalities are completed, the target company shall be precluded from inducting any person or personsominated by the acquirer or belonging to his group into theboard of the target company or in management of the target company during the offer period (Reference : Part II of the Report - sub regulation (7) of Regulation 22 and sub-regulation (3) of Regulation 23).
- The target company shall exclude any person or personsconnected with the acquirer from participating in any matter(s) relating to or arising from the offer (Reference : Part II of the Report - sub- regulation (9) of Regulation 22 and sub-regulation (3) of Regulation 23)
- Management changes can be made after closure of the offer and deposit of full amount in a special account with the bank. (Reference: Part II of the Report - proviso to clause (a) of sub-regulation (3) of Regulation 23).
- To begin a healthy trend as obtaining in developed markets, the board of directors of the target company, if they so wish, may send their unbiased comments on any bid to their shareholders keeping in view the fiduciary responsibility of the directors and for that purpose, seek the opinion of an independent merchant banker or a committee of independent directors. The directors of the target company shall be liable for any misstatement or concealment of material information in the discharge of this function. (Reference : Part II of the Report - sub-regulation (4) of Regulation 23 and sub-regulation (6) of Regulation 45)
- The board of directors of the target company shall facilitate the acquirer in verification of securities tendered for acceptances. (Reference: Part II of the Report - sub-regulation (5) of Regulation 23).

1. www.sebi.gov.in/Index.jsp?contentDisp=SubSection&sec_id=1&s.

- Once the acquirer fulfills his obligations under the regulations as certified by the merchant banker, the target company shall -
- Transfer the shares in the name of the acquirer;
- Allow proportional representation on the board to the acquirer or give control over the company, as the case may be. (Reference : Part II of the Report - sub-regulation (6) of Regulation 23)

Hostile Takeovers

A hostile tender offer made directly to a target company's shareholders, with or without previous overtures to the management, has become an increasingly frequent means of initiating a corporate combination. As a result, there has been considerable interest in and energy expended on devising defenses strategies by actual and potential targets. One of the largest hostile takeovers is the 200 billion takeover of German Co. Mannesmann by Vodafone.

Defenses can take the form of fortifying one self, i.e., to make the company less attractive to takeover bids or more difficult to take over and thus discourage any offers being made. These include, *inter alia*, asset and ownership restructuring, anti-takeover constitutional amendments, adoption of poison pill rights plans, and so forth. Defensive actions are also resorted to in the event of perceived threat to the company, ranging from early intelligence that a "raider" or any acquirer has been accumulating the company's stock to an open tender offer. Adjustments in asset and ownership structures may also be made even after a hostile takeover bid has been announced.

Factors Determining Vulnerability of Companies to Takeover Bids

The enquiry into such strategies is best initiated by an analysis of factors, which determine the "vulnerability" of companies to takeover bids. It is possible to identify such characteristics that make a company a desirable candidate for a takeover from the acquirer's point of view. Thus, the factors which a make a company vulnerable are[2]:

- Low stock price with relation to the replacement cost of assets or their potential earning power;
- A highly liquid balance sheet with large amounts of excess cash, a valuable securities portfolio, and significantly unused debt capacity;

2. www.cfo.com/article.cfm/2987034?f=advancesearch.

- Good cash flow in relation to current stock prices;
- Subsidiaries and properties which could be sold off without significantly impairing cash flow; and
- Relatively small stockholdings under the control of an incumbent management.[3]

A combination of these factors can simultaneously make a company an attractive proposition or investment opportunity and facilitate its financing. The company's assets may act as collateral for an acquirer's borrowings, and the target's cash flows from operations and divestitures can be used to repay the loans.[4]

Analysis of different defenses and their Evaluation in India

Financial Defensive Measures to Hostile Takeovers

I. Adjustments in Asset and Ownership Structure

Firstly, consideration has to be given to steps, which involve defensive restructuring that create barriers specific to the bidder. These include:

1. Purchase of assets that may cause legal problems as this involves purchase of interest in companies with the excess cash before the target companies, in companies which are involved in serious litigation which would have bearing on the latter's performance in the future.
2. Purchase of controlling shares of the bidder itself
3. Sale to the third party of assets which made the target attractive to the bidder, and
4. Issuance of new securities with special provisions conflicting with aspects of the takeover attempt. An example of this type of defense is found in Lenox's defense against the takeover bid by Brown-Forman Distillers Corporation in June 1983

A **second** common theme is to create a consolidated vote block allied with target management. Thus, securities are issued through private placements to parties friendly or in business alliance with management or to the management itself. Moreover, another method can be to repurchase

3. Werton, J. Fred, *et al*, Mergers, *Restructuring, and Corporate Control*, (1998), p.481 cited from www.cfo.com/article.cfm/2987034?f=advancesearch.
4. *Ibid*.

publicly held shares to increase an already sizable management-allied block in place.[5]

A **third** common theme has been the dilution of the bidder's vote percentage through issuance of new equity claims.[6] However, this option in India is strictly regulated vide Section 81A and Regulation 23 of the Takeover Code, 1997. A hostile bidder in these circumstances usually fails in the bid if the bidder has resource constraints in increasing its interest proportionately.

II. The "Crown Jewel" Strategy

A central theme in such a strategy is the divestiture of major operating unit most coveted by the bidder- commonly known as the "crown jewel strategy". The hostile bidder is deprived of the primary intention behind the takeover bid. A variation of the "crown jewel strategy" is the more commonly known as radical "scorched earth approach". Vide this novel strategy, the target sells off not only the crown jewel but also properties to diminish its worth.

However, the experts' opinion is that such a radical step is self-destructive and unwise in the company's interest. Firstly, divestiture of assets by the target company in the face of a hostile takeover bid will send wrong signals to the market. The market will have the knowledge that the divestiture has been resorted to in the face of self-preservation by the company. This will allow potential buyers of such assets to bid their time and allow the company to push the selling price of such assets to the minimum, even below its market price. Consequently, the benefits derived by the company as a result of such defensive restructuring will be minimal. On the contrary, the proceeds of the divestiture will, as usually is, be used in the repurchase of stocks at an inflated price on the market, the prices having skyrocketed consequent to the rumors of a possible takeover bid. A

Deeper analysis will reveal that the shares being purchased in the market at the inflated prices is worthless, as the "scorched earth strategy" would have left the company without any appreciable assets. The end result would be that the major stockholders of the company would be in control of an unduly high proportion of stock without any appreciable value.

5. Dann, L.Y. and DeAngelo H., "Standstill Agreements, Privately Negotiated Stock Repurchases, and the Market for Corporate Control", *Journal of Financial Economics*, Vol. 11, 1983 cited from http://www.newsnmuse.com/article.asp?task=1&Id=9915.
6. Dann, L.Y. and DeAngelo H., "Corporate Financial Policy and Corporate Control: A Study of Defensive Adjustments in Asset and Ownership Structure", *Journal of Financial Economics*, Vol.20 1988, cited from http://www.newsnmuse.com/article.asp?task=1&Id=9915.

Legal Position in India

However, the practice in India is not so flexible. The Companies Act, 1956 has laid down certain restrictions on the power of the Board. Vide Section 293(1); the Board cannot sell the whole or substantially the whole of its undertakings without obtaining the permission of the company in a general meeting. However, there are no restrictions of the sale of a single immovable property, which does not form an undertaking. Hence, primarily there are no restrictions on the power of the Board to deal with the properties of the company, unless they are action against the interests of the company.[7]

The SEBI (Substantial Acquisitions and Takeover) Regulations, 1997 vide regulation 23 prescribes general obligations for the Board of Directors of the target company. Under the said regulation, it will be difficult for any target company to sell, transfer, renumber or otherwise depose off or enter into an agreement to sell, transfer, and encumbrance or for disposal of assets once the predator has made a public announcement. Thus, the above defense can only be used before the predator/bidder makes the public announcement of its intention to takeover the target company.

Similarly, Clause 40 B (12) of the Listing Agreement prohibits a company from selling its any assets of a substantial amount without obtaining the approval of the company in a general meeting.

III. The "Packman" Defense.

This strategy, although unusual, is called the packman strategy. Under this strategy, the target company attempts to purchase the shares of the raider company. This is usually the scenario if the raider company is smaller than the target company and the target company has a substantial cash flow or liquid able asset.

IV. Targeted Share Repurchase or "Buyback"

This strategy is really one in which the target management uses up a part of the assets of the company on the one hand to increase its holding and on the other it disposes of some of the assets that make the target company unattractive to the raider. The strategy therefore involves a creative use of buyback of shares to reinforce its control and detract a prospective raider. But "buyback" the world over is used when the excess money with the company neither gives it adequate returns on reinvestment

7. Thakur, Jayant M., *Takeover of Companies: Law, Practice and Procedure*, (1995), p. 357, cited from http://www.newsnmuse.com/article.asp?task=1&Id=9915.8.Under R.25 of the 1997 Regulations.

in production or capital nor does it allow the company to redistribute it to shareholders without negative spin offs.

Legal Position in India

Buyback of shares has been introduced in the Companies Act, 1956 and SEBI has come up with guidelines to regulate it. This allows the corporate to use it to safe guard against a prospective raider as well as to increase their earnings per share (EPS) and net asset value (NAV). The provision of buyback therefore allows a company to use its assets more productively. Despite the obvious advantages the actual process of buyback is strictly regulated by the regulations of SEBI in this regard to ensure transparency and accountability to protect the investors. The buyback can only be made from free reserves after getting approval from the shareholders via a special resolution. The reason for undertaking the buyback has to be disclosed as does the true financial position of the company. The company is further prohibited to make an issue of shares for a year after the buyback and cannot make such an issue to fund the buyback. If the offer to buyback is made during the period of a public offer it will have to comply with the conditions prescribed for a "competitive offer".[8] In addition, the offer once made cannot be withdrawn unlike a public offer under the Takeover Regulations. This means that if the raider withdraws its public offer it would imply that the target company would still have to go through with the buyback. This is an expensive proposition if the only motivation for going in for the buyback was to dissuade the raider.

IV. "Golden Parachutes"

Golden parachutes refer to the "separation" clauses of an employment contract that compensate managers who lose their jobs under a change-of-management scenario. The provision usually calls for a lump-sum payment or payment over a specified period at full and partial rates of normal compensation.[9] This type of a severance contract has been increasingly used even by the largest Fortune 500 firms. By the mid 1980s, about 25% of the Fortune 500 firms had adopted golden parachute features in their employment contracts for top management.[10] Expert's view is that golden parachutes, by nature control-related contracts, help reduce the conflict of interest between the shareholders and managers in change of control situations.

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9. White, W.L., *Pulling the Golden Parachute Ripchord*, The Mergers and Acquisitions Handbook,(1987),Chapter 30 cited from http://www.newsnmuse.com/article.asp? task= 1&Id=9915.
10. *Ibid*.

Legal Position in India

The primary provisions of law relating to the appointment and remuneration of directors of managing and whole time directors is contained in Section 269 read with Schedule XIII of the Companies Act, 1956. A review of Schedule XIII shows that the term of remuneration, which can be allowed without the approval of the Central Government, can hardly be called generous to an extent that would deter any prospective raider, even if provided at the maximum level possible.

Section 198 further lays down that an overall limit of remuneration to the directors at 11% of the net profits. However, the provisions, which govern a "golden parachute" employment contract in India, are Sections 318-320 which provides the compensation for loss of office. Thus, a perusal of the said provisions would lay down that payment as compensation for the loss of office is allowed only to the managing director, a director holding an office of manager or a whole time director.[11] Therefore, a "golden parachute" contract with the entire senior management, as is the practice in the US, is of no consequence in India.

Moreover, payment of compensation is expressly disallowed if in the case of a director resigning as a consequence of reconstruction of the company, or its amalgamation with any other corporate bodies. An argument can be advanced that this provision would only apply to a director submitting his/her resignation, but not to dismissal from service vide a board meeting.[12] However, corporate practice dictates that no director would actually remain in office after losing the confidence of its shareholder, in this case the acquirer of the company is a post-takeover situation.

Furthermore, there exists a maximum limit as to the quantum of the compensation, subject to the exclusionary categories,[13] to the total of the remuneration the director would have earned for the unexpired residue of term of office, or three years, whichever is lesser.[14]

Moreover, the Company Law Board had vide its notification[15] opined that payment of any sum to a past or retiring Managing Director or whole time director would come within the purview of Section 310, and accordingly if is beyond the limits of Schedule XIII, would require the approval of the State Government. Thus, the restrictions in under the Companies Act, 1956

11. http://www.newsnmuse.com/article.asp?task=1&Id=9915.
12. Section 318 (1) read with 318(3)(a) of the Companies Act, 1956.
13. Section 318 (3), the Companies Act, 1956.
14. Section 318 (4),the Companies Act, 1956.
15. Notification dated August 9, 1963.

are restrictive in nature do not allow the target company to put forth a substantial defense against takeovers in the form of "golden parachutes".

Practice in the USA

An example of an extreme case is the golden parachute payment of $23.5 m. to six officers of Beatrice Companies in connection to its leveraged buyouts. One of its officers received a $2.7 m. package even though he had been with the company for 13 months.[16] Another received a $7 m. package after being called from retirement 7 months before. Also in 1985, the Chairman of Revlon received a $35 m. package consisting of severance pay and stock options.[17] However, it is the researcher's opinion that even in these extreme cases the golden parachutes were small compared to the total acquisition prices of $6.2 b. in the Beatrice Companies and $1.74 b. in the Revlon acquisition. It thus appears that the cost of golden parachutes is approximately 1% of the total cost of a takeover in these cases.

VI. Anti-takeover Amendments or "Shark Repellants"

An increasingly used defense mechanism being used is anti-takeover amendments to the company's constitution or articles of association, popularly called "shark repellants". Thus, as with all amendments of the charter/articles of association of a company, the anti-takeover amendments have to be voted on and approved by the shareholders. The practice consists of the companies changing the articles, regulations, byelaws etc. to be less attractive to the corporate bidder.

Legal Position in India

Every company has the clear power to alter its articles of association by a special resolution as provided under Section 31 of the Companies Act. The altered articles will bind the members just in the same way as did the original articles. But that will not give the altered articles a retrospective effect.

The power of alteration of the articles as conferred by Section 31 is almost absolute. It is subject only to two restrictions. In the first place, the alteration must not be in contravention of the provisions of the Act, i.e., should not be an attempt to do something that the Act forbids. Secondly, the power of alteration is subject to the conditions contained in the memorandum of association, i.e., alter only the articles of the company as

16. Fortune, *Those Executive Bail-out*", December13, 1985 www.cfo.com/article.cfm/3001307?f=advancesearch.
17. The New York Times, *Golden Chutes under Attack*, November 4, 1985 www.cfo.com/article.cfm/3001307?f=advancesearch.

relate to the management of the company but not the very nature and constitution of the company. Also the alteration should not constitute a 'fraud on the minority'.

Types of Anti-Takeover Amendments

There are four major types of anti-takeover amendments.

• Supermajority Amendments

These amendments require shareholder approval by at least two thirds vote and sometimes as much as 90% of the voting power of outstanding capital stock for all transactions involving change of control. In most existing cases, however, the supermajority agreements have a board-out clause which provides the board with the power to determine when and if the supermajority provisions will be in effect. Pure or inflexible supermajority provisions would seriously limit the management's scope of options and flexibility in takeover negotiations.[18]

• Fair-Price Amendments

These are supermajority provisions with a board out clause and an additional clause waiving the supermajority requirement if a fair-price is paid for the purchase of all the shares. The fair price is normally defined as the highest priced paid by the bidder during a specified period. Thus, fair-price amendments defend against two-tier tender offers that are not approved by the target's board.

• Classified Boards

Another major type of anti-takeover amendments provides for a staggered, or classified, board of directors to delay effective transfer and control in a takeover. The much touted management rationale in proposing a classified board is to ensure continuity of policy and experience. In the United States, the legal position of such classified or staggered boards is quite flexible. An ideal example is when a nine-member board may be divided into 3 classes, with only three members standing for election to a three year term each, such being the modalities of the retirement by rotation. Thus, a new majority shareholder would have to wait for at least two annual general meetings to gain control of the board of directors.

In the Indian company law regime, the scope for such amendments is highly restricted. Section 255 of the Companies Act, 1956 is designed to

18. Werton, J.Fred, et al, *Mergers, Restructuring, and Corporate Control*, (1998), p. 481 www.cfo.com/article.cfm/3001307?f=advancesearch.

eradicate the mischief caused by perpetual managements.[19] At an AGM only one-third of the directors of the company, whose offices are determinable by retirement, will retire.[20] Therefore putting the example in the Indian context, in case of 9 directors, 3 can be made permanent directors by amending the articles, i.e., one-third can be given permanent appointment, under Section 255. Thus the acquirer would have to wait for at least three annual general meetings before he gains control of the board. But this is subject to Section 284, which provides that the company may by an ordinary resolution; remove a director before the expiration of his period of office. Thus any provision in the articles of the company or any agreement between a director and a company by which the director is rendered irremovable from office by an ordinary resolution would be void, being contrary to the Act. Therefore to ensure domination of the board of the target management, there needs to be with the target management the strength to defeat an ordinary resolution.

• Authorization of Preferred Stock

Vide such provisions where the board of directors is authorized to create a new class of securities with special voting rights. This security, typically preferred stock, may be issued to a friendly party in a control contest. Thus, this device is a defense against hostile takeover bids, although historically it was used to provide the board of directors with flexibility in financing under changing economic conditions.

VII. Refusal to Register Transfer of Shares

Refusal by the board of directors to register a transfer is an important strategy to avert a takeover. The power to refuse can be present in the articles of association. This would bind the company and the members of the company, as an incident of the contract between them,[21] i.e., the memorandum and articles of association. Therefore the registration of a transfer or a transmission cannot be insisted upon as a matter of right.

The articles of a public company can be used to confer absolute discretion on the board of directors to refuse to register transfer of shares. The object of such a provision is to arm the directors with powers to be exercised in special and exceptional circumstances where the transfer may be found to be undesirable in the interests of the company. Such a provision does not amount to a restriction on the free transfer of shares, as in the

19. *Oriental Metal Processing Works* v. *Bashker,* AIR 1961 SC 573.
20. Section 256(1) of the Companies Act, 1956.
21. *Harinagar Sugar Mills Ltd.* v. *Shyam Sunder Jhunjhunwala,* AIR 1961 SC 1669, para.17.

case of private companies.[22] The power is fiduciary in nature and must be exercised bonafidely in the interests of the company.

On refusal of the directors to register the share sale, the Courts can interfere only in the following circumstances:

- malafide
- inadequacy of reasons
- irrelevant considerations

In *Bajaj Auto* v. *N.K.Firodia,*[23] the Apex Court ruled that if the reasons given by the directors are legitimate the court will not overrule the decision merely because, the court itself would not have come to the same conclusion. However, after 1988 the CLB has wide powers to interfere with any abuse of power by the board.

The Supreme Court in *V.B.Rangarajan* v. *V.B.Gopalakrishnan,*[24] held that the vendee can be denied registration of shares purchased by him on a ground stated in the articles. Thus, refusal to register on the grounds mentioned in the articles is within the meaning of 'sufficient cause' under Section 111(2) proviso of the Companies Act. The omission of Section 22A of the Securities Contract Regulation Act, 1956, has increased the grounds for refusing to register, i.e., not only restricted to the grounds mentioned under the section. But this has also led to the increased judicial scrutiny of the refusal, to see if it falls under 'sufficient cause'.

VII. Poison Pill Defenses

A controversial but popular defense mechanism against hostile takeover bids is the creation of securities called "poison pills". These pills provide their holders with special rights exercisable only after a period following the occurrence of a triggering event such as a tender offer for the control or the accumulation of a specified percentage of target shares. These rights take several forms but all are difficult and costly to acquire control of the issuer, or the target firm.

The board of directors without shareholder approval generally adopts poison pills.[25] Usually the rights provided by the poison pill can be altered quickly by the board or redeemed by the company anytime after they become exercisable following the occurrence of the triggering event. These

22. *Mathrubhumi Co. Ltd*. v.*Vardhaman Publishers Ltd*., [1992] 73 Comp Cas 80 at 105 (Ker).
23. AIR 1971 SC 321.
24. AIR 1992 SC 453.
25. Malatesta, P.H., and Walking, R.A., *Poison Pill Securities: Stockholder Wealth, Profitability and Ownership Structure*, Journal of Financial Economics,Vo.20, 1988,p. 367 www.cfo.com/article.cfm/3001307?f=advancesearch.

provisions force the acquirer to negotiate directly with the target company's board and allow some takeover bids to go through. Proponents of the poison pill argue that poison pills do not prohibit all takeovers but enhance the ability of the board of directors to bargain for a "fair price".[26]

Poison pills, also known as shareholders rights plans, basically entail the creation of a special class of stock designed specifically to discourage or ward off hostile takeovers by making the ultimate price tag much higher. A popular form of the pill enables existing shareholders to buy more stock for, say, half the current market price.[27]

These pills are typically triggered when a hostile suitor acquires a predetermined percentage of company stock. At that point, all existing shareholders except the suitor are granted options to buy additional stock at a dramatic discount, thus diluting the acquirer's share so as to head off a change in control of the company. "We strongly advise companies to continue to have a pill," says Martin Lipton, the corporate lawyer credited with inventing the poison pill defense nearly 20 years ago**.** This is critical since very few companies fail to renew the pill after it expires, notes Lipton, a partner at Wachtell, Lipton, Rosen & Katz in New York City.[28]

Poison Pill trends in USA

However, the best takeover defense is to combine a poison pill with a staggered board of directors, says Lipton and other takeover defense experts.

Moreover, experts say a staggered board of directors is a good way to keep a poison pill in place, as it allows for only a portion of the corporate board of directors to be elected each year. This prevents hostile acquirers from successfully staging a proxy fight because they will not be able to gain a majority on the board of directors in one year.

An example of Poison pill defense was the takeover of People Soft by Oracle. People Soft adopted a resolution which allowed the board to flood the market with new shares, effectively making a takeover too expensive to complete. Oracle filed a suit in the Chancery Court to remove the poison pill.

Legal Issues Concerning Poison Pill Devices

The legality of poison pills has been questioned in courts of law because they alter the relationships among the principals (shareholders)

26. Ryngaert, M., *Effects of Poison Pill Securities on Shareholder Wealth*, Journal of Financial Economics, Vol. 20 1988, p.246 www.cfo.com/article.cfm/3001307?f=advancesearch.
27. www.cfo.com/article.cfm/2987034?f=advancesearch.
28. *Ibid.*

without their approval by vote. In most poison pills, the agents (board of directors) adopt rights plans, which treat shareholders of the same class unequally in situation involving corporate control. Thus, poison pills have been vulnerable to court review especially in the United States.[29]

Conclusion

In recent years, a common shareholder view has evolved that defenses are management-entrenchment tools that create barriers to increasing corporate value. "Having a takeover defense in place can reduce the playing field of potential acquirers," says Shez Bandukwala, senior vice president at Northbrook, Illinois-based Hilco Enterprise Valuation Services LLC.[30] "So it limits the type of premium they'll be paid." Shareholders are growing to be unhappy with takeover defenses of poison pill and staggered board. A study conducted by the IRRC in U.S. found that shareholder proposals to eliminate classified boards and supermajority vote requirements, and to eliminate or allow a shareholder vote on poison pills, have received support averaging at least 60 percent at companies.

Companies are becoming less inclined to use takeover defenses as shown by a study conducted in the USA only the defense of Golden Parachute is being increasingly adopted as compared to other defenses.

Takeover defenses however play an important role in corporate restructuring. Most of the takeover defenses that are frequently used by target companies in the US are restricted by the regulations and acts in India. This kind of corporate synergy requires that the legal paradigm so adjust itself, so that it is in a position to optimize the benefits that accrue from such restructuring. Such need has nowhere been more evident than in the case of regulation of takeovers. The legislature realising this, has entrusted the job of doing the same to SEBI. SEBI has endeavored to keep abreast with the market in this regard, as can be seen from the Bhagwati Committee's scope of reference. But the time has come for the other substantive law, i.e., Companies Act to be a more accommodative towards such defenses. As this would enable takeovers to facilitate the removal of incompetent management and/or traditionally family owned companies and increase efficiency in a more competitive global market.

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29. Kamma,S., et al, *Investors' Perception of Poison Pills*, Journal of Applied Corporate Finance,Vol.1 1988, p. 46,*Unvocal* v.*Mesa Petroleum*, 493 A.2d 949 (Del 1985) www.cfo.com/article.cfm/3001307?f=advancesearch.
30. www.cfo.com/article.cfm/3001307?f=advancesearch.

THE NATIONAL GREEN TRIBUNAL ACT, 2010: AN OVERVIEW

Aruna B Venkat*

Background

It is a matter of common knowledge that the higher judiciary in India is overburdened with a large backlog of cases. It may be appreciated that in order to have effective prevention of environmental pollution environmental complaints should be decided expeditiously which is not possible in the present context of judicial administration. Therefore, there was an urgent need for an alternative forum so that environmental cases were decided without much delay. The Indian Apex Court opined that it would be desirable to have the setting up of "environmental courts on the regional basis with a professional judge and two experts drawn from the... Ecological Science Research Group."[1] A similar view was expressed by some of the prominent jurists of the country.[2]

It may be noted that Principle 13 of the Rio Declaration on Development and Environment states that "states shall develop the national law regarding liability and compensation for the victims of Pollution and other environmental damage". To give effect to the above directive and to provide for a forum for effective and expeditious disposal of cases arising from any accident occurring while handling any hazardous substance, the Indian Parliament enacted the National Green Tribunal Act, 2010.[3]

It may be appreciated that the Stockholm Declaration 1972 which has been described as International "*Magna Carta*" of our environment[4]

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1. *M.C. Mehta* v. *Union of India*, AIR 1987 SC 965-967.
2. Prof. Upendra Baxi has expressed the view that a single judicial forum with jurisdiction under the Environment Act and other related environmental acts over both criminal prosecutions and civil claims for violation of the laws should be established. From this forum, appeals could go to an appellate court of the status of the High Court with the facility of another appeal to the Supreme Court under Art 136 of the Indian Constitution. He was also of the opinion that victim groups and public interest groups should have access to these courts. See, U Baxi, *Environmental Protection Act: An Agenda for Implementation*, 10(1987); see also G Sadasivam Nair, *Environmental Offence: Crime Against Humanity*, in P Leelakrishnan (ed) *Law & Environment*, 186 (1992).
3. The immediate reasons that prompted the Indian Parliament to enact the Tribunals Act had been (i) the inordinate delay involved in the redressal of environment related grievances like the one involving the Bhopal Gas Leak case (*Charan Lal v Union of India* AIR 1990 SC 1480) and (ii) the inadequacy of the existing judicial system to provide adequate relief as evidenced in the Oleum Gas Leak Case (*MC Mehta v Union of India* AIR 1987 SC 965).
4. See *Essar Oil Limited* v. *Halar UtkarshSamithi*, MANU/SC/0037/2004 at Para 25.

and the Rio declaration, 1992 have exhorted the members of the International Community including India, to take appropriate steps for the protection and improvement of human environment. To give effect to these exhortations contained in the global declarations on environment and to provide for a specialized forum for effective and expeditious disposal of cases arising out of enforcement of environmental laws in the country, the Indian Parliament has enacted, recently,[5] the National Green Tribunal Act, 2010 which has come into force on 2 June 2010.[6] The Act seeks to replace the National Environment Tribunal Act, 1995[7] and the National Environment Appellate Authority Act, 1997 which have been in operation for sometime in the country. The Act has been enacted in response to the recommendations of the Law Commission of India and the Indian Supreme Court which highlighted the large number of environment – related cases pending in the courts.[8]

The Objects of the Act

The object of the Act is to give effect to its International obligations arising out of various decisions taken at International Conferences to which India has been a Party and also to implement the Indian apex court's pronouncement that the right to healthy environment is a part of the right to life under Article 21 of the Indian Constitution. This object has been amply reflected in the preamble to the Act which says:

"(T) provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

And whereas India is a party to the decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972 ……. calling upon the States to take appropriate steps for the protection and improvement of the human environment.

5. While the Lok Sabha Cleared the Bill on 30-04-2010, the Rajya Sabha approved the same on 05-05-2010.
6. The Act, in Section 1(2), stipulates that it shall come into force on such date as the Central Government by notification in official Gazette appoint. The Central Government has not yet issued any notification in this regard.
7. The Environment Tribunal under this Act has not been established.
8. See 186th Report, 2003 of the Law Commission of India. See also the decision of the Supreme Court in *M.C. Mehta* v. *Union of India,* (1997) 2 SCC 653, See also *M.C. Mehta* v. *Union of India,* AIR 1987 SC 965 and *Charanlal Sahu* v. *Union of India,* MANU/SC/0285/1990.

And whereas decisions were taken at the United Nations Conference on Environment and Development held at Reo de Janeiro in June, 1992 ……. Calling upon the States to provide effective access to judicial and administrative proceedings, including redress and remedy and to develop national laws regarding liability and compensation for the victims of pollution and other environmental damage.

And whereas in the judicial pronouncement in India, the right to healthy environment has been construed as a part of the right to life under article 21 of the Constitution.

And whereas it is considered expedient to implement the decisions taken at the aforesaid conferences and to have a National Green Tribunal in view of the involvement of multi – disciplinary issues relating to environment".

Salient Features of the Act

The Act seeks to establish specialized Green Tribunal[9] with five benches located at different regions in the country. [10] 1st juridiction to hear a case involving environmental matters is wider than the on conferred on the National Environmental Appellate Authority which has now been reploce by the new Act. The Act confers on the Green Tribunal to hear initial complaints [11] as well as appeals from decisions of authorities under various environmental laws.[12] The Tribunal, when establised, would not be bound to follow the procedure laid down in the Code of Civil Procedure 1973. Instead, it is allowed to follow the abstract principles of natural justice.[13] However, the Tribunal will have the powers of a civil court under the civil procedure code.[14] Its decisions are binding on the parties.[15] There can be appeals to the Supreme Court against the decisions, orders or awards of the Tribunal.[16] The Act also ordains that no civil court shall be allowed to entertain cases which Tribunal is competent to hear.[17] The most salient feature of the Act is that the Green Tribunal is enjoined to follow the internationally recognized and nationally applied environmental principles of sustainable development, Precautionary principle and pulluter pays

9. See Sections 3 and 4 of the National Green Tribunal Act, 2010.
10. Jairam Ramesh, Union Minister of State for Environment and Forests told Rajya Sabha that the tribunals principal bench will beat Bhopal, Times of India, May 6, 2010.
11. Sections 14 and 15, the National Green Tribunal Act, 2010.
12. *Ibid,* Section 16.
13. *Id.,* Section 19 (1).
14. *Id.,* Section 19 (4).
15. *Id.,* Section 21.
16. *Id.,* Section 22.
17. *Id.,* Section 29.

Principle while issuing any order, decision or award.[18] While the Act envisages the conferment of wide jurisdiction on the Green Tribunal, it also, at the same time, seeks to restrict the scope of its jurisdiction only to matters involving substantial, questions, relating environment.[19] The expression a substantial question" has been defined as an instance where there is a direct violation of specific environmental obligation affecting either the community at large other than an infidividual or group of individuals by its environmental consequence or where the gravity of the damage to the environment or property is substantial or (iii) where the damage to public health is broadly measurable.[20] It is interesting to note while the right to Article 21 of the constitution is a fundamental right guaranteed to individuals, the Act seeks to deny to the same individuals and groups of individuals the right to question any environmental consequence theat affects them unless it also affects the community at large or public health. However, individuals can approach the court when the damage to the environment or property is substantial. It is submitted that the definition of the expression " substantial question relatin to environment "as given in the Act which provides for statutory exclusion of individuals may not stand judicial scretiny, for, the right to healthy environment, in its wide amplitude, subsumes all aspects of environmental degradation.[21] Again, it is doubtful whether the jurisdiction of the High Courts which are constitutional courts can be excluded either by ordinary legislation or by a constitutional amendment as their power of judicial review is a part of the basic structure of the Constitution.

The Establishment and Composition of the Tribunal

The Act empowers the Central Government to establish, by notification with effect from such date as may be specified therein, the Green Tribunal to exercise jurisdiction, powers and authority that may be conferred on such Tribunal by or under this Act.[22] The Central Government is empowered to specify, by notification, the ordinary place or places of sitting of the sitting.[23] The Central Government may in consultation with the chairperson of the Tribunal, make rules for regulating the ordinary proactice and procedure of the Tribunal.[24]

18. *Id*., Section 20.
19. *Id*., Section 14(1).
20. *Id*., Section 2 (1) (m).
21. *Supra*, Chapter–II of the Act.
22. Section3, the National Green Tribunal Act, 2010.
23. *Ibid*, Section 4(3).
24. *Id*., Section 4 (4).

The Tribunal shall consist of a full time chairperson and not a less than ten but subject to maximum of twenty full time judicial members as the Central Government may, from time to time, notify. The Tribunal shall consist of not less than ten but subject to maximum of twenty full time expert members as the Central Government may, from time to time, notify.[25] The Chairperson of the Tribunal has been authorized to invite one or more expert members who have specialized knowledge and experience to assist the court in a particular case before the Tribunal.[26]

Qualification of the Members of the Tribunal

The Act stipulates that a person shall not be qualified for appointment as the Chairperson or judicial member of the Tribunal unless he is, or has been, a judge of the Supreme Court of India or Chief Justice of a High Court. However, a person who is or has been a judge of a High Court can be appointed as a judicial member.[27]

As regards non-judicial expert members, the Act provides that no person shall be qualified for appointment as an expert member unless he (i) has a degree in Master of Science (in physical science or life sciences) with a Doctorate degree or Master of Engineering or Master of Technology and has an experience of fifteen years in the relevant field including five years practical experience in the field of environment and forests [including pollution control, hazardous substance management, environment impact assessment, climate change management, biological diversity management and forest conservation] in a reputed national institution or (ii) has administrative experience of fifteen years including experience of five years in dealing with environmental matters in the Central or a State Government or in a reputed National or State level institution.[28]

Appointment of Members of the Tribunal

The Central Government is authorized to appoint the members of the Tribunal subject to the fulfillment of the above prescribed qualifications.[29] The Act states that the Chairperson of the Tribunal may be appointed by the Central Government in consultation with the Chief Justice of India.[30] The other members shall be appointed by the Central Government on the recommendation of such Selection Committee as may be prescribed.[31]

25. *Id*., Section 4 (1).
26. *Id*., Section4 (2).
27. *Id*., Section 5(1).
28. *Id*., Section 5(2).
29. *Id*., Section 6(1).
30. *Id*., Section 6(2).
31. *Id*., Section 6(3).

Tenure of the Office of the Members

The Chairperson, judicial members and expert members shall hold office as such for a term of five years from date on which they enter upon their office and they shall not be eligible for re-appointment. This is subject to the condition that in case a person, who is or has been a judge of the Supreme Court, has been appointed as Chairperson or judicial member of the Tribunal, he shall not hold office after he has attained the age of Seventy years. Similarly, in case a person, who is or has been the Chief Justice of a High Court, has been appointed as a Chairperson or judicial member of the Tribunal, he shall not hold office after he has attained the age of six seven years. Further, in case a pertain who is or has been a judge of a High Court, has been appointed as a judicial member of the Tribunal, he shall not hold office after he has attained the age of sixty seven years. In the case of expert members, the Act says, they cannot hold office after they have attained the age of sixty five years.[32]

No other Office during the Tenure

The Act declares that the members of the Tribunal shall not hold any other office during their tenure as such.[33] The Act also debars them from accepting any employment, after they cease to hold office, from any person who has been a party to a proceeding before the Tribunal under the Act. However, this bar does not apply to any employment under the Central Government or a State Government or local authority or in any Statutory authority or any corporation established by or under any Central or State or Provincial Act or a Government Company as defined in Section 617 of the Companies Act, 1956.[34]

Jurisdiction, Powers and Proceedings of the Tribunal

The Tribunal shall have jurisdiction over all cases where a substantial question relating to environment is involved[35]and such question arises out of the implementation of the enactments specified in Schedule-I[36]. The Tribunal is authorized to hear all disputes arising from substantial questions

32. *Id*., Section 7.
33. *Id*., Section (3).
34. *Id*., Section (4).
35. *Id*., Section 14 (1).
36. In Schedule–I, the Acts that are mentioned are : The Water (Prevention and Control of Pollution) Act, 1974; The Water (Prevention and Control of Pollution) Cess Act, 1977; The Forest (Conservation) Act, 1980; The Air (Prevention and Control of Pollution) Act 1981; The Environment (Protection) Act, 1976. The Public Liability Insurance Act, 1991 and the Biological Diversity Act, 2002. Power is given to the Central Government under Section 34 to either to add a new Act to or delete any Act from, this by notification am ending the same.

relating environment and settle disputes and pass orders there in[37], provided the application for adjudication of the dispute is made within a period of six months from the date on which the cause of action for such dispute first arose. However, the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed with in a further period not exceeding sixty days[38]. Under the Act, the Proceedings before the Tribunal shall be deemed to be judicial proceedings.[39]

The Judicial Remedy under the Act

The Act provides for various kinds of relief.[40] It says that the Tribunal may, by an order, provide relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in the Schedule-I to the Act, including accident occurring while handling any hazardous substance. It may also order the restitution of the property damaged and the restitution of the environment for that areas as the Tribunal may think fit.[41] The relief under this Act is an addition to the relief given under the Public Liability Insurance Act, 1991.[42] The Act seeks to discourage delayed applications for relief. If stipulates that no application for the above mentioned categories of relief would be entertained by the Tribunal unless it is made within a period of five years from the date on which the cause for such relief first arose. However, the Tribunal may allow further sixty days for the application to be filed if it is satisfied that the applicant was prevented by sufficient cause from filing such application.[43] The Act obligates the claimants under the Act to intimate to the Tribunal about the application filed to, or as the case may be, compensation or relief received from, any other court or authority.[44] The Act provides for no fault liability in case of claims involving an accident by authorizing the Tribunal to apply the Principle of no fault.[45] The Act provides for an expeditious relief. It requires the Tribunal to deal with the applications or, as the case may be, appeals, as expeditiously as possible and obligates the Tribunal to endeavor to dispose of the application or, the case may be, an appeal finally within

37. *Supra n*.35,Section14 (a),the National Green Tribunal Act, 2010.
38. Section14 (3),the National Green Tribunal Act, 2010.
39. *Ibid*, Section 19(5).
40. *Id*., Section 15.
41. *Id*., Section 15(1).
42. *Id*, Section 15(2).
43. *Id*., Section 15(3).
44. *Id*., Section 15(5).
45. *Id*., Section 17(2).

six months from the date of filing the application, or, as the case may be, the appeal, after providing the parties an opportunity to be heard.[46]

Who can file an Application or an Appeal under the Act?

The Act provides that an application for grant of relief or compensation or settlement of dispute may be made to the Tribunal by —(a) any person who has sustained the injury; or (b) the owner of the property to which the damage has been caused or (c) all or any of the legal representatives of the deceased where death has resulted from the environmental damage or (d) any agent duly authorized by such person or owner of such property or all or any of the legal representatives of the deceased, as the case may be; or (e) any person aggrieved ; including any representative body or organization. In addition, the Central Government or a State Government, or a Union Territory administration or the Central Pollution Control Board or a State Pollution Control Board or a Pollution Control Committee or a local Authority or any environmental authority constituted or established under the Environment (Protection) Act, 1986 or any other law for the time in force, can also move the Tribunal.[47]

Miscellaneous Aspects

The decisions of the Tribunal are taken by majority of its members and they are binding on the Parties.[48] The Act declares that the orders, decisions or awards of the Tribunal shall be executable by the Tribunal as decrees of the Court. For this purpose, the Tribunal shall have powers of a Civil Court.[49]

The members of the Tribunal shall be deemed to be public servants within the meaning of Section 21 of the Indian penal code.[50] They are given immunity from any suit or prosecution or any other legal proceeding for anything done in good fail in pursuance of this Act.[51] The Act also embodies a non-obstante clause which gives overriding effect to this Act. It says that notwithstanding anything inconsistent contained in any other law for the time in force or in any instrument having effect by virtue of any law other than this Act, the provisions of this Act shall have effect.[52]

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46. *Id*., Section 18(3).
47. *Id*., Section 18(2).
48. *Id*., Section 21.
49. *Id*., Section 25(1).
50. *Id*., Section 31.
51. *Id*., Section 32(2).
52. *Id*., Section 33.

Conclusion

The National Green Tribunal is a special fast-track court for speedy disposal of environment-related civil cases. The main bench of the tribunal will be set up in Bhopal. The tribunal would have four circuit Benches. This is the first body of its kind that is required by its parent statute to apply the "polluter pays" principle and the principle of sustainable development.

The Act is considered a critical step in capacity development because the Act strengthens the framework of global environmental governance. The judiciary has been the backbone for developing a large body of environmental jurisprudence, even though policy enforcement has been weak. A National Environment Protection Authority is also to be established shortly to monitor the implementation of environment laws. However, I hope National Green Tribunal will play a lead role in environmental protection, enforcement and compliance.

THE RIGHT TO INFORMATION ENDEAVOUR FROM SECRECY TO TRANSPARENCY AND ACCOUNTABILITY

Jeet Singh Mann*

Introduction

The intensity of harassment meted out to applicants who seek information from the public authorities is revealed by the Central Information Commission, New Delhi in its own decision where it was forced to direct making an application less cumbersome[1]. In this case, Mr. Shri D S Negi of Dwarka, New Delhi, went to the office of the Chief Engineer (Dwarka Project, New Delhi) to file an RTI application in connection with a water crisis. The applicant was directed to meet the Assistant to Chief Engineer. The Assistant signed the application and marked it to the Public Information Officer (PIO), Superintendent Engineer (SE) (HQ) of the Organization. The PIO asked the applicant to submit an amount of Rs. 10/- in cash, as the Indian Postal Order (IPO) will not be acceptable because of an accounting problem. The application was then marked to Senior Accounts Officer. He in turn marked it to the Accountant and then to the Receipt Clerk. The receipt Clerk simply refused to accept the application and asked applicant to bring a photocopy of the receipt for Rs. 10/- to be attached with the application as proof of payment of the requisite fee. The process therefore took nearly 3½ hrs to simply file an RTI application. This is one of the instances which has been reported and adjudicated by the Central Information Commissioner New Delhi. This case depicts high handedness on the part of public authorities to harass applicants who seek information under the Act, from them. It has been noticed that the PIO or the public authorities always try to manipulate the situation in their favor, because the procedure for the issue of payment of fee under Section 6 of the RTI Act, 2005, is not only uniform, but also provides opportunity to the PIOs/public authorities to harass applicants.

It is well known that there is no uniformity in the payment of application fee and other charges, payable under the RTI Rules framed by various subordinate authorities. The Central Right to Information (Regulation of Fee and Cost) Rules 2005 provides that [update] a fee of Rs. 10 for filing the request. If the applicant is a Below Poverty Line (BPL) Card holder, then no

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1. CIC in Complaint No CIC/WB/C/2006/00178 -14.11.2006 expressed deep concern over the careless attitude in receiving an application under RTI and directed to make easily accessible arrangements for receiving RTI applications over one window or centralized counter.

fee need to be paid. Such BPL Card holders have to provide a copy of their BPL card along with their application to the Public Authority. State Governments and High Courts have formulated their own fee/charges rules on the subject. The Rajasthan Right to Information (High Court and Subordinate Courts) Rules, 2006[2] envisages that any person seeking information under the RTI Act, shall make an application in Form 'A' to the Authorized Person along with non-judicial stamp, of Rs. 100 duly affixed on/attached to it, which shall be non-refundable. But where the information relates to tender documents/bids/ quotation/business contract, the application fee shall be Rs. 500 per application.

The Right to Information (Regulation of Fee and Cost) Central Rules 2005 stipulates the payment of prescribed fee, along with application under Section 6 of the RTI Act, 2005, by Indian Postal Orders/ Cash/ Bank Cheque/ Bank Drafts/ Money Orders. It has also been observed that the majority of the Public Information Officer/APIO does not accept cash, which is the most convenient mode of payment of fee. But PIOs/APIOs always insists upon applicant either to deposit IPO or Bank Draft or Money Order or chalan. The process of procuring IPO, Bank Draft, or Money order, is time consuming and the applicant is required to undergo additional financial burden by paying charges for IPO, MO or Bank Draft.

The Right to Information: Its importance and development in India

The Parliament of India passed the Freedom of Information Act in 2002. However it was never notified till it was repealed in 2005 by the Right to Information Act, 2005. The RTI Laws were first successfully enacted by the state governments of- Tamil Nadu (1997)Goa (1997), Rajasthan (2000), Karnataka (2000), Delhi (2001), Maharashtra (2002), Madhya Pradesh (2003), Assam (2002) and Jammu and Kashmir (2004). The Maharashtra and Delhi State enactments are considered to have been the most widely used. The Delhi RTI Act is still in force. Jammu & Kashmir, has its own Right to Information Act of 2009, the successor to the repealed J&K Right to Information Act, 2004 and its 2008 amendment

The Supreme Court of India in *State of Uttar Pradesh* v. *Raj Narain*[3] has recognized as early as in 1975 the right to information as an important right in a democratic state. The court, while examining the scope and objectives of right to information under Article 19(1) (a) of the Constitution, opined that:

In a government of responsibility like ours, where all the agents of public must be responsible for their conduct, there can be few secrets,

2. Rule 4 Application for seeking information.
3. AIR 1975 SC 865.

everything that is done in a public way by the public functionaries. They are entitled to know, the particulars of every public transaction in all its bearing. Their right to know, which is derived from the concept of freedom of speech, through not absolute, is a factor, which should make one wary when secrecy is claimed for transactions which can at any rate have no repercussion on public security. To cover with veil secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for purpose of parties and politics or personal self-interest or bureaucratic routine. The reasonability of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.

Further a Seven Judges Bench of the Supreme Court in the landmark case *of SP Gupta* v. *Union of India*[4] reiterated that right to information as a Fundamental Right under Article 19 1(a) of the Constitution. The Court declared that right to information is part and parcel of fundamental right enshrined under Article 19(1) (a) of the constitution and observed that:

The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest."[5]

Right to information or right to know is an integral part of the freedom of speech and expression, a fundamental right guaranteed under Article 19(1) (a) of the Constitution. But the Supreme Court in a leading case of *Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express Newspapers Bombay Pvt. Ltd.*[6] has also recognized right to information as a fundamental right under Article 21 of the Constitution. The Apex Court,

4. AIR 1982 SC 149.See also *Union of India* v.*Assn. for Democratic Rights*, ((2002) 5 SCC 294); *Secy., Ministry of Information & Broadcasting, Govt. of India* v.*Cricket Assn.of Bengal*,((1995) 2 SCC 161);and *People's Union for Civil Liberties (PUCL)* v.*Union of India*, ((2003) 4 SCC 399.
5. *Id.*, ParaNo.66.
6. (1988) 4 SCC 592.

while dealing with the issue of freedom of press and administration of justice, held that:

We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform.[7]

The Right to Information Act, 2005: An Overview

The Right to Information Act, 2005 received Presidential assent in June 2005, and came into force from October 13, 2005.The Act covers all central, state and local government bodies and, in addition to the executives, it also applies to the judiciary and the legislature. It covers all bodies owned, controlled or substantially financed, either directly or indirectly by the government, and non-governmental organizations and other private bodies substantially funded, directly or indirectly, by the government. It would seem to include private schools, hospitals and other commercial institutions that have got subsidies in the form of land at concessional rates or tax concessions, among others. The Act also applies to private sector as it provides the citizens access to all information that the government can itself access through any other law. The Act defines information[8] as "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." Right to information, defined in Section 2(j), provides various rights to access information through various modes such as inspection of documents, copies of documents (hard and soft copies), sample of material and raising of questions.

The Act, under Sections 8 and 24, contains certain exemptions from disclosure of information. The matters which are beyond the scope of the

7. *Id*., Para 34, Also, see Justice M N Venketchaliah , Report of the National Commission to review the working of the Constitution (2002) Para 6.10.
8. Section 2(*i*) "record" includes— *(a)*any document, manuscript and file; *(b)*any microfilm, microfiche and facsimile copy of a document; *(c)*any reproduction of image or images embodied in such microfilm (whether enlarged or not); and *(d)* any other material produced by a computer or any other device;

Act includes the disclosure of information which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with the foreign State or lead to incitement of an offence; or information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court. It also excludes the disclosure of information, which would cause a breach of privileges of Parliament or State Legislature. The provisions of the Indian Official Secret Acts, 1923 are also exempted from the scope of the Act. The Act provides for the setting up of independent Information Commissions, one at the Center and one each in the states, comprising of one Chief Information Commissioner and up to ten Information Commissioners. Complaints against violations of provisions can be made to the Information Commissioner. Public Information Officers (PIOs) are also appointed to accept requisitions and provide information within 30 days after receiving such complaint. Extensions are also allowed in some cases such as when third party is involved. Information pertaining to the life and liberty of a person must, nevertheless, be provided in 48 hours. The Act stipulates penalties for PIOs found to be in violation of the provisions. The information Commission can impose penalties at the rate of Rs. 250 per day, and also penalize for refusals to accept requests, for mala fide destruction of information, knowingly giving false information etc., with and maximum limit of Rs. 25,000. Immunity to PIOs for actions done in good faith is also applicable under the provisions of the Act.

Inadequacies and Hindrances in the Promotion of the RTI Act
Protection of Applicant under the RTI from Victimization

A whistleblower may be expressed as someone who exposes wrongdoing, fraud, corruption or mismanagement. In many cases, this could be a person who works for the government who would report misconduct within the government or it could be an employee of a private company who reports corrupt practices within the company. The law that a government enacts to protect such persons who help expose corruption is called a whistleblower protection law. Some countries have already put in place laws to protect whistleblowers or are in the process of doing so. However, the level of protection and the way in which the law operates differs from country to country. The US was one of the earliest to have the Whistleblower Protection Act of 1989, while the UK has the Public Interest Disclosure Act of 1998, and Norway has a similar law in place since January 2007.[9]

9. http://articles.timesofindia.indiatimes.com/2010-03-29/india/28135662_1_public-interest-disclosures-cvc-protection India doesn't have a law to protect whistleblower, visited on May 5, 2011.

It is very clear beyond reasonable doubt that the RTI Act does not provide for any protection to the applicants for use of the RTI. Though the CIC is empowered to award compensation for any harassment, threat or intimidation caused to the applicants for seeking information, in practice this provision is not being utilized in full swing instances of suppression of information and harassment of the employees and applicants are on the increase. It is evident from the incidents that has been occurred in past that the public authority has been trying to suppress the information and coerce the applicant in case the applicant is employed in that organization.

The issue of protection for whistleblowers caught the attention of the entire nation when the National Highways Authority of India engineer Mr. Satyendra Dubey was killed after he wrote a letter to the office of then Prime Minister Shri A B Vajpayee alleging corruption in the construction of highways.[10] It is also evident from the series of instances where more than 10 RTI Activists have been murdered for their active involvement against corrupt activities of bureaucrats, political leaders and contractors' mafia in India. RTI activist Amit Jethwa was killed near the Gujarat High Court in Ahmedabad. Other RTI activities includes such as Datta Patil of Kolhapur (Maharashtra), Vitthal Gite of Beed district, Maharashtra; Sola Ranga Rao of Krishna District, Andhra Pradesh, Arun Sawant of Badlapur, Maharashtra, Shashidhar Mishra of Begusarai, Bihar; Vishram Laxman Dodiya of Ahmedabad, Gujarat, and Satish Shetty of Pune, Maharashtra. Mr. Manjunath Shanmugham, an IIM graduate and a sales manager of the IOC, was also murdered on Nov 19, 2005 for exposing the racket of adulteration of petrol and the mafia behind it.[11] This list is not exhaustive and depicts a grave concern need to be taken care immediately.

This view of the Author has been vindicated by a reported case before the Chief Information Commission (CIC), which depicts the ground realities about the conduct of the public authority for suppressing the facts and harassing the applicants under the RTI Act. In one such instance before the CIC, where in November 2005 under the RTI Act, the applicant requested for access to one Inquiry Report, which enquired into the incident relating to various aspects of incidents when, a student of the Banaras Hindu University, had died at Sir Sunder Lal Hospital attached to the University. Both In-charge of administration (PIO) and Appellate Authority under the RTI Act, overruled the submissions of the PIO and thus became deemed PIO under Sub-Section (5) of Section 5 of the RTI Act 2005. Reply was sent to the applicant under instruction from the Registrar denying him

10. *Ibid.*
11. *Ibid.*

the information, thus, disposing of both, Appellant's application and his first Appeal. The CIC in exercise of powers conferred by Section 20(1) of the RTI Act 2005 imposed a penalty of Rs.25, 000/- on Registrar, for denial of information despite the Commission's clear directions.[12] CIC also raised the issue of alleged victimization of the RTI Appellant who had not been given admission to the post graduate course against seats reserved for students of the University. CIC directed that the Assistant Registrar would visit the University to inspect the documents for satisfying the Commission that the non-admission of the Appellant was not in any way linked to the case before the Commission. The Commission directed the Vice-Chancellor to release the compensation amount to the Appellant for three journeys to Delhi and back as directed in its previous order, as required under Section 19(8)(b).[13] In exercise of powers conferred by Section 19(8)(b) of RTI Act, CIC directed the University authorities to admit the appellant in the Master of Physical Education course with immediate effect and grant him a grace period up to the date of admission for the purpose of attendance and to ensure that an applicant seeking information from the University under the RTI Act 2005 is not victimized in future.[14]

The concern of the Author has been reiterated by the Central Information commission. The CIC taking serious note of the situation issued orders in order to overcome the non-cooperation and harassment of RTI applicants and one of the important circulars reads as under:

> *Some of the public authorities do not behave properly with the persons who seek information under the RTI Act. Responsibility of a public authority and its public information officers is not confined to furnish Information but also to provide necessary help to the information seeker, wherever necessary. While providing information or rendering help to a person, it is important to be courteous to the information seeker and to respect his dignity.*[15]

The Public Interest Disclosure and Protection of Person Making Disclosure Bill 2010, based on the recommendations of Law Commission Report No. 179, has been introduced in the Lower House of the Parliament on 26 August 2010, but it is very strange to note that this Bill does not

12. CIC/OK/A/ 2006/00163-19.10.2006.
13. CIC/OK/A/ 2006/00163-6.09.2006.
14. CIC/OK/A/ 2006/00163-9.11.2006.
15. Para 1 No.4/9/2008-IR Government of lndia, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training) New Delhi Dated the 24th June, 2008. www.rti.gov.in, visited on 5.5.2011.

provide any protection to any RTI applicant, who seek information under the RTI Act 2005.

The objectives of the Act cannot be achieved unless RTI applicants are protected from any harassment that might arise from the operation of the RTI Act. Firstly it is recommended that the Appellate Authority, the State Information commission and the Central Information Commission should be empowered to award exemplary damages in such cases. Secondly the Act should also provide for some protection to those employees who seek information from their organizations. Some provisions on protection of employees especially casual, ad-hoc, part time and other temporary employees, on the issue, which should prevent the public authorities from terminating the services of, except on some serious misconduct after adhering to the *doctrine of natural justice,* such employees for the operation of the RT I Act, should be inserted in the Act. The Sate Information Commission and the Central Information Commission should be empowered to take suo-motto cognizance of any such instances of victimization and pass appropriate order, along with exemplary compensation to the victims, on the matter.

Uniformity in the fee structure and simplification of process of payment of fee

At present, the application fee for obtaining information is not uniform all over the country. Application fee in Himachal Pradesh is Rs. 10/-, whereas in Haryana it is Rs. 50/- and in Arunachal Pradesh it is between Rs. 500/- & Rs. 50/-depending upon the type of information to be obtained.

The Central Government has prescribed Rs. 10/- as application fee and Rs. 2/- per page created or copied for obtaining information. However, the different State Governments have prescribed different fee. The application fee thus varies from Rs. 500/- in Arunachal Pradesh to free of cost at village level in Andhra Pradesh. Similarly, some States levy fee for filing appeal, whereas it is free in most of the States. It is evident from the above analysis that although some States have prescribed reasonable fees for obtaining information, in other States, heavy fee has been prescribed, which makes it difficult for the citizens to obtain information. The heavy fee is not only against the spirit of the RTI Act, but also defeats the purpose of the Act.

In Himachal Pradesh fee for inspection of record/document is Rs. 10 per 15 minutes or fraction thereof. Every page of information to be supplied shall be duly authenticated giving the name of the applicant (including below poverty line status if that is the case), and shall bear the dated signatures and seal of the concerned Public Information Officer/

Assistant Public Information Officer supply the information. Fees/ Charges shall be deposited in a Government treasury under the head of account **"**0070-OAS, 60-OS, 800-OR, 11- Receipt head under Right to information Act, 2005". Accruals in to this head of account may be separate fund by way of grant-in-aid for furthering the purposes of Act, including of equipment and consumable, providing training to staff etc.[16] After analyzing the provisions of the Tamil Nadu Right to Information (Fees) Rules 2005,[17] the Karnataka Right to Information Rules, 2005[18] and the Kerala Right to Information (Regulation of Fee and cost) Rules, 2006,[19] it has been observed that there is no uniformity, with respect to application fee, inspection fee and modes of payment of such fees, in these states. It is surprised to notice that the Rajasthan Right to Information (High Court & Subordinate Courts) Rules, 2006[20] provides such very high application fee, which is beyond the reach of a common man.

Lord Marnoch in *Common Services Agency* v. *Scottish Information Commissioner*[21] while examining the scope of Freedom of Information Act, 2000, has rightly pointed that the terms of the Act should be liberally interpreted, keeping in mind intention of the Legislature, and objectives of the Act. He observed that:

> *…[T]he statute, FOI Act, whose whole purpose is to secure the release of information, should be construed in as liberal*

16. Section 5 of the Himachal Pradesh RTI Act, 2005.
17. Rule 3 of the Tamil Nadu Right to Information (Fees) Rules, 2005,
18. Rule 4 of the Karnataka Right to Information Rules, 2005,
19. Rule 4 of the Kerala Right to Information (Regulation of Fee and cost) Rules, 2006.
20. Rule 4 of the Rajasthan Right to Information (High Court & Subordinate Courts) Rules, 2006 stipulates that "Any person seeking information under the Act shall make an application in Form 'A' to the Authorized Person along with non-judicial stamp, of Rs. 100 duly affixed on/attached to it, which shall be nonrefundable. Where the information relates to tender documents/bids/quotation/business contract, the application fee shall be Rs. 500 per application".
21. Scotland [2006] CSIH 58, December 1,2006. *(x)*the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations; *(xi)* the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made; *(xii)* the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes; *(xiii)* particulars of recipients of concessions, permits or authorizations granted by it; *(xiv)* details in respect of the information, available to or held by it, reduced in an electronic form; *(xv)* the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use; *(xvi)* the names, designations and other particulars of the Public Information Officers; *(xvii)* such other information as may be prescribed; and thereafter update these publications every year; *c)*publish all relevant facts while formulating important policies or announcing the decisions which affect public; and *d)* provide reasons for its administrative or quasi-judicial order.

a manner as possible and, so long as individual and other private rights are respected, and the cost limits are not exceeded, I do not see myself any reason why the Commissioner should not be accorded the widest discretion in deciding the form and type of information which should be released in furtherance of its objectives.

It is evident from the above analysis that some states charge different fees and modes of payment are also varied. Application fee should be minimal and uniform all over the country. Similarly, the charges for obtaining information should also be minimal, uniform and reasonable so that the same are not beyond the reach of common man. Sections 6 and 7 of the RTI Act should be amended requiring the States not to charge more fee than the prescribed by the Central Government. However, the State Government may be at liberty to charge lesser fee than prescribed by the Central Government. It has been noticed that there are different modes of payment of fee under the Act, which may provide an opportunity to the public authority to victimize applicants and moreover the existing process of payment is not convenient to general public. Therefore there is a need to simplify the process for the benefit of common man.

Penal provision for violation of Section 4 of the RTI Act

The Public Authority is required to make pro-active disclosure of all the relevant information as per provisions of Section 4[22].Section 4 (1) Every public authority shall -

a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this

22. Section 4 (1) Every public authority shall -
a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated;
b) publish within one hundred and twenty days from the enactment of this Act,—
(i) the particulars of its organisation, functions and duties;
(ii) the powers and duties of its officers and employees;
(iii) the procedure followed in the decision making process, including channels of supervision and accountability;
(iv) the norms set by it for the discharge of its functions;
(v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;
(vi) a statement of the categories of documents that are held by it or under its control;
(vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;

Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated;

b) publish within one hundred and twenty days from the enactment of this Act,-

(i) the particulars of its organisation, functions and duties;

(ii) the powers and duties of its officers and employees;

(iii) the procedure followed in the decision making process, including channels of supervision and accountability;

(iv) the norms set by it for the discharge of its functions;

(v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(vi) a statement of the categories of documents that are held by it or under its control;

(vii) the particulars of any arrangement that exists forconsultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;

(viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;

(ix) a directory of its officers and employees; *(x)* the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

(xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

(xiii) particulars of recipients of concessions, permits or authorizations granted by it;

(xiv) details in respect of the information, available to or held by it, reduced in an electronic form;

(xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;

(xvi) the names, designations and other particulars of the Public Information Officers;

(xvii) such other information as may be prescribed; and thereafter update these publications every year;

c) publish all relevant facts while formulating important policies or announcing the decisions which affect public; and

(viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as itspart or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;

(ix) a directory of its officers and employees;

of the RTI Act, unless the same is exempt under the provisions of Section.8(1). In fact an information regime should be created such that citizens would have easy access to information without making any formal request for it. Sub section (2) and (3) of the Section 4 of the RTI Act requires for continuous improvement of publication of voluntary disclosures

It has been noticed that public authorities covered under the Act, do not seriously implement the provisions of section 4 of the Act, because there is no penalty provided for the violation. The CIC seems to be aware of this serious issue as signifies by its circular which reads as:

> *The Central lnformation Commission in a case has highlighted that the systematic failure in maintenance of records is resulting in supply of incomplete and misleading information and that such failure is due to the fact that the public authorities do not adhere to the mandate of Section 4(l)(a) of the RTI Act, which requires every public authority to maintain all its records duly catalogued and indexed in a manner and form which would facilitate the right to information. The Commission also pointed out that such a default could qualify for payment of compensation to the complainant. Section 19(8)(b) of the Act gives power to the Commission to require the concerned public authority to compensate the complainant for any loss or other detriment suffered. The CIC directed that the proper maintenance of records is vital for the success of the Right to Information Act.*[23] *It is mandatory for all the public authorities to adhere to the principle of maximum disclosure, and furnish the information, as and when sought by the citizens, for which they do not have to charge any extra*

23. N0.12/192/2009-1R Government of India Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training) New Delhi Dated the 20Ih January 2010.

money, other than what has been prescribed by the Govt. under the RTI fees and costs rules.[24]

RTI applicant has to prove that he suffered loss due to such non-display and then only he may be awarded some compensation. A citizen can complain because the Department has not updated their information, thus causing damage and risk[25]. It is clear that the Act puts an obligation upon public authority to provide information as mentioned in section 4, on its web sites. But the Act does not provide any penalty for volition of Section 4 of the Act. So it is the need of the hour to provide for some penal provision for the violation of Section 4 of the Act, which would ensure effective compliance on the issue and would also minimize the numbers of applicants from approaching Public Information Officer as the information would be displayed/made available to them in convenient way.

It is also recommended, as a preventive measure, that besides penalty for violation of Section 4, non-display of information under Section 4 should be treated as deficiency in service under the Consumer Protection Act, 1986 and the Consumer Forums constituted under the Consumer Protection Act 1986, should be empowered to take cognizance of such failure in case of loss suffered by applicant due to non display of information under section 4 of the RTI Act.

Regulation of inspection of documents under the RTI Act

Right to Inspection[26] an important facet of right to information, which includes inspection of any documents or material, has been recognized under Section 2(j) of the RTI Act. But there is no rule or relation on the subject which can regulate this right of inspection. An analysis of section 2(j), Sections 6 and 7 of the Act depicts that none of the provisions provide time frame for inspection of documents. Section 7.[27]

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24. 204/IC(A)/2006- Government of India Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training) New Delhi dated 25.8.2006.
25. CIC/WB/C/2006/00081- 13 July,2006
26. Section 2(j) of the RTI Act. *(a)* the details of further fees representing the cost of providing the information as determined by him, together with the calculations made.
27. Section 7. (1) Subject to the proviso to sub-section (*2*) of section 5 or the proviso to sub-section (*3*) of Section 6, the Central Public Information Officer or State Public Information Officer, as the case may be, on receipt of a request under section 6 shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in Sections 8 and 9: Provided that where the information sought for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request. (*2*) If the Central Public Information Officer or State Public Information Officer, as the case may be, fails to give decision on the request for information within the period specified under sub-section (*1*), the Central Public Information Officer or

Section7. (1) Subject to the proviso to sub-section (*2*) of section 5 or the proviso to sub-section (*3*) of Section 6, the Central Public Information Officer or State Public Information Officer, as the case may be, on receipt of a request under section 6 shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in Sections 8 and 9: Provided that where the information sought for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request. (*2*) If the Central Public Information Officer or State Public Information Officer, as the case may be, fails to give decision on the request for information within the period specified under sub-section (*1*), the Central Public Information Officer or State Public Information Officer, as the case may be, shall be deemed to have refused the request.(*3*) Where a decision is taken to provide the information on payment of any further fee representing the cost of providing the information, the Central Public Information Officer or State Public Information Officer, as the case may be, shall send an intimation to the person making the request, giving - provides for time limit in which the PIO must furnish the desired information to the applicant but silent on the time limit for inspection of files or documents under the Act. Section 6[28] stipulates the procedure for submission of RTI Application before

State Public Information Officer, as the case may be, shall be deemed to have refused the request. (*3*) Where a decision is taken to provide the information on payment of any further fee representing the cost of providing the information, the Central Public Information Officer or State Public Information Officer, as the case may be, shall send an intimation to the person making the request, giving — *(a)* the details of further fees representing the cost of providing the information as determined by him, together with the calculations made

28. Section 6.(1) A person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means in English or Hindi or in the official language of the area in which the application is being made, accompanying such fee as may be prescribed, to - *(a)* the Central Public Information Officer or State Public Information Officer, as the case may be, of the concerned public authority; *(b)*the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, specifying the particulars of the information sought by him or her: Provided that where such request cannot be made in writing, the Central Public Information Officer or State Public Information Officer, as the case may be, shall render all reasonable assistance to the person making the request orally to reduce the same in writing. (*2*) An applicant making request for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him.(*3*) Where an application is made to a public authority requesting for an information,- *(i)*which is held by another public authority; or *(ii)*the subject matter of which is more closely connected with the functions of another public authority, the public authority, to which such application is made, shall transfer the application or such part of it as may be appropriate to that other public authority and inform the applicant immediately about such transfer: Provided that the transfer of an application pursuant to this sub-section shall be made as soon as practicable but in no case later than five days from the date of receipt of the application.

PIO/APIO for furnishing information under the ambit of the RTI Act whereas it does not contain any provision as to procedure for submission of application for inspection. Lack of adequate process for inspection provides opportunity to Public Authority to manipulate the documents/ materials sought to be inspected by the applicants. The Author is of the opinion that the inspection of documents/materials should be allowed within 48 hours of submission of application or receipt of RTI application for inspection, by the PIOs. It is also recommended that some provision for inspection such as form of application form, time limit for inspection and procedure for submission of inspection application, and process of inspection of documents/materials should be incorporated in the RTI Act or RTI Rule.

Final Thoughts

The RTI Act is a historical and a special enactment that recognizes rights of citizens for seeking information from public and selected private authorities. The Act was enacted to make a turning point in this nation's democratic development. It has long proven to be a key component of a healthy democracy because it empowers citizens with the right to demand what activities and decisions are being made, to promote national interest. The Act has given hope to society that reduces its corruption at all levels of bureaucracy. The movement has been gaining momentum through the innovativeness and perseverance shrouded by activists in various States on its use The State Governments and Public Authorities are still in the process of creating the needed infrastructure in their departments to provide information sought by any agency. But the State RTI laws left much to be desired in implementing the enactment and they are subject to individual interpretation in each State. Action against errant officials is still dependent on the already discredited and cumbersome proceedings of the civil service conduct rules.

It is recapitulated that the penal provision for the violation of Section 4 should be inserted in Section 20. There is a need to ensure uniformity in fee, cost of providing information and inspection charges payable by applicant to the Public Authority under the Act. It is evident that procedure for payment of fee under the Act is complex and inconvenient for general public, where they are required to pay fee by different modes, which gives opportunity to the PIOs to harass applicants. Cash payment should be accepted as the only mode of payment of any fee payable under the Act, which is very convenient and applicant is saved from buereaucratic hassle in respect to payment of application fee /inspection/appeal fee through various modes. Alternatively the author strongly recommends that applicant

should not be charged anything for submitting application under the RTI Act, 2005. It is also observed that the Act does not provide any specific qualifications for the designation of the APIOs/PIOs, therefore it is strongly recommended that permanent employee, not casual, or part time or ad-hoc or temporary employee should be designated as PIO/APIO. It is evident from the existing ground reality that temporary/ad-hoc employees are puppet in the hands of public authority and they can never go against the interest of their organizations and cannot effectively enforce the appropriate department to furnish desirable information under the RTI Act, otherwise their job would be at stake. Further imposition of penalty on them, in case of violation of any provision of the Act, would aggravate their condition.

It is proved beyond doubt that the Right to Information Act has become a 'Brahmastra' (weapon) of general public against corrupt bureaucrats. The right to information has certainly created an impact on accountability and transparency in the administration of the nation. The Act, if effectively implemented, could change the nature of governance in the nation. The process of transparency and accountability in the governmental institutions should be initiated on priority, which would bring a sense of empowerment to the citizens as to verify the government's performance and accountability. Right to information is a facet of the doctrine of accountability and transparency, which is in sprouted form and need to be nourished well for effective and efficient implementation. Awareness regarding the provisions of the Act should be created through various means of media. Success of the program depends upon the alertness of the citizens. Proper propagation and promotion of the subject is the key in reducing corruption and promoting transparency and accountability in the era of globalization and liberalization.

IMPACT OF DIVORCE ON CHILDREN : A SOCIO-ECONOMIC AND LEGAL STUDY

Vijender Kumar•

Introduction

This paper evaluates the traumatic experience of the children of divorced parents. Initially, the pain experienced by children is distressing as they see the family disintegrating and sense vulnerability.[1] Divorce, in any circumstance, rips a child apart, emotionally and psychologically, thwarting upon the child's wellbeing.[2] However, long term affects are determined by the behavior on the part of the parents which determines good adjustment for children going through divorce.

A major impact of divorce is on the parent-child relationship. The quantity and quality of contact between children and non-custodial parents-usually fathers-tend to decrease and the relationship with the custodial parent-usually the mother shows signs of tension.[3] Further, divorce raises the needs of definitive articulation of child rights in the present context and how they must be represented in a divorce proceeding.

Divorce is an extremely disturbing experience for all children depending upon the age or maturity level.[4] In the present context, when the family in India is understood as the first line of defense, in an event of divorce, family serves as a source of stability.[5] In light of this let us now observe the experience of children in the family while going through their parents divorce.

Child's Behaviour Associated with Divorce

Divorce is inarguably intensely distressing for children. Outside the realm of family, because of the stigmatization of divorce, the child faces a

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1. Sara Eleoff, AN EXPLORATION OF THE RAMIFICATIONS OF DIVORCE ON CHILDREN AND ADOLESCENTS, http://www.childadvocate.net/divorce_effects_on_children.htm.
2. Jayna Solinger, THE NEGATIVE EFFECTS OF DIVORCE ON CHILDREN, http://www.public.iastate.edu/~rhetoric/105H16/cova/jlscova.html.
3. F. Furstenberg and C.W Nord, PARENTING APART: PATTERNS OF CHILD REARING AFTER MARITAL DISRUPTION. *Journal of Marriage and the Family,47,*893-904 (1985).
4. Kelly and Wallerstein, BRIEF INTERVENTIONS WITH CHILDREN OF DIVORCING FAMALIES, 47 *American Journal of Orthopsychiatry* 23, 29-30 (1977).
5. M. Desai, TOWARS FAMILY POLICY RESEARCH. *Indian Journal of Social Work, 56,*

tough time attempting to be accepted by a conservative society.[6] In socio-economic attainments, children who experience their parents' divorce have lower educational prospects than children from intact homes.[7] Within the family, the obvious effects are on the physiological behaviour of the child.[8] There are also children who are left in a guilty conscious in the post-divorce period especially if they are a frequent witness to the parent's feuds.[9] They are left thinking what is that they did to cause the divorce. Moreover, in older age groups the assumption of *hyper-maturity* is also common as children often assume the tasks of adults to stabilise the custodial parent's household.[10] There is also a reciprocal dependency relationship between the child and the single parent which is in 90 percent of the cases the mother. This principally relates to a closer relationship between the parent and the child more as peers, both struggling to keep the family going.[11] A lack of generational boundaries means a less hierarchical family and less authoritative generational distinctions. This is understood to inadequately socialise children or place them in a disadvantageous position when they find themselves in hierarchical organisations.[12]

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pp. 25-231 (1995); Amitai Etzioni, THE FAMILY: IS IT OBSOLETE? *Journal of Current Social Issues* 14 (1977).

6. Andreas Diekmann and Kurt Schmidheiny, THE INTERGENERATIONAL TRANS MISSION OF DIVORCE, http://paa2004.princeton.edu/download.asp?submission Id=40 951.
7. Andrea H. Beller and Sheila F. Krein, EDUCATIONAL ATTAINMENT OF CHILDEN FROM SINLGE PARENT FAMILIES: DIFFERENCE BY GENDER, EXPOSURE, RACE,*Demography* 25: 221-234 (1998). It is also observed that children of divorce have lower level of employment, and financial attainment due to the instability within the family structure. *See* S.McLanahan, and G. Sandefur, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994).
8. Sadness and depression are common to all age-groups of children which is further characterised by loss of appetite, relentlessness, lack of decision making, difficulty in concentrating etc.*See* Howard Raab, THE EFFECT OF DIVORCE ON CHILDREN, http://www.divorcesource.com/FL/ARTICLES/raab3.html.
9. Watson, THE CHILDREN OF ARMAGEDDON: PROBLEMS OF CUSTODY AFTER DIVORCE**,**21*Syracuse Law Review* 55, 78 (1969).
10. Kalter, CHILDREN OF DIVORCE IN AN OUTPATIENT PSYCHIATRIC POPULATION, 47*American Journal of Orthopsychiatry* 40,48(1977); McDermott, PARENTAL DIVORCE IN EARLY CHILDHOOD,124 *AmericanJournal of Psychology* 1424, 1424 (1968).
11. Robert Weiss, "Marital Separation"(1975).
12. Steven L. Nock, THE FAMILY AND HIERARCHY, *Journal of Marriage and the Family,* 50 (Nov): 957-966 (1988). Article 9(1) of the Convention states that: States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

Financial Considerations

Money or lack of it poses a problem in post-divorce households. To begin with, about thirty-five percent of the children of divorced parents live in poverty.[13] Child support payments and financial assistance when not paid put much pressure on the custodial parent.[14] On the other hand, wealth increases access to positive opportunities and decreases the likelihood of negative traumas, such as transportation difficulties, serious illness without adequate medical care.[15]

Some may dismiss the argument of financial resources not being relevant to children's positive experience as 'idealistic' however researchers have maintained another viewpoint that the importance of wealth tends to be overestimated in relation to other factors and the possession of wealth can itself serve as evidence of a lack of parental commitment.[16]

Step Families

Step-families often prove to be very complicated as children find it difficult to adjust with the step-parent and the extended step-family. Initially the child may prove to be obstinate in adjusting but it is possible for the new family to become a strong family unit.[17] The new family must take things very slowly, especially the spouses, to help the child cope up with his/her life just like themselves.

Children learn how to relate to others by watching their parents relate to each other. Divorce gives them an unconscious notion of not trusting their mates.[18] Divorce also significantly increases the chances of young

13. NAESP Staff Report, One-Parent Families and Their Children, *60 Principal 31, 33* (1980) at 31.
14. Leighton E. Stamps, Seth Kunen, and Robert Lawyer, JUDICIAL ATTITUDES REGARDING CUSTODY AND VISITATION ISSUES, 25 *Journal of Divorce and Remarriage* 23,33 (1996).
15. Alan C. Acock and K. Jill Kiecolt, IS IT FAMILY STRUCTURE OR SOCIOECONOMIC STATUS? 68 *Social Forces* 553 (1989). This is often to say that lower socio economic status increases sources of stress and is correlated with lower self-esteem in children of divorced families. *See* N.J. Shook & J. Jurich, CORRELATES OF SELF-ESTEEM AMONGST COLLEGE OFFSPRING OF DIVORCE FAMILY, 18 *Journal of Divorce and Remarriage* 18-314 at 157 (1992).
16. Carolyn J. Frantz, ELIMINATING EONSIDERATION OF PARENTAL WEALTH IN POST DIVORCE CUSTODY DISPUTES, *Michigan Law Review*, Vol. 99, No. 1. (October 2000), pp. 216-237.
17. L. K. White, THE EFFECT OF PARENTAL DIVORCE AND REMARRIAGE ON PARENTAL SUPPORT FOR ADULT CHILDREN, *Journal of Family Issues*, 13, 234-250. (1992).
18. Paul R.Amato and Alan Booth, A PROSPECTIVE STUDY OF DIVORCE AND PARENT CHILD RELATIONSHIPS, *Journal of Marriage and the Family*58 (May1996):356-365.

people leaving their homes due to friction with a parent, increases the chances of premarital cohabitation, and also the odds of premarital pregnancies or fatherhood.[19]

Child's involvement in Parental Conflict

In the light of effects of divorce of parents on their children, it is important to note that children are interested and affected parties in a divorce action though they are not directly involved in the divorce proceedings.[20] When parents resort to divorce the rights of a child in the companionship and care of the parents inarguably becomes significant.

The phrase 'children's rights' is not definitive.[21] These rights therefore can only be broadly enunciated with the help of the Constitution and the Convention on Rights of the Child relating to the present context.

Although a child's rights may be limited, they should not be ignored or eliminated since children are, in fact, persons under the Constitution wherein all fundamental rights are guaranteed to them. Article 39(f) of the Constitution lays down the responsibility on the State to frame a policy securing the children.[22] The provisions under Article 15(3)[23] and Article 51-A(k)[24] also voice the rights of the child.

Under the Convention on the Rights of the Child the primary duty is placed on the parents and then on the State.[25] It is provided for the State parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination due to the status of parents or family.[26]

19. Edgar F. Borgatta and Rhonda J.V. Montgomery, CONSEQUENCES OF DIVORCE FOR CHILDREN, Encyclopedia of Sociology, 2nd ed. 2000, Vol. I, p. 707.
20. Hansen, THE ROLE AND RIGHTS OF CHILDREN IN DIVORCE ACTION, 6 *Journal of Family Law* 1, 9-11 (1966); Speca and Wehrman, PROTECTING THE RIGHTS OF CHILDREN IN DIVORCE CASES IN MISSOURI, 38 *UMKC Law Review* 1, 6 (1969).
21. It is an umbrella term encompassing myriad sets of rights relating to different situations a child may be found in. *See* Scott A. Cannon, FINDING THEIR OWN "PLACE TO BE": WHAT GREGORY KINGSLEY'S AND KIMBERLY MAYS' "DIVORCES" FROM THEIR PARENTS HAVE DONE FOR CHILDREN'S RIGHTS, 39 *Loyola Law Review* 837 (1994).
22. Article 39(f) of the Indian Constitution states that: The State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
23. Article 15(3) of the Indian Constitution states that: Nothing in this Article shall prevent the State from making any special provision for women and children.
24. Article 51A(k) of the Indian Constitution states that: It shall be the duty of every citizen of India who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between six and fourteen years.
25. Convention on the Rights of the Child, General Assembly Resolution 44/25. [Hereinafter referred to as "Convention"].
26. Article 2(1) of the Convention states that: States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without

This essentially means that a child of divorcees shall not be discriminated against in educational institutions etc.[27] The most relevant Article which pertains to separated parents provides for the best interest of child to be taken into consideration while deciding the residence of the child.[28] Further, both parents are sought to be responsible for the development of the child and for the necessary assistance.[29] Thus, the broad category of rights ensures the welfare of the child during the parents' divorce.

Despite the strong infringement on a child's interests implicit in divorce, the law currently does not consider children to be affected parties except in the issues regarding custody.[30] Leaving apart the archaic legislations on personal laws which govern child custody, there is no special legislation to treat child rights on a larger platform and to accord them special status and thus to treat these children as different from others.[31]

discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

27. It is also the states responsibility to ensure the care and protection of child taking into account the rights and duties of the parents as provided under Article 3(2) of the Convention which states that: States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. Further, the child has the right to be cared for by the parents as provided under Article 7(1) of the Convention which states that: The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.
28. Article 9(1) of the Convention states that: States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
29. Article 18(1) of the Convention states that: States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
30. BALANCING CHILDREN'S RIGHTS INTO THE DIVORCE DECISION, 13*Vermont Law Review* 531 (1989).
31. Such children do not fall within the ambit of 'child in need of care and protection' under the Juvenile Justice(Care and Protection) Act, 2000 since the provisions do not specifically relate to children undergoing a parental conflict but cursorily look upon children neglected by the parents or with a parent who is unfit to rear them. Section 2(d)(ii-b) of the Juvenile Justice (Care and Protection) Act, 2000 states that "a child in need of care and protection is one who is residing with a guardian who has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person". Also, Section 2(d)(iv) stipulates that "a child in need of care and protection who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child."

There are special set of child rights that come to the fore during divorce proceedings which must be looked into from a distinct point. These rights may include both parents to remain jointly and severally liable for care and maintenance of the child; to establish a stable home for the child close to the pre-divorce standard of living.

The reform by the way of a specialised legislation[32] to focus on the child rights in case of parental conflict is a proactive step towards looking into this special situation demanding a specific articulation of child rights. Further, the policy of mediation should be employed rather than the use of solicitors because mediation is seen as a more effective way of reducing hostility and encouraging cooperation.[33] The difference simply lies in recognizing autonomous 'child rights' rather than just the 'rights' to be protected.[34]

Child Rights *vis-à-vis* Parental Rights

The concept of rights presents special difficulty because of the conflicting interests and rights of the parents and child.[35] Parents are seen as protectors of their children's interests but their interests may differ vastly from those of their children.[36]

We solicit the rights of individuals to emphasize their autonomous selves. Such emphasis may be obscure in the case of parent-child relationships. The problem that emerges in defining the parent and child rights separately is that of demarcating the *self* of parent and children.[37] The idea of according equality rights in the specific context of Article 14 of the Constitution of India to children is then relatively confounding.[38] The concept of equality that entails differential treatment to respond to different needs must especially be looked into with regards to children.

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32. There are legislations like Children Act, 1989 in England which specifically cater to the needs of these children. *See* J. Roche, THE CHILDREN ACT 1989: ONCE A PARENT ALWAYS A PARENT? (1991)5 *Journal of Social Welfare and Family Law,* pp.345-61, 355.
33. R E Emery and M M Wyer, DIVORCE MEDIATION, *American Psychologist* 42. 4-2-480.
34. J. Roche, CHILDREN'S RIGHT IN THE NAME OF THE CHILD, 17 Journal *of Social Welfare and Family Law* 281-300 (1995), at 281.
35. Keiter, PRIVACY, CHILDREN AND THEIR PARENTS, 66 *Minnesota Law Review* 459, 498 (1982); DEVELOPMENTS IN THE LAW: THE CONSTITUTION AND THE FAMILY, 93 *Harvard Law Review*, 1156, 1221-40 (1980).
36. Olsen, THE MYTH OF STATE INTERVENTION IN THE FAMILY, 18 *Michigan Journal of Law Reform* 835, 851 (1985).
37. *See* Hegel, *Philosophy of Right,* sections 158-64; Aristotle *(Politics* 1: 13.15 and 7.16-17), does describe children as "another self" of the parents.
38. Colleen Sheppard, CHILDREN'S RIGHT TO EQUALITY: PROTECTION VERSUS PATERNALISM, 1*Annals Health Law* 197 (1997).

Parental right to raise children is fundamental even though not expressly mentioned in the Constitution.[39] This traditional approach that favours parental rather than children's rights led the State to affirm the inherent *parens patriae* jurisdiction of the State to protect the best interests of the child.[40]

When divorcing parents have agreed on a common course of action, there is little reason to believe that the judge is in a position to make a better decision. The parents are far more familiar with their children than any Court could hope to become.[41] While it is possible that some parents would trade off reduced custody or visitation privileges for higher support payments or even a fit parent to not want custody at all, it is not clear how the Courts by forcing such a parent to take unwanted custody would be in the best interests of the child. Hence, only unusual custodial arrangements which pose imminent harm to the child should justify intervention.[42]

Rights of Parents and Children Involved in Custody Cases

A divorce is often followed by prolonged conflicts over the custody of minor children. It is therefore, essential to analyse the aspect of child custody and how the children are affected largely through the custodial arrangements. Custody means the obligation to control, care for and supervise a child. Custodial parent may be the guardian for both the person and property of the minor and is often over-loaded with the child's responsibility. There are also consequences of being the non-custodial parent, such as not being able to take the child out without the Court's permission.[43]

The basic conflict in social principles in a custody case is whether to treat the child as a detached individual, apart from his/her blood-ties, or to emphasize the family unit from the standpoint of the parent.

One of the natural rights incidentals to parenthood is the right to custody of the child recognised as a common law doctrine of 'parental autonomy' which the Courts do not easily discard. [44] Also observe that the natural right of the parent to the care of a child prevails as against an entire

39. Nancy B. Shernow, RECOGNIZING CONSTITUTIONAL RIGHTS OF CUSTODIAL PARENTS: THE PRIMACY OF THE POST-DIVORCE AMILY IN CHILD CUSTODY MODIFICATION PROCEEDINGS, 35 *University of California Law Review*, 677 (1998).
40. Bernard M. Dickens, THE MODERN FUNCTION OF LIMITS OF PARENTAL RIGHTS, 97 *L.Q.Review* 462 (1981).
41. Mnookin and Kornhauser, BARGAINING IN THE SHADOW OF LAW: THE CASE OF DIVORCE, 88 *Yale Law Journal* 950, 957-58, 995-96 (1979).
42. Folberg and Graham, JOINT CUSTODY OF CHILDREN FOLLOWING DIVORCE, 12 *U.C. Davis Law Review* 523, 559 (1979).
43. CHILD CUSTODY AND VISITATION,http://www.umiacs.umd.edu/users/sawweb/sawnet/divorce/child_custody.html.
44. *In re White*, (1936) 6 Cal(2d) 166.

stranger.[45] However, cases like *V. Meenapushpa* v. *V. Ananthan Jayakumar*[46] point out that the custody of children is being granted to grandparents also when going according to the wishes of a mature child.[47] This principally conflicts with the 'parental autonomy' which is acquired by parents by the virtue of giving birth to the child which has nothing to do with the intervention of the State. Thus, there are two sets of interests competing in a custody case.[48]

Factors Ascertaining the 'Best Interest' of Child

The law cannot prevent all damage to the child's interests caused by divorce, since it cannot compel harmonious human relationship. It can, however, provide a means for reducing the damage by ensuring that the child's interests are not neglected in divorce custody proceedings.[49] While there has been no formal enunciation of factors ascertaining best interest, the Courts look at the following decisive factors:

- Child's age, gender, mental and physical maturity and also of parents;
- Relationship and emotional ties between the parent and the child;
- Parent's ability to provide the child-food, shelter, clothing, medical care, education; and
- Child's established living pattern-school, home, community.

When the family unit has been broken in a divorce-custody dispute, neither parent can be presumed to be representative of the child nor the counsel for the parents represent both the child's best interests and the interests of their clients when those interests are divergent. It has been argued, however, that the child's interests are protected by the Court as *parens patriae*.[50] However, within the 'rigors of adversary proceedings', without separate representation for the child, the Court may neglect

45. *Newby* v. *Newby* 202 Pac at 892.
46. AIR 2004 Mad 1.
47. The Court in the abovementioned case held that the even though the parents may be of good character and financially secure, and yet not suited to the trust of rearing and educating a child, with whom they had not previously resided.
48. Joseph Landisman, CUSTODY OF CHILDREN: BEST INTEREST OF CHILD v RIGHTS OF PARENTS, *California Law Review*, Vol. 33, No. 2. (June 1945), pp. 306-316.
49. LAWERYING THE CHILD: Principles of Representation in Custody and Visitation Disputes Arising from Divorce, *Yale Law Journal*, Vol. 87, No.6.(May 1978), pp.1126-1190.
50. The *parens patriae* doctrine, which developed in the seventeenth century, allowed the Chancery Court to assume child-protective functions and later to deny custody to an unfit father; Foster and Freed, CHILD CUSTODY (pt. I), 39 *New York Law Review*, 423-24 (1964).

important interests of the child in both the outcome and the process of the proceeding.[51]

It is therefore important that a child be represented by a *guardian ad litem* whose central responsibility is to assist the Court to determine the best interest of the children.[52] It is only to ensure that the child's interests receive priority in the midst of other competing interests[53] because the judge who is restricted to the courtroom cannot on his own obtain the facts pertaining particularly to the child's viewpoint.[54]

When applying the 'best interest' standard in contested custody proceedings, Courts must consider the question of how much weight to be given to the child's own custodial preference.[55] In practice, however the broad discretion given to the Courts often means that the child's preferences may be ignored.[56] Some Scholars have argued that the children in a divorce custody proceeding be given an absolute or presumptive choice of custodial parent.[57]

Issues of custody and guardianship under the Hindu law are governed by the Hindu Minority and Guardianship Act, 1956. Section 6(a) of the Act defines 'natural guardian' in the case of a boy or an unmarried girl as the father,[58] and after him, the mother.[59] Also, it must be noted that the father

51. Mnookin, CHILD CUSTODY ADJUDICATION,39 *Law and Contemporary Problems* 226, 286-87 (1975).
52. Oster, CUSTODY PROCEEDING A Study of Vague and Indefinite Standards, *5 Journal of Family Law*. 21, 23-25 (1965).
53. Maurice K. C. Wilcox, A CHILD'S DUE PROCESS RIGHT TO COUNSEL IN DIVORCE CUSTODY PROCEEDINGS, 27 *Hastings Law Journal* 917, 924 (1976).
54. The child's attorney can be a better fact finder than the judge for several reasons. (1) The judge usually speaks with the child in chambers, if at all. Interview in chambers is still at best brief and takes place in an imposing and unfamiliar environment. Attorneys can and do make efforts to speak to children in surroundings more comfortable to the child. (2). He conducts his own investigation, seeks out facts that he considers important, and can actively discourage attempts to introduce evidence or testimony that he considers irrelevant and likely only to increase the parents' bitterness.
55. Virtually all states provide, either by statute or by judicial decision that the preference of a child should be a factor in the determination of his best interests if s/he is competent to make a reasonable choice. *See* Speca, THE ROLE OF THE CHILD IN SELECTING HIS OR HER CUSTODIAN IN DIVORCE CASES, 27 *Drake Law Review* 437, 441-43 (1977-1978).
56. Bersoff, REPRESENTATION FOR CHILDREN IN CUSTODY DECISIONS: ALL THAT GLITTERS IS NOT GAULT, 15 *Journal of Family Law* 27, 39-40 (1976).
57. Some scholars argue that there is a general sphere of decision making autonomy for competent minors which, because "a custody decision affects the very essence of what determines a child's future life." *See* Levy, THE RIGHTS OF PARENTS, 1976 *B.Y.U.Law Review*.693,706.
58. Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.
59. Though there has been a storming controversy over the interpretation of the phrase 'and after him' in the said Section, it has now been settled that the phrase necessarily means *'in the absence of'*as laid down by the Supreme Court in *Githa Hariharan* v. *Reserve Bank of India* (1999) 2 SCC 228.

who is the natural guardian would not 'ipso facto' *becomes the custodian of the child.*[60]

Studies however show that eighty-five to ninety percent of children of divorce couples are placed in their mothers' custody.[61] However, the Courts now often extensively delve upon the question of custody of children looking into matters like mental health, financial status etc. of both the parents and the interests of the child rather than moving on *a priori* notion.[62] Therefore, facts of each case should be a matter of anxious consideration for the Courts as to where the welfare of the child lies.[63]

Mohammedan Law

Under Muslim law, the father is the sole guardian of the child but, the mother has the primary right to custody. According to the Shia School, the mother's right to custody of the child terminates when the boy reaches the age of two and in the Hanafi School, this right is extended till the age of seven. Both the Schools agree that mother has the right to the custody of a minor girl till she attains puberty. In addition to these classical conditions some flexibility is also accorded in the light of Guardians and Wards Act, 1890 and the Courts are pro-active in their custodial arrangements by applying the criteria of best interests of child.[64]

Other Statutory Provisions

The Law on child custody was codified as early as 1890 in the form of the Guardians and Wards Act which consolidates and amends the law relating to guardians and wards. The Guardians and Wards Act, 1890 is a secular Act and guardianship in communities other than Hindu and Muslims is governed by the Guardians and Wards Act, 1890 which clearly lays down that the father's right is primary. Under Guardians and Wards Act, 1890 'guardian' is defined which is similar to what is in the Hindu Minority and Guardianship Act, 1956.[65]

60. *Samuel Stephen Richard* v. *Stella Richard* AIR 1955 Madras 451. Not only this, but both Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 stipulate that the child's view is regarded while making an arrangement when the child is above 12 years of age and that maintenance and education of children should be consistent with their wishes wherever possible.
61. L. Weitzman, THE DIVORCE REVOLUTION, 4 *Behavioural Science and Law*. 105, 106-07 (1986) at 222; *Shaik Moidin* v.*Kunhadevi* AIR 1929 Mad 33.
62. *Y. Varalakshmi* v.*Kanta Durga Prasad* (1989) 1 DMC 379.
63. *Thrity Hoshie Dolikuka* v.*Hoshiam Shavaksha Dolikuka* AIR 1982 SC 1276.
64. The Muslim Women (Protection of Rights on Divorce) Act, 1986. The Act also stipulates that the divorced wife is entitled to any outstanding dower, any property given her before or during marriage, and maintenance for children in her custody born before or after the finalisation of the divorce.
65. Section 4(2) of the Guardians and Wards Act, 1890 defines a guardian to be person having the care of the person of a minor or of his property or of both his person and property.

The Divorce Act, 2000[66] provides law of custodial arrangements for children among Christians.[67] In case of Parsis, Section 43[68] of the Parsi Marriage and Divorce Act, 1936 makes provision for the custody of children.

Effect of Remarriage of the Spouse

An impending issue as to what would be the effect of remarriage of a spouse was resolved when the Apex Court in *Lekha* v. *P. Anil Kumar*[69] held that the remarriage of the mother cannot be taken as a ground for not granting custody of the child to the mother. Similarly, where a father marries it is not a ground for depriving him of his parental right of custody.[70]

Custody Issues and the Sex of the Child

It is now settled law that child custody can go to either parent.[71] On the sociological front, researchers find that boys raised by fathers and girls raised by mothers may do better than children raised by the parent of the opposite sex.[72] However, the children's adjustment following a divorce has more to do with the quality of the parent-child relationship than with the gender of the child.

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66. Previous Indian Divorce Act, 1869 was amended in 2000.
67. Section 44 of the Divorce Act, 2000 states that: The High Court after a decree absolute for dissolution of marriage or a decree of nullity of marriage and the District Court after a decree for dissolution of marriage or of nullity of marriage has been confirmed, may, upon application by petition for the purpose, make from time to time all such orders and provisions, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said court, as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.
68. Section 49 of the Parsi Marriage and Divorce Act, 1936 states that: In any suit under this Act, the Court may from time to time pass such interim orders and make such provisions in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children under the age of [eighteen years], the marriage of whose parents is the subject of such suit, and may, after the final decree upon application, by petition for this purpose, make, revoke, suspend or vary from time to time all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such final decree or by interim orders in case the suit for obtaining such decree were still pending.
69. 2007(1) ALT 35(SC). *See* also, *Kumar V.Jahgirdar* v. *Chethana Ramatheertha* 2004 (1) HLR SC 468.
70. *Sura Reddy* v. *Chenna Reddy* AIR 1950 Mad.306.
71. http://www.infochangeindia.org/archives1.jsp?secno=4&monthname= March&year = 2006 &detail=T.
72. However, the children's adjustment following a divorce has more to do with the quality of the parent-child relationship than with the gender of the child. Even so, the judicial point of view throughout the country generally takes the view that female child of growing age needs company more of her mother compared to the father as seen in *Kumar V. Jahgirdar* v. *Chethana Ramatheertha* AIR 2004 SC 1525. *See* Mary W. Temke, THE EFFECTS OF DIVORCE ON CHILDREN, http://extension.unh.edu/family/documents/divorce.pdf.

Maintenance for Off-springs of Divorcees

Financial problems can be far more catastrophic than the emotional turmoil the child faces. Studies show that only half of all Court-Ordered child support is paid[73] affecting the child's daily care, schooling etc. In such a situation the Courts must ensure fall back mechanisms like asking for the extended family members to act as surety etc.

Maintenance under the Hindu law is provided in the Hindu Adoptions and Maintenance Act, 1956 wherein under Section 20[74] it is obligatory upon the parents to maintain their minor children. In case of Mohammedan law, the maintenance for the children of divorcees is basically to be taken care of by the father regardless of the custodial arrangement. It is stipulated in the Muslim Women (Protection of Rights on Divorce) Act, 1986 in Section 3(b).[75] Under the Divorce Act, 2000 applicable to Christians, Section 43 deals with Courts' power to make provisions for the minor child's maintenance.[76] Usually the Courts grant maintenance for children while deciding the issue of maintenance to wives in divorce cases.

Divorce after 1970 has become a dominant institution in the American society[77] and rights of children have been more broadly defined especially

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73. DEALING WITH THE FINANCIAL IMPACT OF DIVORCE, http://financialplan. about. com/cs/divorceandmoney/a/DealWithDivorce.htm.
74. Section 20 of the Hindu Adoptions and Maintenance Act, 1956 states that: Maintenance of children and aged parents.-(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or inform parents. (2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor. (3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.
75. Section 3(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 states that: where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children.
76. Section 43 of the Divorce Act, 2000 states that : In any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted in, or removed to, a High Court, the court may from time to time, before making its decree absolute or its decree (as the case may be), make such interim orders, and may make such provision in the decree absolute or decree, and in any such suit instituted in a District Court, the court may from time to time, before its decree is confirmed, make such interim orders, and may make such provision on such confirmation, as the High Court or District Court (as the case may be) deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit, and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the Court.
77. Edgar F. Borgatta and Rhonda J.V. Montgomery, CONSEQUENCES OF DIVORCE FOR CHILDREN, Encyclopedia of Sociology, 2nd ed.2000, Vol. I, p. 709.

in situation of marital disruptions.[78] Most States in America have stressed that parents should be encouraged to arrive at custody decisions privately.[79] In the Indian context however, the matter automatically at the time of passing of the decree of divorce comes under the jurisdiction of the Court. This conflicts with the parental authority in making decisions for their child's welfare.[80]

Even in England, the defences of "parental authority" or of "family privacy" are no longer justified for State intervention. The Children Act, 1989 in England addresses the core issue of the rights of a child in divorce proceedings. In India, there has been no comprehensive legislation dealing with rights of child in this context.

It is also important to note that one of the reasons of the high divorce rates in the west is due to the destigmatization attached to the families. Attitudes toward divorce in the west have become more accepting over a period of time, even when children are involved.[81] However, in India the process of divorce is still stigmatised, and in a way society creates a negative stereotype of the children of divorcees.[82]

Furthermore, while in India the 'best interest of child' criteria is obscure and is left into the hands of judiciary to enumerate upon the parameters, in 1970 American National Conference on Uniform State Laws adopted the Uniform Marriage and Divorce Act which laid down the yardsticks to ascertain the best interest of the child. In the absence of such enumeration the judiciary is left unguided in India.

It has already been discussed that there is a need for formal recognition of the rights of child involved in parents' divorce and how the

78. This marks the age of the growth of individual rights and the loss of family autonomy beginning in America from the 1960s. *See* Edgar F. Borgatta and Rhonda J.V. Montgomery, Encyclopedia of Sociology, 2nd ed. 2000, Vol. II, p. 951.

79. Cheryl Buehler and Jean M. Gerard, DIVORCE LAW IN THE UNITED STATES : A FOCUS ON CHILD CUSTODY, *Family Relations*, Vol. 44, No. 4, Helping Contemporary Families. (October 1995), pp. 439-458.

80. Also, the consideration given to the child's preferences is much more in the west while determining the custody than what is relevant in India. It is recognised as a substantive due process protection and cannot be denied to minors merely because of their age; and nothing can limit this recognized right to choose whom to live with.

81. Arland Thornton, CHANGING ATTITUDES TOWARDS SEPARATION AND DIVORCE: CAUSES AND CONSEQUENCES, 90 *American Journal of Sociology,* 856-872 (1985).

82. In India,it is widely assumed that the two-parent family is ideally suited for the socialization of children.*See* Vasudha Dhagamwar, LAW, POWER AND JUSTICE: THE PROTECTION OF PERSONAL RIGHTS IN THE INDIAN PENAL CODE, Sage Publishers, Delhi (1996); Louis Dumont, A SOUTH INDIAN SUB CASTE: SOCIAL ORGANISATION AND RELIGION OF THE PRAMALI KALLAR, Translated from the French by M Moffatt and L. and A. Morton. Revised by A. Stern, Oxford University Press, Delhi (1986).

child can be helped through the divorce rigmarole. The primary duty is on the parents to constantly *interact* with the child and let him/her know the separation in the family. This will basically maintain their trust in the parents. Interaction further depends upon the age of the child. For toddlers, school goers sharing general information is appropriate while with adolescents there must be greater details shared as to what exactly are the reason for the divorce etc.[83]

Secondly, the most important factor for children's well being is to not let them be privy to the ongoing conflicts. This must not be confused with *interaction*; it is necessary for the child to know only through the parents. Further, keeping in touch with the non-custodial parent and a regular communication is beneficial for the child's growth.

Moreover, minimum numbers of transitions after the divorce are beneficial for the children. Keeping them in the same school, home or neighbourhood always helps the children relate to some stability without having undergone another set of *changes* for even simple changes are experienced as losses.[84] Associating with relatives, going out in the neighbourhood, seeing friends for weekends all can help gather support from various sources. Socialising can help children overcome the divorce stigma and this will make it look simpler.

Conclusion

The analytical efforts made aforesaid conclude on the point that the child's psychological balance is deeply affected through the marital disruption and adjustment for changes is affected by the way parents continue positive relationships with their children. Also, as regards the recorded rise in female headed households,[85] the scholarly opinion largely asserts that fathers need to take up a larger responsibility and provide for timely maintenance.

Apart from the developmental considerations due to family disruption, there are certain rights which need to be looked into from a distinct standpoint to cater to special situations the children are found in during the time of their parents' divorce. As it has been argued, these rights though cannot be distinctively articulated from that of the parent's rights, yet the child should be considered as an autonomous *self* to be accorded individual rights. The researcher also reiterates the need for enumerating the parameters to

83. L. Weitzman, THE DIVORCE REVOLUTION, 4 *Behavioural Science and Law* 105, 106-07 (1986).
84. Cochran and Vitz, CHILD PROTECTIVE DIVORCE LAWS: A Response to the Effects of Parental Separation on Children, 17 *Family Law Quotients* 327, 330-41.
85. Bruce *et al*., Families in Focus, Population Council, New York, 1995.

determine the best interests of the child rather than leaving the judiciary with absolute powers to determine the child's welfare. From a legal standpoint, the researcher suggests that a single law governing child rights in divorce cases and also matters pertaining to custody and maintenance must come into place for an enhanced framework protecting the child's future.

To ensure that the child receives a stable and nurturing environment after the divorce of the parents, some scholars have opined that if a parent fails to promote the child's interest at some threshold level of adequacy, a form of intervention, ranging from counselling to obtaining fine from the parent as well as loss of parental rights to the child, may be legitimate.[86] The farfetched idea of a prenuptial agreement may also be worked out though it shall take a while for the Indian environment to be suited to the design.

86. Paul R. Amato and Alan Booth, A PROSPECTIVE STUDY OF DIVORCE AND PARENT CHILD RELATIONSHIPS, *Journal of Marriage and the Family* 58 (May 1996): 356-365.

USE BASED ENTITLEMENTS - CHANGING DIMENSION OF LAND OWNERSHIP IN INDIA

K.Vidyullatha Reddy*

Introduction

Land owning is a dear fact for many citizens in fact some people judge prosperity in terms of the extent of land owned. No person requires land more than the extent required for utility or livelihood people tend to yarn for owning more land. The reasons for owning more extent of land than required could be that: (i) it gives them the pleasure of feeling competent or (ii) it provide more quantum for their progeny to inherit or (iii) it gives them an assurance to generate money in times of need as an asset or (iv) to increase food production or (v) for other reasons better known to them. It is only the few out of the box thinkers who may not have so much liking to own land. In spite of interest to own the land it is the means to own that matters, the more one like to own and the less means they have may lead to desperation or disapproval of the society around them. There are issues such as moral, ethical, social and legal issues involved in owning land. The changing scope of the characteristics of land ownership in India requires to be analyzed as it can have impact on our economical, cultural, social and emotional values.

Legally speaking ownership generally encompasses certain characteristics,[1] in the context of land ownership they can be stated as:

1) Right to consume, destroy or alienate the land owned (Owner may plant fruit bearing plants or leave it uncultivated or do not bother to maintain record of ownership which in the long run may ruin his rights or may alienate to others by way of sale, gift etc.);
2) Right to use and enjoy and land owned (Owner may construct a house and live in it, cultivate it, develop drip irrigation facility, build resorts and make money out of it etc.);
3) Right to possess the land owned (Owner may let out a portion or give on lease but the right to regain possession shall vest with owner so it is not the actual possession that matters but the right to possess matters to determine ownership);
4) Indeterminate duration and perpetual interest (Owner may retain ownership until death or sell it, once the sale takes place the

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1. P.J. Fitzgerald (rev.) Salmond, "Jurisprudence", 12th ed.1966, p. 246.

buyer becomes owner and the buyer exercises same rights. So these rights remain perpetually and with whom and how long are indeterminate as it depends on the owner when the intention of dispossession actually materializes); and

5) Residuary character (Owner rights are subject to rights of tenants however the residuary rights if any lies with owner and does not go with tenancy).

Modes of Owning Land

In India it is legal for government to acquire others land in the name of eminent domain for any valid purpose under Land Acquisition laws. It is legal under transfer of property law for a mortgagee to acquire mortgagors land if the mortgagor fails to repay as promised in mortgage agreement. It is legal for the children to own their parents land on their death as per the laws of inheritance. It is legal for a non heir to own land under a gift deed or a will deed as permitted by laws of succession. Sale off course is still the primary mode of owning land from an unknown or a known seller. Unclaimed land belongs to the Government. Forest lands, wetlands and other lands which cannot be owned by individuals for any reason provided in any law shall be owned by Government. Corporations, firms and societies may own land in their own name. The prominent modes of land ownership can be summarized as follows:

1) Sale (Buyer becomes owner; buyer may be individual, firm, government etc.);

2) Inheritance (Heirs of deceased becomes owner in accordance with the applicable law such as Hindu Succession Act, 1956 etc.);

3) Succession (Successors of deceased becomes owner by will etc. with applicable law such as Hindu Succession Act, 1956 etc.);

4) Mortgage (Mortgagor unable to pay debt and mortgagee as secured creditor becomes owner with applicable law such as Transfer of Property Act, 1882 etc.);

5) Eminent domain (Land Acquisition Act, Urban Development Authority Act etc. empower Government to acquire land irrespective of the intention of the owner in the interest of larger public and thus becomes owner. Government may also assign land in public interest to public);

6) Adverse possession (Tenancy Laws which empower the tenant in case of long undisturbed tenancy to become owner etc.); and

7) Land ceiling (Government may take over land of its citizens or corporation etc. if the extent is beyond the prescribed limit under urban land ceiling or agriculture land ceiling law etc thus claiming ownership).

Nature of Ownership

The nature of ownership may determine the entitlements of owner and the heirs however the characteristics of ownership are generally not affected by nature of ownership. The different types of nature of ownership could be summarized as follows:

1) Joint Ownership (The example for this kind of ownership is the coparcenary interest as given in Section 6 of Hindu Succession Act, 1956);

2) Co ownership (The example for this kind of ownership can be shareholders of a limited liability Company etc.); and

3) Sole Ownership (The example for this kind of ownership can be an Individual owning a piece of land).

The characteristics of ownership in cases of all modes of ownership and all nature of ownership are generally found across in all instances. The following are some of the instances where few of these characteristics are found and not all of them are present.

Limited Ownership

Limited Ownership was provided to widowed Hindu women under the Hindu Women Right to Property Act, 1937 in India before the enactment of Hindu Succession Act, 1956. The Act empowered women (widow, daughter) to inherit property and empowers them to use and enjoy the property they inherited but they could not alienate it except in case of legal necessity and not otherwise, hence this ownership was popularly referred as limited ownership.[2] This kind of ownership is abolished by the Hindu Succession Act, 1956. This is different from *Stridhana* which was considered women's property and would be inherited by her heirs unlike women's estate (property inherited under Hindu Women Right to Property Act, 1937) which would revert back to the heirs of last male holder. The people who would inherit it as heirs of last male holder were referred as reversioners and their interest in the property was called reversionary

2. The widow would inherit the property of her husband on his death, however on her death the property would revert back to the heirs of the last male holder i.e. her husband in this case and not to her heirs.

interest. This ownership is popularly refereed as women's estate or limited ownership, it is called limited ownership as the owner did not enjoy all the powers like other owners.

Life Estate

Another kind of ownership which is prevalent in India since olden times and even today is life estate under which an interest is created in favor of a party who can use and enjoy the property till his death without interruption however he / she can never alienate it. It may be created in favor of heir or a non heir. Section 19 of Transfer of Property Act, 1882 provides for different kind of ownership in land which is known as vested interest.[3] Vested interest can be created as a life estate or even otherwise. The vested interest limits the ownership rights.

Testamentary succession also provides for creating such interest by will deeds. Section 119 of the Indian Succession Act, 1925 provides for vesting of legacies[4].

Section 119: Date of vesting of legacy when payment or possession postponed**.**

-Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the

3. Section 19 Vested interest:Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.A vested interest is not defeated by the death of the transferee before he obtains possession.Explanation : An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

4. Section 119: Date of vesting of legacy when payment or possession postponed.-Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest. **Explanation** - An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

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There are provisions in Hindu law and Mohammedan law relating to the power to execute will.

Joint and Co-ownership – Limited and Life Estate

Joint ownership and co ownership are different from limited ownership and life estate. Joint ownership and co ownership explains the nature of ownership while limited ownership and life estate curtails the rights of owner. For example, joint owner and co owner will own land along with others and the right to inherit differs depending upon the nature of ownership. In case of succession to a joint owner the surviving member or members among the joint owners will succeed to the deceased share, where as in co ownership the legal heirs of the deceased succeed to the share of the co owner and is not dependent upon the surviving co owners. This does not limit the rights as exhibited by ownership there may be right to preemptions recognized under various laws in few situations however it is not the same as limiting the rights of owner, i.e., owner has a right to alienate with preference of purchase being given to some parties in view of the prevailing relationship.

Special Economic Zones

To encourage free trade more and more countries have adopted the model of Special Economic Zone. Special Economic Zone is a geographic territory earmarked to encourage free trade within the specified territory. This territory will be deemed to be foreign territory as far as application of certain laws are concerned, more specially economic laws pertaining to tax, exports and imports, labor laws etc. In India usually minimum 1000 acres of land is earmarked to constitute a Special Economic Zone. The procedure to set up units and the governance regarding those units in the Special Economic Zone is governed depending upon the policies of the

respective Government. It can be set up in public sector, public private partnership etc., however the rights of the unit holders on the land in the Special Economic Zone depends on the nature of Special Economic Zone, terms specified and the policy. This has altered the hitherto concept of land ownership in few situations, in case of a long lease running for 99 years or so there is no change in the ownership rights, however the question of long tenure and the use based investment raises lot of questions such as postponing certain rights of ownership (such as alienation, use and enjoy, destroy etc.) for long time and their implications.

Cooperative Societies

Land is allotted by Governments to certain societies for specific purpose such as housing, education, sports etc. The ownership in the land allotted vests with the society members and the Government does not retain any control over the land, however the use of land is restricted to the purpose specified in the allotment. Land is allotted at a price which could be nominal price or otherwise.

Certain societies acquire land from private parties for specific purposes in such cases they are governed by the specific State legislations which generally restrict the use to the purpose of the society formation.[5]

Trusts and Endowments

Trusts and endowments are created with specific purpose and the trustee or the recipient of an endowment will be obliged to use the property/ land vested upon for the specific purpose for which trust or an endowment is created. Trust and endowments does not create absolute ownership interest rather they create an interest which is in conformity with the trust or endowment deed.

The issue of whether government is the owner of all unclaimed land, forest land, wetland and other acquired property requires consideration in the light of Supreme Court decision in *M.C. Mehta* v. *Kamalnath*.[6]

The Supreme Court of India in the above case held that "our legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the

5. For example Andhra Pradesh Mutually Aided Cooperative Societies Act, 1995 provides the society members to decide as per the bye laws of the society.
6. (1997) 1 SCC 388.

natural resources. These resources meant for public use cannot be converted into private ownership".

The Court drew the fine distinction between public use and public purpose. If the natural resource meant for public use is to be converted to public purpose especially into private ownership Government must be cautious and see to it that it does not commit breach of that trust. Court held that public trust doctrine as discussed in this judgment is part of the law of the land.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

The Act recognizes the right of forest dwellers over forests for certain aspects such as collecting minor forest produce, residence, settlement for conversion, fishing, pastoral activities etc. The Act provides for the ways to make such claim by individual or a community as forest dwellers who could be tribal or non tribal. The conditions for tribal population to establish as forest dwellers are less stringent as opposed to non tribal population. The nature of rights raises many legal questions as certain rights are community rights, certain rights are use based rights etc.

The position of forest dwellers rights on land prior to the enactment of Recognition of Forest Rights Act, 2006 can be summed up based on decision of the court in *Banwasi Seva Ashram* v. *State of U.P*.[7]

The Supreme Court of India accepted a letter written to the Court as writ petition in *Banwasi Seva Ashram* v. *State of U.P*.[8] The Supreme Court had to consider issues relating to the claim to land and related rights of the Adivasis living within Dudhi and Robertsganj Tehsils in the District of Mirzapur in Uttar Pradesh. The State Government declared a part of these lands in the two Tehsils as reserved forest as provided under Section 20 of Indian Forest Act, 1927,[9] and in regard to the other areas notification under Section 4 of the Act was made and proceedings for final declaration of

7. AIR 1987 SC 374.
8. *Ibid*.
9. Section 20: Notification declaring forest reserved: (1)When the following events have occurred, namely –(a) the period fixed under section 6 for preferring claims have elapsed and all claims (if any) made under that section or section 9 have been disposed of by the Forest Settlement-officer; (b) if any such claims have been made, the period limited by section 17 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and (c) all lands (if any) to be included in the proposed forest, which the Forest Settlement-officer has, under section 11, elected to acquire under the Land Acquisition Act, 1894 (1 of 1894), have become vested in the Government under section 16 of that Act, the State Government shall publish a notification in the Official Gazette,

those areas also as reserved forests were undertaken. Adivasis and other backward people living within the forest used the forest area as their habitat. They had raised several villages within these two Tehsils and for generations had been using the forests around for collecting the requirements for their livelihood. The Tribals had converted certain lands around their villages into cultivable fields and had also been raising crops for their food. These lands too were included in the notified areas and, therefore, attempt of the Adivasis to cultivate these lands too was resisted.

Criminal cases for encroachments as also other forest offences were registered and systematic attempt was made to obstruct them from free movement. The Government took steps for throwing them out under the U.P. Public Premises (Eviction of Un authorized Occupants) Act, 1972.

In 1983, the Court ordered to work out a formula under which claims of Adivasis or Tribals in Dudhi and Robertsganj Tehsils, to the possession of land and to regularisation of such possession may be investigated by a high powered committee with a view to reaching a final decision with regard to such claims.

The Maheshwar Prasad Committee constituted for the above purpose identified 433 villages lying South of the Kaimur Range of the Mirzapur District to be relevant for the dispute. Out of those 299 were in Dudhi Tehsil and the remaining 134 in Robertsganj Tehsil. The area involved was 9,23,293 acres out of which in respect of 58,937.42 acres notification under Section 20 of the Act has been made declaring the same as reserved forest and in respect of 7,89,086 acres notification under Section 4 of the Act has been made. The Committee in its report pointed out that unauthorized occupation related to roughly one lakh eighty two thousand acres. It has also been stated that the Government by notification dated August 5, 1986, has established a special agency for survey and record operations to solve the problems of the claimants in the area and a copy of the notification has also been produced.

While the matter is pending before the Court, Government has decided that a Super Thermal Plant of the National Thermal Power Corporation Limited ('NTPC') would be located in a part of these lands and acquisition proceedings were initiated. NTPC has agreed before the Court that it shall strictly follow the policy on "facilities to be given to land trustees" as placed

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specifying definitely, according to boundary-marks erected or otherwise, the limits of the forest which is to be reserved, and declaring the same to be reserved from a date fixed by the notification. (2) From the date so fixed such forest shall be deemed to be a reserved forest.

before the Court in the matter of lands which are subjected to acquisition for its purpose. Regarding the forest dwellers who claim right over the disputed land can claim their right before the forest settlement officer appointed as per the Indian Forest Act, 1927. An appeal shall lie from the settlement officer to the Additional District Judge specially appointed for these cases. All appeals shall lie from the decision of the settlement officer to the Additional District Judge irrespective of the fact whether the appellant chose to file the appeal or not. The Supreme Court also made it clear that if the appellate authority finds the claim justified then the State Government should honor the claim. The Supreme Court also made it clear that legal aid should be provided by the State Government for the forest dwellers. However the Court declined to determine the maintainability of the claim of the forest dwellers over the forest land.

The use based entitlement over forest land has come for adjudication before the Allahabad High Court in the case of *Ishwar Chandra Gupta* v. *State of U.P.*[10] The Prescribed Authority has passed an eviction order in exercise of power provided under Section 61-B (2)[11] of the Indian Forest Act, 1927 (as amended vide The Indian Forest (Uttar Pradesh Amendment) Act, 2000) as well as under Section 34-A[12] of the Wild Life (Protection) Act, 1972 (as amended in 2002 and 2006).

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10. AIR 2011 All 88.
11. Section 61-B. Summary eviction of unauthorized occupants:(1)If a Forest Officer, not below the rank of a Divisional Forest Officer is of the opinion that any person is in unauthorised occupation of any land in areas constituted as a reserved or protected forest under Section 20 or Section 29 as the case may be, and that he should be evicted, the Forest Officer shall issue a notice in writing calling upon the persons concerned to show-cause, on or before such date as is specified in the notice, why an order of eviction should not be made. (2) If after considering the cause, if any, shown in pursuance of a notice under this section, the Forest Officer is satisfied that the said land is in unauthorised occupation, he may make an order of eviction for reasons to be recorded therein, directing that the said land shall be vacated by such date, as may be specified in the order, by the person concerned which shall not be less than then days from the date of the order. (3) If any person refuses or fails to comply with the order of eviction by the date specified in the order, the Forest Officer who made the order under Sub-section (2) or any other Forest Officer, duly authorised by him in this behalf, may evict that person from and take possession of the said land and may, for this purpose, use such force as may be necessary. (4) Any person aggrieved by an order of the Forest Officer under Sub-section (2) may, within such period and in such manner as may be prescribed, appeal against such order to the Conservator of Forests of the circle or to such officer as may be authorised by the State Government in this behalf and the order of the Forest Officer shall, subject to the decision in such appeal, be final.
12. Section 34 A: Power to remove encroachment:(1) Notwithstanding anything contained in any other law for the time being in force, any officer not below the rank of an Assistant conservator of Forests may,-(a) evict any person from a sanctuary or National Park, who unauthorisedly occupies Government land in contravention of the provisions

The Petitioners claim protection under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 which according to them, has overriding effect over the Indian Forest Act, 1927. Besides it they claim that they are in possession over there since the time of their ancestors and are carrying on business to earn their bread and butter since 1928. It is also their case that the shops in the Mandi were allotted to the Petitioners in the year 1928 on yearly lease rent on the application moved by their father. Accordingly their shops are established having electricity connection etc. They paid lease regularly since then, however in 1986 forest authorities refused to accept rents and the petitioners obtained a favorable court order which directed the forest officers to accept rent from them.

Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 recognizes the rights[13] and occupation in forest land of the forest dwelling scheduled tribes[14] and other traditional forest dwellers.[15] The petitioners argue that they are other traditional forest dwellers as per the Act and are entitled as per Section 3 of the Act to live in forest land, maintain patta of the land, manage the land etc. They also

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of this Act; (b) remove any unauthorised structures, buildings, or constructions erected on any Government land within any sanctuary or National Park and all the things, tools and effects belonging to such person shall be confiscated, by an order of an officer not below the rank of the Deputy Conservator of Forests: Provided that no such order shall be passed unless the affected person is given an opportunity of being heard. (2) The provisions of this section shall apply notwithstanding any other penalty which may be inflicted for violation of any other provision of this Act.

13. Section 3. (1) For the purpose of this Act, the following rights, which secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely: (a) right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers; (b) community rights such as nistar, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes; (c) right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries; (d) other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities; (e) rights including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities; (f) rights in or over disputed lands under any nomenclature in any State where claims are disputed; (g) rights for conversion of Pattas or leases or grants issued by any local authority or any State Government on forest lands to titles; (h) rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages; (I) right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use; (j) rights which are recognised under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned

contended that they cannot be evicted as per Section 4 (1)(b) and (5)[16] of the Act which entitle them right to be not vacated. The Allahabad High Court held that the petitioners run the shop, which is not related in any manner to the forest activities nor are they dependent upon any relative activity of forest, therefore, on the count of possession they have no right to continue their shops over there. The Court held that the Petitioners have no right to continue their possession over the forest land with their non-forest activities like doing business.

This case is an example of how use of land determines entitlements over land.

Conclusion

The land ownership issues have taken new dimensions with use based entitlements gaining prominence. The Special Economic Zones, Societies, Trusts, Land Acquisition, Recognition of Forest Rights which are the major issues concerning land ownership today, all have changed the dimension of land ownership. They tend to provide more use based rights such as in case of Special Economic Zones right is vested over land for defined economic activity, forest dwellers right to collect minor forest produce, cultivate etc. are recognized under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

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tribes of any State; (k) right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity. (l) any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in Clause (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal; (m) right to in situ rehabilitation including alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement to rehabilitation prior to the 13th day of December, 2005.

14. Section 2 (c) Forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities.
15. Section 2 (o) other traditional forest dweller" means any member or community who has for at least three generations prior to the 13th day of December,, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs. Explanation.—For the purpose of this clause, "generation" means a period comprising of twenty-five years.
16. Section 4 (1) Notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of this Act, the Central Government hereby recognises and vests forest rights in- (b) the other traditional forest dwellers in respect of all forest rights mentioned in Section 3.(5) Save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete.

Ownership has a utility and owner is free to use the land but the use does not determine the ownership in such case; however the recent developments state that utility determines ownership or interest in land which is a phenomenon very rampantly adhered to at present.

In olden days when Hindu women inherited land she would own it with limited rights which could be compared to forest dwellers rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 today. The Hindu Succession Act, 1956[17] abolished such discrimination and thereafter legislation was made in 2006 which gave similar entitlements for forest dwellers, it may need another decade or so to again correct it. When it comes to Special Economic Zones it is the government land on which corporate or others are given limited rights we cannot compare them with forest dwellers. Access to land in both cases is not same and is not justified on same grounds. These are few jurisprudential propositions which shall arise in administration of justice in the context of land entitlements based on utility.

17. Section 14 of Hindu Succession Act, 1956.

COLONIALISM AND THE MAKING OF CRIMINAL CATEGORIES IN BRITISH INDIA

Santhosh Abraham*

Introduction

The British imperial authority in the subcontinent always emphasized upon the goal of a 'modern productive' and 'moral and material progressive' India.[1] The project of 'modernization' that colonialism sought to carry forward in India has brought about institutional changes and fundamental epistemological conquest of the societies as well. This in Saidean sense was understood as 'Orientalism' where attempts were made to produce knowledge about the 'Orient' which in turn created a distinction between East and West or Orient and Occident.[2] The early colonial attempts of Orientalism created the fields for social scientific exercises and discourses in producing knowledge about the Orient. This was perhaps one of the major techniques of governance instituted by the British colonial masters in the non-western possessions. However, in doing so, the sustaining tendencies of Orientalism irretrievably altered the epistemological pre-colonial setting in the colony.

The technique of social scientific discourses of the colonial state was central to the maintenance of law and order in British India. This phenomenon is a derivative of Michel Foucault's concept of 'governmentality' which showed the shift in the basis of government from the notion of social contract to an 'order' and discipline based idea of governing and managing the population.[3] In his article entitled 'Governmentality', Foucault points out that the art of government underwent a transformation in the modern West from the eighteenth century onwards. Until then, the general principles of public law derived from the theory of social contract provided the basis for government. This changed when through a subtle process of interlinked developments in the economy, the idea of governing the population assumed centre stage, thus transforming the art of government into a science of government. Population thus emerged as a field of intervention and as an objective of governmental techniques. The juridical and institutional form given to the sovereignty

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1. Scholars like U.Kalpagam has worked on the colonial attempts of creating statistical knowledge of the Indians. See U.Kalpagam, 'The colonial state and statistical knowledge', *History of the Human* Sciences (Vol.13, No.2, 2000), p. 39.
2. Edward Said, *Orientalism* (New Delhi: Penguin, 2001), p.2.
3. Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon &Peter Miller (Eds.), *The Foucault Effect*, (London,1991), pp.87 -104.

that characterizes a modern state now changed, ushering in a new triadic link of sovereignty–governmentality–discipline replacing the older link of sovereignty–territoriality–discipline. The practices of governance keeping population as a target of interventions introduced by the modern colonial state in India, and elsewhere as well, ushered in a new sphere of engagement between colonizers and colonized.

This new field in colonial India promoted a scientific construction of criminality, where a section of colonized were identified and constructed as 'criminals' in the colony through the conflation of law, of crime and of new racial sciences. The attempts in India were similar to the technological environment in early modern England which sought to identify criminals with scientific accuracy.[4] The British colonial state in India, as part of establishing key sites of law and order constructed certain tribes, groups, castes and individuals as 'criminals'. These criminal definitions came to play a prominent role in imperial criminal justice policies in India. This type of construction of criminality in the colonies also portrayed the stereotypical sense of the West who depicted the indigenous in the East among other things as 'criminals', 'robbers', 'rebels', 'docile Hindus', 'fanatic Muslims', 'untrustworthy Arabs', etc. Such nomenclatures were invented to describe those groups reacted against the colonial invasion and was an important tool in de-legitimising such local uprisings. It is as Edward Said has pointed out, 'through this exercise, various colonial texts had made sweeping generalizations about the Orient, its culture, mentality and society'.[5] The discourses to label the non-Western population as inherently dangerous in the colony were also to alleviate its own fears and anxieties.

Studies on the typical colonial stereotypical portrayals of north India said to have emerged in the historigraphical realm are the 'effiminate Bengali', martial races, and the 'criminal tribes'. However, most studies on native criminality in colonial India have focused on the mid or late nineteenth century with special reference to the ways and reasons by which the native tribes, peasants and groups were labelled as 'criminals' by the colonial state. Native criminality is often regarded as the only means left for livelihood. As Ranajit Guha noted, 'there were regions of chronic poverty, where for hundreds of years peasant youths have been slipping out of desolate villages and starvation and bonded labour in order to take to dacoity

4. George Pavlich, 'The subjects of criminal identification',*Punishment & Society* (Vol.11, No.2, 2009), p. 171.
5. *Supra* n. 2, p.193.

as a profession'.[6] More pointedly David Arnold has argued that 'the colonial Criminal Acts were used against the marginals who did not conform to the colonial pattern of settled agricultural and wage labour'.[7] Sanjay Nigam too found that the category of 'criminals' was a colonial stereotype invented to justify the punitive 'disciplining and policing' interventions to sections of population that were unwilling to accept the new moral order that the British sought to impose on rural society.[8] The purpose of this article is to identify one of such constructions in south India, basically in the region of Malabar[9] where certain section of *Mappilas* were categorise as 'Jungle Mappila Bandits' epitomizing criminality by the British during the last decade of eighteenth century. It is argued that there were several attempts by the colonial state from the very beginning of their rule in Malabar to classify certain sections of the Malabar population as distinct from the rest. This characterization in Malabar was the first of its kind in south India, where the British attempted to construct criminal types to serve the imperial interests. The relegation of the recalcitrant native groups into criminality was preceded by conciliatory interventions to win them as 'useful' participants and collaborators of the colonial state. Paradoxically, these rebellions strengthened the hand of the colonial state and apart from repression allowed it to push the principles of the rule of law firmly into the public.

Colonial Construction of Indian Criminality: Caste, Race and Group

Colonial construction of identity and criminological exercises in British India evolved around the ideas of race, caste and groups. This section of the article examines these themes through which the British constructed native criminality in India. Questions of public order and discipline had been a concern of British administrators since the establishment of East India Company's authority in India. The British quest to establish the notions of law and order and definable and reliable relationship between the colonizers

6. Ranajit Guha, *The Elementary Aspects of Peasant Insurgency in Colonial India* (Delhi, Oxford University Press, 1983), p.84.
7. David Arnold, 'Crime and Crime Control in Madras, 1858 -1947', in Anand Yang (Ed), *Crime and Criminality in British India* (Tuscon, University of Arizona Press,1985), p. 85.
8. Sanjay Nigam, 'Disciplining and Policing the "Criminals by Birth": The Making of a Colonial Stereotype'*The Indian Economic and Social History Review* (Vol. 27, No. 1 1990), pp. 131–64; Sanjay Nigam, 'Disciplining and Policing the 'Criminals by Birth: the Development of a Disciplinary System, 1871–1900',*The Indian Economic and Social History Review* (Vol. 27, No.2, 1990), pp.257–87.
9. The region of Malabar - the territory between Cochin and Canara, the Arabian Sea and Western Ghats - comprised of the northern districts of present Kerala State, namely, Kasargod, Kannur, Wayanad, Kozhikode, Malappuram and Palakkad. During the pre–colonial period, especially between the late fifteenth and late eighteenth centuries, the region was a land of several kingdoms.

and the governed entailed the formulation of knowledge through various ethnological investigations into a wide range of questions on native society.[10] Initially, the quest to establish a definable and reliable relationship between the colonial government and the governed entailed the formulation of knowledge about the pre-colonial legal system of India. The central aspect to the control of the people of India at this time was thought to be establishing continuity with the ancient regime, which as Derret said 'took the orthodox Brahminic learning as the standard of Hindu law'.[11] The Orientalist identification of the Code of *Manusmriti*[12] suggested the concept of hierarchical caste and the related notion of *dharma as* the legal keys to unlocking pre-colonial judicial India. High-castes, by virtue of their greater privilege, occupied key positions within the criminal justice system. Outside the four-fold hierarchy were the untouchables and the criminal castes and tribes. The pre-colonial Indian notions of policing and justice were in agreement with the caste hierarchy wherein offences were defined and penalised according to caste, respectability and social norms.

By internalizing the knowledge of the high-castes, the early colonial officials established key sites of 'law and order'. Caste definitions assumed a more concrete form, not only in a social and political capacity, but also in the construction of caste-related criminality. Thus, Warren Hastings' plan for the administration of justice in India assumed that indigenous norms could be incorporated into Western-based legal texts without significantly altering the laws of the *Quran*, with respect to the Mohammedans and the laws of the Brahmin *úâstras* with respect to the Hindus.[13] As Kartik Kalyan Raman has pointed out that, 'this was a process, whereby the British made compromises by supporting the symbolic expressions of indigenous policy and accordingly adapted their expectations to certain prevalent Indian legal forms, such as the appellations and form of tribunals or the applicable law'.[14]

10. See for example, Bernard Cohn, *Colonialism and its Forms of Knowledge*:*The British in India*(New Delhi: Oxford University Press, 1997).
11. *J. D. Derret, Histories of India,Pakistan and Ceylon (London: Oxford University* Press, 1961), p. 21.
12. The Code of *Manusmriti* were not only the ordinances relating to law, but a complete digest of the prevailing religion, philosophy, and customs practized by the *Brahmin,* the *Vaishyas,* and the *Kshatriya.* For details, see S. Sengupta,*The Evolution of Ancient Indian Law* (Delhi: Deep and Deep Publications, 1950), p. 3. And also as quoted in S. Roy, 'Customs and Customary Law in British India',*Tagore Law Lectures* (Calcutta: Sacred Books, 1908), p. 16.
13. Walter Kelly Firminger (e.d), *Affairs of the East India Company, Being the Fifth Report from the Select Committee of the House of Commons, dated 28th July, 1812*, Vol. 1 (Delhi: B.R. Publishing Corporation, 2001, First Published in 1812), p.18.
14. Kartik Kalyan Raman, "Utilitarianism and the Criminal Law in Colonial India: A Study of the Practical Limits of Utilitarian Jurisprudence",*Modern Asian Studies* (Vol.28,No. 4, 1994), p. 740.

Thus, Hastings's plan established a hierarchy of civil and criminal courts, whose role was to apply Hindu and Islamic legal norms in all suits regarding inheritance, caste and religion. The impact of these ideas is clearly discernible in the subsequently transformed administration of the judiciary.

This eventual transformation of law and the development of the duality of legal system were a process in which the Company's officials were successful in maintaining effective control by focusing on the principle of the 'greatest good for the greatest number'.[15] Central to that philosophy was the notion of race', in which biological differences determined the natural capacities and destinies of racial groups. This scientific, essentialist ideology gained an increasing hold as many Indian judicial institutions were categorized as inferior and to be subjected to imperial reform. Benjamin Disraeli outlined these ideas in a speech before the House of Commons in February 1849. 'Race', he argued, 'implies difference, difference implies superiority, and superiority leads to predominance'.[16] This acquired its legitimacy from the evolutionary theories, especially the typologies from what was increasingly becoming known as criminal anthropology. Marc Brown has pointed out that, 'ideas about criminal types and the development of a scientific understanding of native criminality in India emerged directly from these exercises which were, themselves, grounded in the principles and measurement systems of race theory'. [17] The use of 'scientific' notions of 'criminality' culminated in the arrest, removal and forcible transportation of the natives. Therefore, it is right to say that, legal language and cultural and 'scientific' images also played a crucial role in framing the Indian criminality.

Thus in India, certain sections of the indigenous were identified as a race of outcastes addicted to crime, not simply as economic necessity, but as a way of life. As part of this discourse, as Fitzpatrick notes, 'Western identity was formed obliquely by excluding non-European peoples who were accorded characteristics ostensibly opposed to that identity' – the 'savages' and the 'barbaric races'.[18] An identical scientific policy was used as various

15. For details, see Eric Stokes, *The English Utilitarians and India* (London: Routledge, 1959).
16. Cited in Waltraud Ernst, 'Introduction: Historical and Contemporary Perspectives on Race, Science and Medicine', in Bernard Harris and Waltraud Ernst (Eds) *Race, Science and Medicine, 1700–1960* (London: Routledge, 1999), p.3.
17. Marc Brown, 'Race, Science and the Construction of Native Criminality in Colonial India', *Theoretical Criminology* (Vol. 5, No. 3, 2001), p.349.
18. P. Fitzpatrick and E. Darian-Smith, 'The Laws of the Postcolonial: An Insistent Introduction', in E.Darian-Smith and P. Fitzpatrick, *Laws of the Postcolonial* (Ann Arbor, MI:University of Michighan Press, 1999), p.1.

castes and tribes were enumerated and brought under imperial gaze. It suffused a developing Western-in-India identity, which assumed Western racial superiority and an imperial mission. As a result, the non-western, with their ascribed status of race and caste were considered distinct. It is as Balbus argues, the imperial Law, as part of its hegemonic character coupled with the ideas of race and caste imposed repression through formal rationality.[19] This served to depoliticize collective violence and militate against the growth of consciousness and solidarity of the participants.

Since the late eighteenth century, several efforts were also made by the British colonial officials to classify 'criminals' into groups and types. To British minds, one of the distinguishing features of crime in India was its communal character. Not only was robbery attended by violence – referred to as dacoity – widespread but it was also undertaken almost wholly by men operating in bands whose pursuit of crime was tied both to kinship networks and to structures of patronage and authority. In a series of measures beginning with Governor General Warren Hastings's Article 35 of 1772, British government in India sought to repress crime through means that extended the arm of punishment beyond the immediate offender. By the 1860s there had emerged something of a consensus that Indian society indeed carried within it hereditary criminal communities. The ethnological connections drawn between community, caste, profession and individual were repeated and reiterated in many contexts.

It was the problems associated with governance that led colonialists to classify particular groups of communities as criminals. During the early colonial rule in India, crime was associated with groups rather than individuals. British officials in India were actively involved in tracking and recording the details of these groups, now referred to as criminal fraternities. The behaviour of such groups, their family and kinship associations, their language and their identifying social customs were measured and duly recorded. An array of colonial scholars have worked on the making of criminal communities and groups in north India through the discourse of race, caste and tribe, especially *Thuggees* and *Sansis*, who were known for their perceived criminal propensities.[20] Very recently, in an interesting

19. I. Balbus, *The Dialectics of Legal Repression* (New York: Transaction Books, 1977).
20. For more details of the images of native criminality found in the phenomenon of *thuggee* and in the ethnological classification of criminal tribes in north India, see Anand Yang, *Crime and Criminality in British India* (Tucson, AZ: University of Arizona Press, 1985); Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Delhi: Oxford University Press, 1998). Sandria Freitag, 'Crime in the Social Order of Colonial North India'*Modern Asian Studies*, 25 (1991), pp. 227–61;

comparative analysis on colonial India and Victorian England, Preeti Nijhar has stated that, 'in colonial India, identities were constituted through the use of similar authoritative techniques of legal (criminal and civil law) and scientific methods, as in Victorian England.[21] Her analysis further suggested that, crimes of survival by the *Sansi* were redefined by imported imperial definitions of criminality.[22] The 'criminal' tribes and castes of imperial India were legally and socially reified in ways similar to the 'dangerous' classes in Victorian England. In the following discussion, the article examines a similar case in south India much before the proclamation of Criminal Tribes Act of 1871. This section will focus on the *Jungle Mappilas* of Malabar who were categorized as 'criminals' and 'Bandits' by the colonial state.

The Construction of *Mappilas* as 'Criminals' and 'Bandits'

Muslims of Kerala were known by the generic appellation of *Mappilas*.[23] The *Mappilas* are geographically located in Malabar and their origin is often traced back to Arab traders and converts to Islam from among the natives of Malabar.[24] Throughout the colonial rule, the attitude of the British towards *Mappilas* was a mixture of positive and negative remarks and policies. The *Mappilas* in return also showed their dissatisfaction and resistances to the alien rule. The colonial approach towards the *Mappilas* had different stages since the beginning of the British rule in Malabar. At the beginning of the Malabar settlement, the attitude of the British was favourable towards the Hindu establishment, mainly due to the British perception that during the Mysorean interlude in Malabar,[25] the *Mappilas* had given their support to Tipú while the Hindus had opposed him.[26] The colonial tendency to classify the population into groups and

21. Preeti Nijhar, *Law and Imperialism: Criminality and Constitution in Colonial India and Victorian England* (London: Pickering & Chatto, 2009), p.115.
22. *Ibid*, p.134.
23. The name *Mappila* is a transliteration of the Malayalam word *Mappila*. The transliteration has taken several different forms, the most common being *Mâppila*,*Mâppilla* and *Moplah*. The origin of the term is not settled, but it appears to have been basically a title of respect. For more details of the significance of the name *Mappila*, see Roland Miller, *Mappila Muslims of Kerala: A Study in Islamic Trends* (Hyderabad: Orient Longman, 1976), pp. 30-36.24.For more details of the origin of *Mappilas*, see A.P.Ibrahim Kunju, *Mappila Musims of Kerala: Their History and Culture* (Trivandrum: Sandhya Publications, 1989), pp. 14-28; Asghar Ali Engineer, *Kerala Muslims: A Historical Perspective* (New Delhi: Ajanta Books, 1995), pp. 17-34.
25. The rulers of Mysore, Hyder Ali (1725-82) and Tipú Sultán (1750-99) had made repeated attempts to gain control over Malabar between the years 1766-92 (Logan, 1887: 399-473). By the treaties of *Sriran gapatanam* with British, Tipú was forced to yield 'one half of the dominions including Malabar which were in his position at the commencement of the war'.
26. The reforms introduced by the Mysorean rulers affected the ruling elites in Malabar and favourable to the Muslim community. When the Company took over the Malabar region,

sections as exercised against the tribes in north Indian regions was visible in Malabar in the categorization of *Mappilas*. In 1792, for instance, the joint commissioners of Malabar conducted a survey of the region of Malabar and reported that,

[A]long with the great and respectable body of *Mappilas* there are also very several numerous bands of public robbers by profession in Malabar country who from their haunts and general residence are called *Jungle Mappilas*. They are banded together under the chiefdom of *Unni Moosa Muppan*, who is an open avowed robber. He has several places of residences in the jungles. He kept with him four head *Moopas* (heads of the gangs) and two hundred armed men, besides many other inferiors, who infest the jungles and pay him tribute and acknowledging him as their chief, join him when required. They frequently assemble at night and to commit depredations as usual after which it was their customs to divide immediately and disperse. They were concerned with kidnapping children and to be sold to commanders of European vessels for exportation.[27]

These extracts from the colonial records clearly identifies *Unni Musa* as 'chief of public robbers' and the category of *Jungle Mappilas* as 'public robbers'. The report also identified the 'members of lower caste communities of South Malabar, who either voluntarily espoused Islam or resorted to banditry'.[28] This representation in the Joint Commissioners' report was the primary resource from which the later administrators drew upon and constituted in many ways to illustrate the inhabitants of Malabar. However, the categorization of a section of the *Mappila* community as 'robbers' and 'bandits' - together as 'criminals' - was the continuation of the initiatives of the Bengal Governor General Warren Hastings in 1772.[29] All the reports, diaries and political and judicial documents that followed the Joint Commission reports in Malabar continued with this classification till the

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the British helped the privileged classes in the region to regain what they had lost during the Mysorean rule. The justification to the British rule also came from the colonial creation of the tradition of violence and the pre-existing animosity between Hindus and Muslims. It is with and against this traditional background description of *Mappilas* that the British defined and justified all their actions against them in the following years.

27. *BombayCastle Records* (Henceforth *BCR*)*Secret and Political Department Diary* (Henceforth *SPDD*),1793, No.32, *Letter from Malabar Commissioners to Bombay*, pp.116-117.
28. *Ibid*, p.120.
29. In 1772, Governor General Warren Hastings in Bengal enacted laws (article 35) to punish dacoity and robbery from the individual offender to his family and village. For more details see John William Kaye,*The Administration of East India Company* (London: Richard Bentley, 1853), pp.380-416. Also see Radhika Singha, *Despotism of Law*, Chapter 1, pp.27-32 & Chapter 6.

first decade of nineteenth century. John Wye's report identified the *Mappilas* as 'very turbulent, prone to robbery and the revenue always more difficult to uncover where the *Mappilas* prevail'.[30] Spencer's report on the administration of Malabar also continued with the same categorisation *Jungle Mappilas* and with the very same propensities.[31] Another description of a *Mappila* as a 'robber' and 'bandit' is found in the Board of Revenue Consultations of 1802.[32] Interestingly, in these initial instances, the term 'fanatic' was nowhere mentioned.

Another fact which should be noted here is that John Wye's report identified the *Nairs* of Malabar along with the *Jungle Mappilas* as 'criminals'. The report said, 'the *Nairs* of Malabar are the hereditary military…..always proceeded whether on business or for pleasure with arms in their hands and the *Mappilas*, since the *Muhammadan* invasion, being more independent have done the same'.[33] The primary objective of such categorizations, as described by Homi Bhaba, 'is to construe the colonized as a population of degenerate type on the basis of social origin in order to justify conquest and to establish a system of administration'.[34] This view is similar to the views of early colonial officials of 1773 where Warren Hastings instructed to regard all persons travelling with arms through the country as enemies of the government. Possession of arms was a matter of grave concern for the state. In another example, the attitude of the British was seen as they were taking advantage of the breach between the *Nairs* and the *Mappilas*. Wye's report projected 'the spirit of jealousy between the *Mappilas* and *Nairs* as the circumstance favourable to the Company government'.[35] Richards' administrative paper also confirmed this as, 'a judicial management of the enmities and rival ships of the adverse tribes of *Nairs* and *Mappilas* may materially conduce to the firm and permanent establishment of our own power'.[36]

The colonial classification of *Jungle Mappilas* as 'bandits' takes our attention to the notion of 'social banditry' coined by E.J.Hobsbawm.

30. John W. Wye, *Report on the Southern Division of Malabar*, 4th February 1801 (Calicut: Calicut Collectorate Press, 1907), p.13.
31. J. Spencer, Smee and Walker,*A Report on the Administration of Malabar*, July 28, 1801, (Calicut: Calicut University Press, 1809).
32. *Board of Revenue Consultations*, Letter from the Collector of Malabar to the President and Members of the Board of Revenue, June 28, 1802, (Madras: Fort St.George, 1806), Section XII.
33. *Supra* n. 30, p. 16.
34. Homi K Baba, *Location of Culture* (New York: Routlege, 1994), p.77.
35. *Supra* n. 30, p.17.
36. Robert Richards, *Papers on the Administration of Malabar District*, February 20, 1804, p.8.37.Eric Hobsbawn, *Bandits* (London: Weidenfeld and Nicholson, 1969), p.13.

Hobsbawm explains the social bandits as 'peasant outlaws whom the lord and state regard as criminals, but who remain within the peasant society and are considered by their people as heroes, as champions, as avengers, fighters for justice, perhaps even leaders of liberation'.[37] Hobsbawm also examined banditry as a form of 'primitive rebellion' occurring in pre-capitalist societies and bandits, robbers of a special kind, perceived as outlaws and delinquents by the state, were supported and revered by the peasant community as heroes and avengers.[38] Specific to India he has pointed out India that, ' a possible or partial exception might have to be made for the peculiar caste divided societies of Hindu Southern Asia, where social banditry is inhibited by the tendency of caste robbers, like all other sections of society, to form self – contained caste and communities'.[39] Indian scholars have further confirmed that there is little firm evidence for social banditry in South Asia.[40] Therefore, the colonial categorisation of *Jungle Mappilas* as 'bandits' exhibit incongruity with the concept 'social bandit'.

Colonial Law and *Mappila* 'Criminals'

The colonial vision of the British categorized the existing Indian judicial institutions as inferior and to be subjected to imperial reform. As a result, the scientific notions of the colonialists enumerated various castes and tribes in India and brought them under imperial gaze. This in turn was an attempt to show Western racial superiority and imperial mission in the colonies. The colonial construction of criminality among the *Mappilas* in Malabar got further strengthened as the British began to implement the western legal codes. At this juncture, it is as Aninidta Mukhopadhyay has noted, the law was geared to seize the most unlikely candidate in a robbery and the members of the criminal tribe generally received a jail sentence on the grounds of suspected livelihood'.[41] Colonial law began to distinguish between crime committed by individuals (ordinary crime) and that committed by collectivities (extraordinary crime).It was on this 'constructed' idea of crime and criminality, colonial law began to treat the *Jungle Mappilas* of Malabar. As part of this general understanding, the Malabar Joint Commissioners proclaimed punishments and penalties for the region of Malabar. The commission suggested that:

38. Eric Hobsbawn, *Primitive Rebels: Studies in Archaic Forms of Social Movements in the Nineteenth and Twentieth Centuries*(Manchester:Manchester University Press,1959), p.3.
39. Hobsbawn, *Supra n*. 37, pp.15-16.
40. *Supra n.* 20, 'Introduction', pp.1-47.
41. Anindita Mukhopadhyay, *Behind the Mask: The Cultural Definition of Legal Subject* (New Delhi:Oxford University Press, 2006), p. 223.

[W]e fear that the avidity of gain in individuals and the unprincipled habits of the Jungle and the other *Mappilas*, who long have been in the practice of driving emolument from thus preying on their fellow creatures, have on the experiment proved too powerful for these inhabitants which were however all the commissioners had been in their power to promulgate against such inveterate mischief, in the carrying on of which the law less part of the *Mappilas* found themselves as much interested.[42]

This ethnological observation of the Joint Commissioners on the 'criminals' in Malabar informed the British administrative consciousness to enact separate *Faujdari* laws to bring this 'dangerous band' under the command of law. Hence, the 1793 criminal regulations clearly framed notes on punishments by penalties, fines and scourging against child stealing or sale of children for exportation.[43]

It was the British decision to take over the administration of Malabar that brought the *Mappilas* of Malabar into collision with the British administrators, particularly due to the British decision to restore the Hindu Rajas and chieftains in Malabar.[44] This issue can also be discussed in the background of the Mysorean interlude in Malabar, which saw the upper sections of the Malabar Hindu society taking refuge in Travancore to save themselves from the 'oppression' of Tipú Sultán. The Joint Commission noted that, 'during the time of Tipú's rule, many of the *Janmies* were reduced to the necessity of relinquishing everything and of taking refuge in Travancore where a Hindu prince maintained his independence of Mysore'.[45] Scholars have different views regarding the habituation of independent tenures by the *Mappila Kanamdars* during the period of '*Janmi* depression' in

42. *BCR, Judicial Department Diary* (Henceforth *JDD*) No.52,1793, *Letter from Malabar Commissioners to Bombay*, p. 23.
43. *Malabar Joint Commission Manuscripts* (Henceforth *MJCM*), Voucher No.97, *Criminal Faujdari Regulations*, Sections: LXIX to XCI.
44. With respect to the land revenue, the British adopted the principle of state authority that had been initiated by the Mysoreans. The British decided to utilize the *Rajas* as the land revenue agents in their old territories and at the same time affirm the *janmies*, sharing revenues with them on an equitable basis. In this way they could both assure the collection of revenue and bind to themselves the traditional leaders of the Malabar society. Involved in this policy was the decision to restore ownership of their properties to those who had fled during the Mysorean wars, a determination that meant inevitable conflict with those who had taken possession of the land. For details see Thomas Munro, *Report on the Revision of Revenue and Judicial System in the Province of Malabar*,July 4, 1817 (Calicut: Government Press, 1912).
45. *Report of a Joint Commission from Bengal and Bombay Appointed to Inspect into the State and Condition of the Province of Malabar in the Years 1792-93*(Hereafter *RJCM*), Foreign Miscellaneous Series, (Madras: Fort St.George Press, 1862), Section: 114.

Malabar. Conrad Wood is of the view that Mysore hegemony had provided the Mappilas with unique opportunities to advance their interests at the expense of the high-caste Janmi hierarchy.[46] K.N. Panikkar on the other hand has pointed out that only the *Mappila* chieftains like *Unni Musa*, *Chemban Poker* and *Attan Gurikkal*, took advantage of the situation and enhanced wealth, power and influence, through their association with Tipú Sultán.[47]

The Joint Commissioners of Malabar observed that 'when the *Janmies* returned to Malabar from exile to reclaim their ancient estates with the support of the British, this entailed not only resistance but disaffection and open rebellion from the *Mappila* tenants who during the period of *Janmi* depression and exile had habituated themselves to the ideas of independent tenure'.[48] From the moment Tipú's forces were in retreat, members of the *Zamorin*'s family, thought of attacking and subduing the *Mappilas*. The Joint Commissioners substantiated this:

The ill-will that subsisted between the *Mappilas* and those of the *Nairs* and other Hindu castes together with the ill-judged and unsuccessful measures of violence that were resorted to by the latter of the *Zamorin*'s family to reduce them; an object which might much more easily have been attained by the opposite means of conciliation and mild treatment.[49]

It was reported that in 1792, the *Mappilas* of *Kondotti* (south Malabar) complained of 'oppression by the *Nairs*, in so much they were obliged to take up arms in their own defence'; and therefore the Commissioners of Malabar issued a warning to all persons especially the *Nairs* 'not to oppress the *Mappilas* and the *Mappilas* were required to apply themselves to their former occupations'.[50] The British apparently tried to halt this persecution and save the *Mappila* tenants from the extortionate demands of the *Janmies*. Admitting the discrimination, the Joint Commission issued a public notice, giving consideration to the *Mappila* tenants over the Hindu *Janmies* and anything different from such an approach was thought to be 'unjust and

46. Conrad Wood, 'The First Moplah Rebellion against British Rule in Malabar', *Modern Asian Studies,* (Vol.10, No.4, 1976), pp. 543-44.
47. K.N.Panikkar, *Against Lord and State* (Delhi: Oxford University Press, 1992), p.55.
48. *RJCM*, Section: 179.
49. *Ibid*, Section: 187.
50. *From the Diary of the Bombay Commissioners*, 26 June 1792, Proclamation warning the *Nairs* not to oppress the *Mappilas* of *Kondotti*, in William Logan (Ed), *A Collection of Treaties, Engagements and Other Papers of Importance Relating to British Affairs in Malabar,Malabar Manual*, Vo.III, Thiruvananthapuram: Kerala Gazetteers, Government of Kerala, 1998, First Published in 1879. Part II, Section X, p.152.

contrary to the intention of the honourable Company'.[51] However, the oppression continued in the form of arbitrary tax collection, particularly from the *Mappila* peasants.

The admiration found in the Joint Commission report as 'the great and respectable body of the *Mappilas*', proclaimed the need to reconcile and attach as far as possible body of the *Mappilas* to the Company's government. Therefore in order to reconcile the people to the new order, the British proclaimed a general amnesty for all crimes committed by the *Mappilas* and *Nairs* against each other up to the 1st of February 1793. It proclaimed, ...the Commissioners appointed for settling the ceded countries, considering the pernicious state of things in the region to make all the inhabitants unite and live together on terms of concord .....have therefore determined that it would be neither politic nor just for the present Government to make a strict scrutiny into the manifold enormities committed during the last twenty years in this country. It is merely declared that no acts of homicide, maiming, robbery or theft committed before the first of the present month of February shall be cognizable in any court of justice and as Government have in the present instance evinced its merciful disposition towards those unfortunate persons.....and the Government will take necessary actions on such persons who offence against the public peace and private security of any persons from the date aforementioned, wherefore let this proclamation be a warning to all men in time to come to observe a just and circumspect conduct towards each other and to deport themselves in all respects as become good and peaceful subjects'.[52]

This offer of general pardon was directed especially to the section of Mappilas branded as *Jungle Mappilas* and their chief *Unni Musa Muppan* who apparently maintained connection with Tipú and continued his resistance. *Unni Musa Muppan* reportedly participated in the war against the Company with Tipú Sultán of Mysore.[53] *Unni Musa* is also reported to have become effective proprietor in *Janmies'* landholdings in their absence during the period of Tipú.[54] By this colonial act of proclaiming pardon to the native 'criminals' of Malabar, colonialism is projected itself as representing the 'impartial rule' of the enlightened over the primitive people. However, the objective was to gain the allegiance of the southern *Mappilas* and to

51. *Ibid*, *From the Diary of Malabar Joint Commissioners*, June 5, 1793, Publication against the inequalities in assessing Hindus and Muslims, Section. XLIII, pp.189-90.
52. *Ibid*, *From the Malabar Joint Commissioners' Diary*, A Proclamation of General Amnesty, dated 8th February, 1793 , Section: XXIX, pp.176-77.
53. *BCR, SPDD*, 1793, No.34, p. 56.
54. *Ibid*.

show off the colonial notion of 'humanitarian concerns' towards the colonized.

In an attempt of remoulding the recalcitrant colonial public into 'useful' participants and collaborators in the operations of the colonial state in Malabar, the earlier Mysorean plan was adopted in the region. As in the Mysorean plan of administration, the British continued with the appointment of *Moopas* (headman) to various districts with a proportion of armed *Mappilas* to assist them. These *Moopas* who were entrusted with the collection of revenue and the preservation of peace were to be subordinated to the British superintendent of each division. The objective of the British at this juncture was to gain the allegiance of the southern *Mappilas* 'even by scarifying to them, if necessary, some part of what might be the justifiable claims of government'.[55] Roland Miller has pointed out that, these conciliatory gestures towards the *Mappilas*, whether genuine or politically motivated, fell afoul of the major direction of the British policy.[56]

The early colonial discourse on *Mappilas* and indigenous criminality is problematic and significant for multiple reasons. Certain observations need to be emphasized. Firstly, the Malabar Joint Commission had observed that, only a small population of the 'great and respectable body of the *Mappilas*' were reported to be the 'criminals. Secondly, the criminal bandits, especially the *Jungle Mappilas* were not comprised of *Mappilas* alone; it was recognized as voluntary converted *Mappilas* and the members of the lower caste communities. Thirdly, the evidence of crime in the reports was assumed rather than established. The early reports which followed Joint Commission reports, did not change or go further from this initial colonial construction of *Mappila* criminality till the term 'fanatic' was enforced and administered into existence during the later decades of nineteenth century.

The occupation of Malabar by the English East India Company in 1792 generated popular discontent. The spontaneous and activated revolts in the region and they disturbed the peace and tranquillity of the region for more than a decade and was mainly restricted among the agrarian classes. Although the peasantry as a whole, both Hindus and *Mappilas*, were subjects to exploitative conditions, collective action was confined to the *Mappilas*, which was made possible owing to the mediation of religion. It was during and after those various movements of the *Mappilas* that the

55. *Supra n*, 31, p.28.
56. Roland Miller, *Mappila Muslims of Kerala,A Study in Islamic Trends* (Madras: Orient Longman, 1976), p.105.

British produced a caricature of the *Mappilas,* first as 'criminals' and 'robbers' and later as 'brutish and hopeless fanatic'. Once the conciliatory measures failed to generate desired results the war was taken to the domain of representations too. The history colonial representations of Mappilas stated with that of *Jungle Mappilas* as embodiments of criminality and banditry, which became definitive in the making of subsequent colonial representations of the Mappilas. In suppressing the discontents among the local population, the British imposed their system of administration and justice on India reiterated their claim of superior administration and legitimacy to rule the natives than the natives themselves.

Conclusion

By categorizing and labeling certain sections of the indigenous population in India as criminals and bandits, the colonial state attempted to sustain Western identity and racial superiority. The non-Western, the savage heathen, was viewed as opposite to the Western subject. In India, this designation did not only affect the colonial masters, but also allowed the higher castes to identify themselves with their colonial masters, thus placing the 'criminal' tribes and castes outside the notion of modernity and progress. The present paper identified one of such constructions in south India, in the region of Malabar where certain section of *Mappilas* were categorize as 'Jungle Mappila bandits' epitomizing criminality by the British during the last decade of eighteenth century. It is argued that there were several attempts by the colonial state from the very beginning of their rule in Malabar to classify certain sections of the Malabar population as distinct from the rest. This characterization in Malabar was the first of its kind in south India, where the British attempted to construct criminal types to serve the imperial interests. Disciplinary procedures and actions were used to remould the recalcitrant native groups into 'useful' participants and collaborators of the colonial state.

TRANSBOUNDARY MOVEMENT IN GENETICALLY MODIFIED ORGANISMS WITH SPECIAL EMPHASIS ON CARTEGENA PROTOCOL

R. Anita Rao*

Introduction

Biodiversity, the term given to fauna and flora on the earth are shaped due to the continuous process of evolution either by intervention of human ingenuity or through gene manipulations. The resources are mostly community utilized resources, that is, resources common to all, is well protected by millions of people passed on to the next generation without damaging the intrinsic value of the source. The sustainable use of the living resources of our planet *vis-a-vis* with the trade development called for an international consensus in the 'Rio Declaration' on Biological Diversity. It is the most comprehensive and integrated legal document for conservation of biodiversity. A fine balance is made to achieve the dual object of protecting and preserving the biodiversity. The Convention of Biodiversity (CBD) also deals with a fair and equitable sharing of benefits, genetic resources and appropriate transfer technologies.

The convention emphasized the need for the parties to the convention to develop national policies and programmes for the conservation and sustainable use of biodiversity. The focus is on the establishment and the regulations to manage; control the risks associated with the use and release of Living Modified Organisms (LMOs) from the biotechnology which are likely to have adverse environment impacts that could affect conservation and sustainable use of bio-resources.[1] Recognizing that trade and environment agreements are mutually supportive for achieving sustainable development and also keeping in view the positive benefits the mankind derived with the biotechnological inventions, with adequate safety measures this tool can be used for the well being of mankind.

The Cartegena protocol laid emphasis on the modalities for appropriate procedures in particular, Advance Information Agreement (AIA) in the field of safe transfer (transboundary) handling and use of LMOs resulting from Biotechnology that may have adverse affect on the conservation and sustainable use of biodiversity.[2] With this backdrop the author tries to present a brief account of the international regime relating to transboundary

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1. Article 8(G) of Convention on Biodiversity (CBD).
2. Article 19(3) (4) of CBD.

movement of Genetically Modified (GM) foods and the impact of the Canadian Supreme Court decision on GM foods on developing countries. The paper is divided into the following sections: Section II-The Cartagena (Biosafety) Protocol; Section III-The Conflicts and Controversies on GMOs; Section IV- Cartegena *vis-à-vis* WTO; Section V- The Schmeiser's Controversy; Section VI-Implications of the Judgment; Section VII-Significance for India; Section VIII-Conclusions.

The Cartegena (Biosafety) Protocol

It is the first international treaty on Biosafety which came into force on 11.09.2003 and India is a party to this multilateral treaty. The introduction of Genetically Modified Organisms (GMOs) has been highly controversial throughout the world.[3] The main provisions of the protocol, deals with the international trade in GMO foods. It gained significance in the global trade due to the scientific uncertainties surrounding the risk and benefits associated with the use of agri-biotechnology. The AIA in the protocol requires that an exporter seek consent from an importing country prior to the first shipment of LMO intended for introduction into the environment. The exception to this rule is it does not apply to LMO commodities that are intended for foods, feed or processing or for scientific research. The importers are to make decision on the import of the LMO intended for introduction in the environment based on scientific risk assessment within 270 days of notification of intention to export. The exports need to label the shipment as GM varieties and the importing country can decide whether to import these commodities based on scientific assessment.

The convention requires the concerned governments to provide Bio safety Clearing House (BCH) with the data relating to the final decisions on the domestic use of LMO commodity. The convention specified the shipment documentation relating to this GMOs transboundary movement. The precautionary clause mentions clearly that lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of potential adverse affects of a LMO.[4] The protocol reaffirms the Precautionary approach contained in Article 15 of Rio declaration on environment and development; and any doubt exists as to the safety of the substances or processes; Government may take precautions to protect the public until they are proven to be safe. The European Union (EU) laid down clear guidelines basing on precautionary principle to achieve high

3. Many environmental activists, religious organizations and scientists raised concerns about GM foods. The most important concerns are a) environmental hazards b) human health risk and c) economic concerns.
4. The U.S. State Department.

level of protection to environment, human, animal and plant health. The Precautionary principle is a complementary to Sanitary and Phyto Sanitary (SPS) measures included into WTO Agreement.

The principle needs to be applied only in case of actual risk or perceived risk, and not to be in an arbitrary manner to form as trade block. The essential imperatives for the existence of a potential risk are:

- The actual adverse effects
- Evaluation of scientific data
- Extent of uncertainty

The guidelines for applying the precautionary principle indicate a cautious approach while assessing the scientific uncertainty.[5] The U.N. in the Earth Summit 1992 discussed the liability based on precautionary principle in Article 3.[6] The protocol contains references to precautionary approach and also the establishment of BCH to facilitate the exchange of information on GMOs. Thus before the existence of the protocol there is no binding international agreement that helps to regulate the transboundary movement and biosafety of GMOs. The scope of Cartegena Protocol is wider in its application and a detailed procedure is laid down in the field of liability and redress for damages resulting from transboundary movement of LMOs. The protocol is also applicable in transit, handling and use of LMOs that have adverse effect or risk on human health.[7]

The Conflicts and Controversies on GMOS

Introducing genes from one species to other in order to get the desirable traits produce the GMOs. The divergent opinions are that the GMOs may damage the ecosystem and possible health risk on humans, animals and plants. The two major concerns are (a) the vectors used for introducing genes from one organism to another to make GMO highly infectious and virulent biological agents. It is this infectious nature that makes them useful as vectors to introduce alien genes into biological

5. The three specific principles are (a) implementation of the principle should be based on the fullest possible scientific examination (b) the risk evaluation should precede potential consequence of inaction (c) the interested parties needs to be given full opportunity to ensure transparency.
6. Article 3 of the Earth Summit 1992 - "The parties should take precautionary measures to anticipate, prevent or minimize the causes of climatic change and mitigate its adverse effects where there is threats of "
7. The African Model Law on bio safety is wider in its application and covers not only the damage to person, property but included damage to economic and cultural practices if indigenous knowledge systems. The disruption is damage to the biological mass, economy of an area or community-Draft Model Law on Bio-safety.

organism (b) the GMOs are novel organisms which are not existed in nature, their impact on environment and human, animal and plant health is not fully assessed lack of scientific certainty is taken as safety in some cases.[8]

The agreement on Sanitary and Pyto-Sanitary measures (SPS) which requires the government to regulate GMOs must justify the regulation with risk assessment based on scientific assessment /evidence that have a direct threat. Lack of scientific data is no defense. The proof that use of that particular GMO is dangerous or a perceived danger is very essential before the ban.

The positive concerns are with the advances in biotechnology and gene transfer thereby required traits can be induced in the original variety, which is pest resistant, drought resistant and high yield varieties can be obtained; that solves the world's food scarcity problems. Thus gene technology with reference to GMOs is having a bright future with enormous potential benefits; however, a cautious approach is required.

Cartegena Protocol *vis-à-vis* WTO

An analysis of the conventions raises two important issues that is, do we need two separate agreements on trade and environment and if so how the interests of the developing countries be protected. Secondly, in case the subjects overlap and conflict arises the reconciliation to be viewed both from countries trade and environmental policies.--7 The WTO focuses the attention between free trade *vis-a-vis* with governmental desire to maintain domestic health, safety and environmental standards. These health provisions, safety provisions designed by the governments, should not be a bottleneck to free trade, especially as a disguised means of protectionism. The multi trade agreements with the object of facilitating free trade should deal these conflicts with harmonious interpretation of these two conventions with WTO on Trade and Environment. U.S. raised an interesting issue against E.U that their ban of GMO is inconsistent with the provisions of WTO.

8. 1.The agreement on Sanitary and Pyto-Sanitary measures (SPS) which requires the government to regulate GMOs must justify the regulation with risk assessment based on scientific assessment /evidence that have a direct threat. Lack of scientific data is no defense. The proof that use of that particular GMO is dangerous or a perceived danger is very essential before the ban. 2.The agreement on Technical Barriers to Trade (TBT) which requires that trade restrictive measures to accomplish the goods should conform to the international standards. The most related are international products, process methods, symbols, packing, labeling and marketing. A link between international standards and redesigning of domestic legislations is of greater importance and these provisions should not act as trade restraints. Both TBT and SPS are based on scientific information and should not cause an obstacle to international trade.3.TRIPs agreement is conflicting

The U.S. government incorporated the Cartegena Protocol as a part of U.N. Environment Programme (UNEP) on biological diversity. The two conventions, i.e., the bio-safety and biological diversity, appear to be contradictory, but a closer look reveals they are mutually supportive of trade and sustainable development.[9] The successful implementation of these conventions would have a positive impact on international trade. For Example, the AIA would remove the doubts in the minds of importer while importing a GMO from other countries. Similarly the exporters label the exportable goods with caution by following the international standards of packaging and labeling. This would also infuse the transparency in trade, which leads to Foreign Direct Investments. The protocol also encouraged the national governments to develop their legislative framework regarding the export and import of the GMOs. The precautionary principle based on scientific assessment would lead to scientific uncertainty at each stage. The protocol is having beneficial implementation, by protecting the biodiversity in a broader sense and bio-safety in specific.

The Schmeiser's Controversy

The recent decision of Canadian Supreme Court in *Monsanto* v. *Schmeiser*[10] raised an interesting issue regarding the patents in GMOs. Earlier the Monsanto raised the objections only with reference to environment protection vs. sustainable development. The issue of patents was not of much focused area. The Canadian Supreme Court discussed at length the Intellectual Property Rights (IPRs) issue in the above case. The discussions and the judgment are of great relevance to the farmers' **community specifically in developing countries.**

The crucial issue regarding the seed patenting and other related IPRs were dealt in depth by the Canadian Supreme Court and settled the legal uncertainty about the genetically modified food crops. The primary issue for discussions is whether a living organism could be patented at all, genetically modified or otherwise. This recalls the previous decision by U.S. Supreme Court in *Anand Mohan Chakravarthi's* case. The U.S. Apex Court gave the judgment that life forms are also included for patent protection. This judgment was based on the fact that in U.S. Constitution

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with biodiversity and foods security concerns. The divergent opinion is the TRIPs agreement failed to provide a specific mechanism to achieve the WTO objective of sustainable development vis-à-vis environment protection. The positive side is TRIPs enhance protection and encourage the transfer of environmentally sound technology.

9. Articles 7, 8, 27.2, 27.3, 31 and 33 of TRIPs agreement; Articles 15, 16.1, 16.5, 22 of CBD and Chapter 34 of Agenda 21 of Rio Declaration.

10. SC (Canada) SCC 2004.

there is no provision expressly excludes such inventions.[11] The issue was opened again in a recent case when the U.S. government refused to grant patent on Harvard University's 'oncomouse' the mouse genetically engineering for cancer research. The Court rejected the issue of patenting life forms, as it would raise moral and ethical issues.[12].

The Courts' decision in Dr. Chakravarti's case was spilt 4 out of 9 judges ruling as per the earlier ruling of Canadian Supreme Court, organisms including plants cannot be patented – as was the case with Harvard University's oncomouse.

Schmeiser argued the case basing on the traditional concept of property. The jurisprudential debate on possession and ownership was not appreciated by the judges and they made it clear that the focused issue is on patents and not on the ownership.

Thus there is no international consensus on this vital issue.

These decisions have a great impact on the contentious issue whether the genetically modified organism/ living modified organism can be patented, if yes, the product that contained a patented compound was itself covered by the provisions of the patents, if the owner intended to sell. The defense raised by the defendant in the present case, when the Court ordered him to pay a compensation of $100,000 to Monsanto is- he used only the seeds that he has harvested himself and GM seed must have come from plants that propagated themselves from the seeds blown from the neighboring farms. He never wanted an herbicide resistant crop though many of his neighboring farm owners were using such seeds. He countered it that it is through the GM contamination for which he should be compensated from Monsanto.

The judges decided the case exclusively on infringement of patents held by *Monsanto*-, and the immediate concern was to determine the validity of patent held by Monsanto. The issue is whether the patentability of a component contains GM cells includes patenting the single GM cell or extension is granted to the whole of the product. The analogy is that if the dominant characters of the structure are based mainly on the GM cell and

11. Dr. Ananda Chakravathy developed a bacterium which splits the oil ingredients into its basic elements. The bacterium is very useful to clear the oil spillings on the high seas, which are very potential for high risk dangers. The legal battle in this case is to have clarity of thought on the conceptual analysis of patentable inventions.
12. The Courts' decision in Dr. Chakravarti's case was spilt 4 out of 9 judges ruling as per the earlier ruling of Canadian Supreme Court, organisms including plants cannot be patented – as was the case with Harvard University's oncomouse.

the significant results can be mainly related to the patent gene, the patent owner can demand royalty from the user. The Court also made it clear that mere presence of a cell would not amount to infringement for commercial gains. In the present case the successful defense that Schmeiser could raise is that even if the GM cell contaminated his own original crop (where he never wanted any GM crop) was not commercially exploited. The judges went much beyond the arguments and concluded that even though Schmeiser commercially exploited GM seed, the borrower/buyer of the seed would be depriving the royalties that Monsanto would have received from them. The presumption was so strong that the ignorance of GM seeds on his farm was not a defense.[13]

Implications of the Judgments

The Cartegena Protocol on bio-safety examined the environmental and health impacts of genetically modified organisms. Certain countries incorporated some provisions as a part of their domestic regulations. For example, E.U. has formulated a Common Agricultural Policy (CAP) based on the Cartegena Protocol.[14] The decision may have long term implications on developing countries whose food safety and security are the basic concerns, but it may have its impact on pharmaceuticals companies, and seed MNCs who would become powerful in the international markets. The farmer would be liable to pay compensation even though he intentionally/ unintentionally used the patented GMO. The judgment is silent regarding the responsibility of the parties, but lay a strong presumption against the farmer, that he ought to have used GMOP without paying royalties to patent owner or corporation. The traditional practice of exchanging the seeds (especially in developing countries) as a custom is no more a privilege to the farmer and it is for the farmer to watch that his crop is not contaminated by GMO.

The Cartegena Protocol is designed basically to protect the bio safety and assumes significance due to scientific uncertainties. Contrary the focus in Schmeiser's judgment is mainly the patenting of GMO and less importance has been given to bio-safety and precautionary approach. The dispute regarding bio-safety against Monsanto, responsible for introducing GM was

13. Schmeiser argued the case basing on the traditional concept of property. The jurispru dential debate on possession and ownership was not appreciated by the judges and they made it clear that the focused issue is on patents and not on the ownership.

14 E.Us Common Agricultural Policy (CAP) aims at stable supply of food and reasonable standard of living to the E.U farmer. The focused points are to improve quality of European food, food safety. The national legislation on food security is designed with this basic philosophy.

not addressed directly. Unless the country in its agricultural policy excluded the organic agriculture it is presumed it is supported by the government. The issue is not much of legal angle, but of policy matter of the country's government whether to opt for GMO at all.[15]

Significance for India

The bio-safety protocol in Schmeiser's judgment is of immense value to India. The liberalized trade policy where trade is transboundary it is essential that all the exporters need to be provided sufficient prior information on GMO shipments and risk assessments of GMO. The precautionary principle recognizes the scientific certainty of GMO in order to prevent the environmental hazards, public health and consumer safety.

The protocol would give clear visibility /guidelines for the strict implementation of these principles to protect and preserve the biodiversity and provide credibility to the national systems. A clear thinking whether country like India opts for GM to alleviate food scarcity needs to be discussed at the national level on economic/political fronts. India has not yet announced a policy on GM foods, however it is pertinent to note that India is supportive of Tran genetic plant research. The Cartegena Protocol is well designed to deal with the issues relating to GMOs, but no mention made to protect the environmental from intentional/unintentional contamination of GMOs released through pollination. Schmeiser's case is a glaring example that India can take one or two examples. The Indian legal system needs to design a comprehensive legal framework, exclusively to deal with handling and safe transboundary transfer of GMOs.

However, the Indian government issued a notification on December 5, 1989 in exercise of its power conferred under Sections 6, 8, 25 of the Environment Protection Act of 1986. The object of this notification is to protect the environment, health in connection with the application of gene technology and micro organisms. Rule 2 of the notification is applicable to manufacture, import and storage of micro organisms in gene technological products. It also applies to GMO/Micro organisms and correspondingly any substance, product and food stuffs; of which such cells, organisms which forms part of it and includes exportation and importation, production, manufacturing, storage packing of GMOs. The committee known as Genetic Engineering Approval Committee (GEAC) has been constituted under this

15. Brazil banned GM crops entirely, Japan announced the health testing of GM foods as mandatory as on 2001. Currently testing is voluntary and Japanese super markets are offering GM foods and unmodified foods, but the customers are showing strong preferences to unmodified foods. Canada also banned GM foods.

notification to give permission for the substances and products which contain GMOs for sale or importation.[16]

Conclusion

To conclude, the Schemeiser's case may have a negative impact spreads over the whole globe affecting the farmers' rights and bio-safety provisions in the Cartegena Protocol. Uniform and harmonious bio-safety regulations at the international level would minimize this risk. The basic environment principle of strict liability 'the polluter pays principle is the best option' making it clear that the entity marketing GMO is solely liable for all the consequences of transboundary movement of GMOs. However, the Cartegena Protocol once implemented in its true spirit, subject to adequate and transparent measures would protect bio-safety. It also protects the rights of the Indians to have safe GMOs. To achieve this government should have a well defined bio-safety standards and procedures to protect the mega biodiversity and safe use of biotechnology. Thus bio-safety and biotechnology must go hand in hand for better future of the environment and for the safety of the mankind.

16. India opened the door to GM technologies in 2002 after years of trails and allowed Mahyco in which Monsanto owns 26% share in BT cotton. The GMOs in the list are rice, potato, mustard are being field tested.

MEDICAL NEGLIGENCE AND CONSUMER RIGHTS: EMERGING JUDICIAL TRENDS

M. Srinivas*

The medical profession is one of the noblest professions in the world. However, corporatisation and commercialization of medical profession has made it like any other business and the medical profession is increasingly being guided by the profit motive rather than that of service. Such a situation gave rise to unethical practices and negligence. When business motive comes to the force, service to the patients takes place as last row. Today like every thing in the society Hippocrates noble profession has become commercialized and people are not only suspicious but downright sceptical of their practice. Therefore, if there is a rashness or negligence on the part of the doctor while treating a patient he is being made liable under the Consumer Protection Act, 1986.

The Consumer Protection Act, 1986 is an innovation in India for the better protection of the consumers. The praiseworthy objective of the enactment is to provide inexpensive and quick justice without any delay. There are number of laws which protect the rights of consumers, but each Act deals with a special class of consumers and that too, with regards to only a particular area of consumer behaviour. Whereas the Consumer Protection Act is a special class of legislation, which not only recognizes certain basic rights of consumers but also provides for an expeditious mechanism for the redressal of their grievances. Though the Consumer Protection Act has not changed the law of medical negligence, has created an inexpensive and speedy remedy against medical negligence.

However, it is pertinent to note that there are divergent opinions in judgments of Supreme Court in deciding the negligence of a doctor while treating a patient. The issue of what amounts to medical negligence and when can a doctor be said to be negligent and the standard of care that a doctor is expected to meet in his practice has been the topic of a number of landmark judgments of the Judiciary.

The present paper focuses on medical negligence and the role of higher judiciary in protecting the rights of consumers along with divergent opinions delivered by the Supreme Court of India with respect to liability of the doctors for their negligence.

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Medical Negligence

The issues relating to civil liability of the doctors assume special significance in the present context, due to commercialization of medical profession. The action against personal injury caused to the complainant at the hands of doctors requires the proof of legal duty to take care, breach of such duty and consequential damage suffered by the complainant. The Supreme Court in *A.S. Mittal* v. *State of U.P.*[1] held that "a mistake by a medical practitioner which no reasonably competent and careful practitioner would have committed is negligent one". A medical practitioner can be said to be reasonably competent and careful when he adopts the ordinary skills and normal practices of the profession. Law does not expect very high or very low standard from a person who renders professional services. In *Dr. L.B.Joshi v. T.B.Golbole*[2] the Court held that, "the duties which a doctor owes to his patients are:

i) A duty of care in deciding whether to undertake the case;

ii) A duty of care in deciding what treatment to give; and

iii) A duty of care in administration of that treatment.

A breach of any of these duties gives a right of action for negligence to the patient".

Medical Negligence: The Bolam Rule

In United Kingdom the issue of medical negligence was considered in great detail in the case of *Bolam* v. *Friern Hospital Management Committee*.[3] This case is seminal authority for determining the standard of care required from medical professionals. In this case the Court held that "in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at that time and that there may be one or more perfectly proper standards and if the medical man conforms with one of those proper standards he is not negligent". Hence, the Courts there opined that a doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men. The Court will take into consideration what other medical professionals do in similar situation while deciding medical negligence. Hence, *Bolam* case laid down a modest and "ordinary skilled professional standard of care" for determining the liability of the doctors.

1. AIR 1989 SC 1570.
2. AIR 1969 SC 128.
3. (1957)1 WLR 582.

Liability of Doctors for Medical Negligence: The Judicial Approach to the Issue

In deciding the cases of medical negligence the Supreme Court of India has followed liberal approach in some cases while it preferred to follow the strict liability rule in some other cases. The approach of Judiciary in deciding with the cases of medical negligence and liability of the doctors has been described as "Two lines of judicial authorities on medical negligence liability in India" by B.B.Pande. He opined that "in India in respect of claims for medical negligence the judicial rulings of the Supreme Court of India and of the State High Courts can be put in two distinct lines. The first line, that favours a limited liability based on 'ordinary professional standard' as laid down in *Bolam* case. The second line, that favours expanding the sphere of medical profession's liability and demanding a higher duty of care towards the patient and his relatives, particularly where medical expertise is provided on a commercial basis".[4]

The Supreme Court while adopting a liberal approach, has approved the rule of "ordinary skilled professional standard of care" laid down in *Bolam* case in *Dr. Suresh Gupta* v. *Govt. of N.C.T of Delhi*,[5] *State of Punjab* v. *Shiv Ram*[6] and *Jacob Matthew* v. *Union of India*[7] cases. These cases are some of the instances where the court has preferred to follow liberal approach in the matters of medical negligence. In *Jacob Matthew* v. *Union of India*[8] the Supreme Court held that "no sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake".

In *Martin F. D'Souza* v. *Mohd. Ishaq*[9] the Supreme Court has once again approving the *Bolam* rule held that "judges are not experts in medical science, rather they are lay men. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence… While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminative proceedings and

4. B.B. Pande, 'Why Indian Patients do not deserve the Highest Expert Skills from Doctors?'(2009) 4 SCC 21.
5. (2004) 6 SCC 422.
6. (2005) 7 SCC 1.
7. (2005) 6 SCC 1.
8. *Ibid*.
9. (2009) 3 SCC 1.

decisions against doctors are counter productive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation". And the Supreme Court has further directed that, "whenever a complaint received against a doctor or hospital by the consumer fora or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the consumer fora or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed and only after that doctor or committee reports that there is prima facie case of medical negligence should notice be then issued to the concerned doctor or hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent". Thus in this case the Supreme Court not only has taken very liberal approach but also directed consumer fora to take the opinion of the medical experts before initiating the proceedings in medical negligence cases. This judgment has far reaching effects in deciding medical negligence cases. If the expert committee opines that there is no negligence on the part of the doctor or hospital the victim's remedy will become vein as, he has no chance to say any thing in favour of his case.

On the other hand the Supreme Court has taken stringent action in some medical negligence cases following 'higher duty of care rule'. In cases of grave professional negligence like, failure on the part of the doctor to inform or warn the patient about the risks involved in the treatment the court has not followed the rule laid down in *Bolam* case. The Supreme Court even applied the doctrine of *res ipsa loquitur* in some cases where the negligence is manifest. *Dr. Khusaldas Pammandas*[10], *Achutrao Haribhau Khodwa*[11], and *Spring Meadows Hospitals* v. *Harjot Ahluwalia*[12] are some illustrative cases where the Supreme Court has applied the 'higher duty of care rule' in deciding the negligence of the doctors. Recently the Supreme Court refrained to take a liberal approach in establishing medical negligence and emphasized on accountability and higher duty of care in medical profession in *B. Jagadish* v. *State of A.P.*[13] In a historic judgment in *Nizam's Institute of Medical Sciences* v. *Prasanth S. Dhananka*[14] the Supreme Court held that "moreover, in a case involving medical negligence, once the initial burden has been discharged by the

10. *Dr. Khusaldas Pammandas* v.*State of M.P.*, AIR 1960 50.
11. *Achutrao Haribhau Khodwa* v. *State of Maharashtra*, (1996) 2 SCC 634.
12. (1998) 4 SCC 39.
13. (2009) 1 SCC 681.
14. (2009) 6 SCC 1.

complainant by making out a case of negligence on the part of the hospital or doctor concerned, the onus then shifts on to the hospital or to the attending doctors and it is for the hospital to satisfy the Court that there was no lack of care or diligence". In this case the Court awarded Rs. 1 crore as compensation to the victim of medical negligence.

V. Kishan Rao Case

In its landmark judgment in *V. Kishan Rao* v. *Nikhil Super Speciality Hospital*[15] the Supreme Court recently held that 'there cannot be a mechanical or straitjacket approach that each and every medical negligence case must be referred to experts for evidence' and declared that the judgment rendered in *Martin F.D'Souza* v. *Mohd. Ishfaq*[16] is *per incuriam.* This judgment is a welcome decision for better achievement of the objectives of the Consumer Protection Act, 1986.

In *V. Kishan Rao* v. *Nikhil Super Speciality Hospital*[17] the Complaint's wife got admitted in Respondent hospital, who was suffering from fever and chills. She was wrongly treated for typhoid instead of malaria for four days. As a result of said wrong treatment she died. On the complaint, District Forum found that there was negligence on the part of the hospital and awarded compensation. The order of the District Forum was reversed by the State Commission and as well by the National Commission. But the Supreme Court set aside the orders passed by the State Commission and National Commission and restored the order passed by the District Commission. In this case the Supreme Court held that "in the context of such jurisprudential thinking in England, time has come for this Court also to reconsider the parameters set down in *Bolam* test as a guide to decide cases in medical negligence and specially in view of Article 21 of the Constitution which encompasses within its guarantee, a right to medical treatment and medical care". While pronouncing the judgment rendered in *Martin F.D'Souza per incuriam*, the Supreme Court further held that "this Court is constraint to take the view that the general directions given in para 106 in *D'Souza* cannot be treated as a binding precedent and those directions must be confirmed to the particular facts of that case". And the further held that, "the larger Bench decision in *J.J. Merchant (Dr)*[18] has not been noted in *D'Souza*. Apart from that, the directions in para 106 in *D'Souza* are contrary to the provisions of the governing statute. That is

15. (2010) 5 SCC 513.
16. (2009) 3 SCC 1.
17. *Supra n.*15.
18. *J.J Merchant (Dr)* v. *Shrinath Chatruvedi,* (2002) 6 SCC 635.

why this Court cannot accept those directions as constituting a binding precedent in cases of medical negligence before the Consumer Fora".[19]

The Supreme Court further declared that "this Court makes it clear that in these matters no mechanical approach can be followed by these Fora. Each case has to be judged on its own facts. If a decision is taken that in all cases medical negligence has to be proved on the basis of expert evidence, in that event the efficacy of the remedy provided under this Act will be unnecessarily burdened and in many cases such remedy would be illusory".[20] The consequence of the judgment in *V.Kihan Rao*[21] is that now the Consumer Fora in the country need not necessarily refer the cases of medical negligence to expert committee before issuing the notice to the doctor or hospital accused of medical negligence and the problems arising from the directions given in the *Martin F. D'souza*[22] case will be put to an end.

Medical Negligence and the Judiciary: The way forward

The cordial relationship between doctor and patient has undergone drastic changes due to corporatisation of medical profession, resulting in commercialization of the noble profession, much against the letter and the spirit of the Hippocratic Oath. Though rapid advancements in medical science and technology have proved to be efficacious tools for the doctors in the better diagnosis and treatment of the patients, they have equally become tools for the commercial exploitation of the patients.

The development of law pertaining to professional misconduct and negligence is far from satisfactory. The legislations are not adequate and do not cover the entire field of medical negligence. In a situation where medical services are commercialized applying the rule of "ordinary skilled professional standard of care" laid down in *Bolam's* case in establishing the medical negligence may not do the proper justice to the injured patients.

Finally, it is submitted that the judiciary while deciding medical negligence cases, more incline may be showed towards injured patients ensuring them higher medical skills at the hand of doctors rather applying "ordinary skilled" rule. In this way the *V. Kihan Rao's*[23] case is a welcome judgment. To conclude it is useful to cite an observation of former Chief Justice K.G. Balakrishnan in his address at National Seminar on the 'Human

19. (2010) 5 SCC 533.
20. *Ibid*, p.522.
21. *Supra n.*19.
22. *Supra n.* 9.
23. *Supra n.*19.

Right to Health'[24] that "the right to health cannot be conceived of as a traditional right enforceable against the state. Instead, it has to be formulated and acknowledged as a positive right at a global level one which all of us have an interest in protecting and advancing".

24. (2009)1 SCC 8.

Book Reviews

Book Review

CONSTITUTIONAL IDENTITY**

Mallikarjun G.*

The book titled CONSTITUTIONAL IDENTITY authored by Gary Jeffrey Jacobsohn deals with the important role of the Constitution s in the contemporary societies. The title of the book drags the reader deep into the subject and upon reading the reader will be richer in gaining knowledge on comparative Constitutional law. Author makes important contributions to Constitutional theory, comparative law, and comparative politics. These contributions could be seen as a central idea of the book, wherein he demonstrated his in-depth knowledge on comparative Constitutional law.

It is certain that the reader will enjoy the text while reading, as if whole material is before him in the form of picturisation.

Author has made an attempt to analyse the problems of Constitutional identity for that argues that a nation's Constitution is more than a written document and it also entails the fundamental norms and principles of a given society. This concern of the author about the Constitution alism enables him to include useful discussions of the ongoing Constitutional debates in Israel, which has no a formal, integrated, written Constitution presently. According to author the core of Constitutional government is the rule of law and the administration of impartial justice.

In first Chapter the author focuses about the identity, disharmony and points out that disharmonic Constitution does not refer to the incoherence of Constitution, though that may be one of the conditions. However the dissonance with in and around the Constitution is the key to understand the Constitution.

In Chapter - II the author examines the puzzle of the unconstitutional Constitutional amendments in the context of Constitutions like Ireland, Srilanka and India and there by introduces the theme of realities and challenges of Constitutional identity. The discussion on leading cases of Israel, India, and Ireland provide in-depth analysis of challenges of Constitutional identity of respective nations

In Chapter - III he argues that a satisfactory account of Constitutional identity cannot ignore the various disharmonies that are embedded in the history of a nation's Constitution. For that he gives the

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** Gary Jeffrey Jacobsohn 1st edition 2010, published by Harvard University Press, pp. xvii + 368, ISBN: 9780674047662.

example of Turkey and its Constitutional development in twentieth-century as the progressive entrenchment of a secular identity. Thus he suggests that there is a need to act prudently and to always be sensitive towards the customs and practices of the country.

In Chapter - IV author explains that the Constitutional change comes in many forms, one of them may be due to use of foreign sources and precedents of the one National Court by justices from another. Though he supports the foreign source for Constitutional change as every nation is supposed to learn lessons from other countries, yet he cautions to act prudently, and be sensitive to the nation's historical customs and practices. Therefore, he emphatically says that 'the Constitution al aspirations are not framed in a vacuum; they are rooted in the past and adopted to the circumstances of the movement'.

In Chapter -V author explains about two models of Constitutionalism that exhibit divergent orientation with respect to the expected impact of Constitutional presence in the life of the larger community. For this he refers the Turkish Constitution and Indian Constitution and explains how the social structure is vital to the construction of the Constitution. History, values and aspirations of society are key points to define the Constitutional identity of one nation. A nation's Constitutional identity is never a static thing. Rather, a Constitutional identity emerges from the interplay of inevitably disharmonic elements.

In Chapter - VI author discussed the family law issues in the context of Constitutional values of respective countries and how the Constitution is relevant for the nation's social fabric. Further he argues about the nature of change in Constitutional identity, how it occurs and what it look like with the example of the struggle between forces seeking fundamental changes in the nature of Constitution and others who intend on preserving the Constitution as it is.

The author with his command over the subject presented it in the form of a text with relevant case law of various Constitutions of the World. The main concern of the author about the Constitution identity is so much that he has shown the path for the future researcher to explore on this topic by recommending golden principles namely: 1) the text is a start; 2) bounded fluidity; and 3) the balance of internal and external disharmonies. This book paves the way for researchers, scholars and academicians to look at new dimensions of Constitutions from the angle of ideas of the framers of the Constitution *vis-a vis* the thinking of the judiciary at the time of interpretation.

Book Review

CONTRACT LAW[¨]

Shaik Nazim Ahmed Shafi*

The present society depends upon free exchange in the market at every stage. The interactions in the market or business at all times depend upon voluntary agreements between individuals or any legal persons. Such voluntary agreements can never become binding without a legal contract. Though it may sound strange, it is often a problem in the business world that parties fail to implement a properly constituted and executed written contract between them. A contract is an essential element of any agreement whether it is for a sale, purchase, employment or arrangement. It regulates the very foundation of the agreement between the parties and sometimes importantly, governs what happens if it all goes wrong. A good written contract is advised even where the agreement is formed and based on a relationship despite there being trust in the relationship as we can never predict when a relationship will go wrong. With the advent of the recent economic reforms through the process of *'Liberalisation, Privatisation and Globalisation'*, the contract law is strengthened by way of parties entering into *'international contracts'*. Hence, it is pertinent to note that a person, who enters into an agreement, must understand the language of contract law which lays down the essential principles as imbibed in this particular book.

The book 'Contract Law' authored by Prof. Akhileshwar Pathak has made a valuable contribution to the general understanding of contract law. The book offers an overview approach to contracts, yet it recognizes all contract's complexities. The book is segmented for easy digestion of difficult material by applying a methodology of Case, Cases for Analysis, Examples, Court Cases, and Application of Principles. The book also cites the Sections under the Indian Contract Act, 1872 for better appreciation of the subject.

This single volume contains 6 parts covering every facet of a contract from formation of agreement to restitution, breach and damages, with a start of introduction to the contract law. The introduction offers a brief overview of contract law, setting the stage for the well-focused chapters on specific issues that follow.

Part-I speaks of the 'Formation of Agreement' dealing with Offer, Acceptance and Agreement giving a picture how a market based economy

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* Visiting Faculty, NALSAR University of Law, JusticeCity, Shameerpet, Hyderabad. Prof. Akhileshwar Pathak, 1st edition 2011, published by Oxford University Press, YMCA Library Building, 1 Jai Singh Road, New Delhi 110001, India, pp. viii + 407, Price Rs. 395/-.

has given an opportunity to the individuals in exchange of their rights over property rights etc. This Part draws the attention of the readers to the various facets of formation of agreement with simple examples supported by cases and adherence of the principles at the formation of a contract. The author tried to bring out the principles laid down in English law and its applicability under Indian law. Under the title 'Business Practices and Formation of Agreements' the author stresses on, the rules of an offer and also by defining the various exceptions to the general rule. At this juncture of communication, the author adds a colour of recent technological developments in the area of electronic communication and its application in contract law i.e. the internet and e-shopping outlining the validity of communication. A reference is also made regarding the validity of acceptance and circumstances leading to rejection of an offer. Taking note of the aforesaid importance of offer and communication, a review of judgments in formation of agreements is highlighted. The author focused the relevancy of 'Place of Contract' and 'Jurisdiction of Court' by taking inputs from the Civil Procedure Code relating to the jurisdictional issues pertaining to the outcome of disputes under a contract. Vehemently, he discusses the 'Postal Rule'. Regard is made to explain the validity of a 'Unilateral Contract' and a 'Bilateral Contract which is discussed at length. During the formation of contract, 'Incorporation of Terms' plays a vital role in making the terms binding on the parties and it is well discussed by the author. Simultaneously, the author points out how the mistakes are committed during the process of agreement relating to the identity of a person or of the subject matter by explaining the types of mistakes a party to the contract is confronted.

Part-II lays down the important ingredient for formation of a contract known as 'Consideration' subject to exceptions which is elaborately dealt from the concept level upto the creation of legal relationship through various decided English as well as Indian case law on this point. Dealing with 'Consideration and Revocation of Offer' - whether an agreement not to withdraw an offer is binding, is illustrated with examples through Cases for Analysis. How well the consideration plays a vital role is focused when the terms of a contract take form like of a remission, alteration etc. is discussed at length. At the end of this part, 'Promissory Estoppel' an innovation of the British courts is examined with care and caution. This part is summed up by – how intention creates a legally binding relationship, whether intention is the crux in formation of a contract, is dealt precisely.

Part-III draws the inference from a contract for its validity by taking the factors by which a contract has come into play by involuntariness. As a rule, a contract comes into existence only when there is a 'Free Consent'. But under what circumstances a contract is influenced without free consent is dealt elaboratively with the support of the provisions under Indian Contract Act 1872 and also the case law. A review of Indian cases is also explained for the purpose of understanding. This part also brings out the qualification required to enter into a contract known as 'Capacity of Parties' by highlighting the Privy Council's decision in Mohiri Bibee's case. At this juncture the author correlates the subject with the provisions of other laws like the Transfer of Property Act 1882.

Part IV evaluates a contract by looking into its object for which the parties have agreed thereupon. As contract law emerges out of a private agreement between the parties, it is prone for its vices like transgressing the prohibitions of law. Any private agreement cannot have precedence over the statutory law. But if it contains the factors like defeating the provisions of law, violating the provisions of law, fraud, illegal, immoral or against public policy etc. then the contract becomes void. So this part shows the way through which one can easily understand under what circumstances the parties can make a contract valid. Hence, the circumstances leading to a void contract are clearly spelt out. However, this part is dealt with cases and also with a review of court judgment.

Part V paves the way for 'Discharge and Performance'. As the contracts are based on the reciprocal promises between the parties, each party has to perform his obligation by which it leads to performance of the contract. When once the parties to a contract have performed their respective obligations, then they are discharged from the contract. This part deals with how contracts are performed and how they are discharged. It also highlights the manner of performance, who should perform the contract, time and place of performance, and discharge by mutual consent. The impossibility of contract is explained by taking the development of the law in India through exploring the issue by the facts of the cases like the Satyabrata Ghose's and Naihati Jute Mill's case.

Finally, Part VI concludes with the 'Restitution, Breach and Damages'. Contract comes into existence by way of agreement. But there are some contracts without any agreement but resembles a contract, which are dealt precisely under the head Quasi-Contracts. In this part it deals with how a party can be made liable to pay the other without an agreement (quasi-contract) or with agreement for its breach etc. The factors leading to breach

and termination, anticipatory breach, are well discussed with English as well as Indian Case law. The principle for award of damages is clearly dealt with. Liquidated damages, mitigation of damages, penalty etc. are also explained elaboratively.

The said book is presented in a good style of fine printing in a legible font and binding by which a reader can update the subject with utmost satisfaction. At the end, a Case Index is given for reference purpose on various cases of English and Indian origin.

The author having dealt the 'Contract Law' very precisely, concisely with accuracy touching each and every aspect of law referring and correlating the relevancy of other laws like the Civil Procedure Code, Transfer of Property Act, etc. in a very simple and understanding language with an analysis of principles, cases, illustrations, case-analyses, review of Indian judgments etc. will prove and cater the needs of law students, teachers, researchers, lawyers, judges and also the layman who is eager to know the precepts of contract law and its application in their profession like the builders, contractors, engineers, and infrastructure and aviation related personnel. Over and above, the author has assimilated the technological developments in the sphere of Contract by adding Internet and E-Shopping. On the whole this book serves one and all without any barrier in attaining the knowledge over the said subject.

Book Review

LAW ON PROTECTION OF PERSONAL & OFFICIAL INFORMATION IN INDIA[¨]

T. Raghavendra Rao*

'Law on Protection of Personal & Official information in India' is currently facing many obstacles due to the absence of proper Legislative Frame Work. There is no express Legislation in India dealing with the protection of personal and official information, even though the data protection Bill was introduced in the parliament way back in the year 2006, it is yet to see the light of the day. The Bill is a welcome step in the right direction. While the Information Technology Act of 2000 contains provisions regarding Cyber and related IT Laws India, the act does not address the need for stringent Law on Protection of Personal & Official Information being in place. It is the need of the hour that India need a compressive Law on Protection of Personal & Official information which in turn protect the rights of the individuals. Law has undergone a sea change to make more relevant to the recent times. At the same time there is a dearth of dependable and standard text books. It is in this back drop that the book under review is indeed a welcome initiative on the part of both the author and the publisher.

The book under review is divided into five chapters. Chapter I – is an introduction of the book. The author counters the concept of legal protection provided to the individual, the concept of personal liberty and its relevance to the protection of personal and official information taking the cue from the works of Thomas M. Cooley, the concept of right to privacy and its infringement from the ambit of socio legal rights, views of the Ancient Hindu Law givers, various international conventions and judicial decisions.

The Second chapter of the book related to Discloser of Personal Information by Government Practices. Covering the Identity Card Systems, Surveillance and Interception of Communications, Exploration of Internet, National Security and The Project Echelon, Video Surveillance, Work Place Surveillance, Technology Transfer and Policy Convergence, Using Geographic Information Systems and Discloser of Governmental Records.

The Third chapter of the book related to Protection of Personal Information in India. Covering Indian Evidence Act, 1872 with special

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** Dr. Amit Ludri, 1st Edition 2010, published by the Bright Law House, NewDelhi, pp. xi + 171, Price Rs. 525/-.

reference to communication between Husband and Wife protected Sources of Information, Professional Communications Protected, Position of Interpreters etc. Further various legislations such as the Dramatic Performances Act, 1876, Indian Easements Act, 1882, The Indian Telegraph Act, 1985, The Indian Post Office Act, 1898, Newspaper (Incitements to Offences) Act, 1908, The Indian Press Act, 1910, The Industrial Disputes Act, 1947, The Indian Commission of Enquiry Act, 1952, The Young Persons (Harmful publications) Act 1956, Criminal Procedure Code, 1973 , The Water (Prevention and Control of Pollution) Act, 1974, Terrorist Affected Area (Special Courts) Act, 1984, The Information Technology Act, 2000, Right to Information Act, 2005 with special emphasis on protection of Personal Information, Test of Privacy, Procedure of Protection of Personal Information, Protection of third party Information, Public authority as a third party who can claim Exemption from discloser are analyzed. Author analyzed the Protection of Personal Information with the help of Judicial Innovations with in the ambit of public interest. Emphasis was laid on Protection of pleadings as well.

The Fourth chapter of the book related to Protection of Official Information in India, with special reference to Indian Evidence Act, 1872, Dramatic performances Act, 1876, The Indian Press Act, 1910, The Official Secret Act, 1923, and the Right to Information Act, 2005.

The Fifth chapter of the book related to Protection of Personal Information in Developed Countries. This chapter is further divided into 2 parts: Part 1 dealt with publication of Personal Information Protected, Commercial Information Protected, Legislations, Personal Information Protected from Governmental Records, Data Protection Laws. Part 2 dealt with protection of Publications of Manuscripts Painting or Photographs, Communications between Husband and Wife protected, Confidential Information Protected, Personal Information Protected in Public Interest, Defence of Public Interest in Disclosure of Communications, Protection of Personal Information under British Data Protection Law.

The book under review is a welcome addition to the scanty literature on Law and Protection of Personal and Official Information in India. In the present work, the Author has copiously referred to the numerous recommendations and suggestions of the courts, International conventions, legislations.

The Author has supplied The Appendix 1 which related to The Right of Privacy by Samuel D. Warren and Louis Brandeis, the Appendix II related to The Official Secret Act, 1923 and The Right to Information Act, 2005.

At various places the author has tried to make an Analytical Assessment of the likely impact of certain provisions relating to protection of personal and official information.

The book and its title cover are well designed with fine printing of the text. It contains a table of cases which gives the reader a perspective on the judicial thinking. The presentation of the book is simple and each chapter is deeply analyzed and supported by the legislative developments and judicial pronouncements. The table of contents, the table of cases and bibliography provided in the book made it handy for immediate reference.

On the whole the book would prove very helpful to the readers of law especially judges, lawyers, students, teachers, researchers and the academic community, who are seeking to find the law on protection of personal and official information in India.

Book Review

SEXUAL VIOLENCE AGAINST WOMEN: PENAL LAW AND HUMAN RIGHTS PERSPECTIVES**

Rachna Reddy B.*

The discourse on Sexual Violence, critically analyzed from the cultural, historical, psychological besides judicial and legal perspective focusing both on pure legal obstacles and remedies on one hand and international human rights perspective on the other is indeed an exhaustive and thought provoking piece of legal literature.

Dr. Vandana, a senior academician at the Faculty of Law, University of Delhi, is also a pronounced expert in gender studies, having completed her doctoral research on sexual violence and women. She has contributed several legal research articles and continues to be a sought after expert, delivering lectures and conducting workshops both at the University of Delhi and other non governmental organizations.

The book follows an elaborate and understandable chronology in its narration, by both introducing the reader to the seriousness of the topic being dealt with and educating and informing the reader as it advances with its critical judicial analysis to the eventual well researched conclusion. The discourse starts of with the most basic concept and occurrences resulting in sexual violence. The author skillfully differentiates between gender and sexual violence, expertly bringing out the 'causal determinant,' of the latter like the unfair societal power structures, resulting in patriarchy, male dominated ideologies and the unfortunate corollaries to male dominance in the form of the male control over a woman's sexuality, conflict and the drastic dichotomy between the role and violence against the woman in public and private.

By determining the causal factors the author lays out the groundwork to discuss the impact of sexual violence on both the body and psyche of a woman, before elaborately discussing sexual violence from the feminist perspective, minutely detailing the reasons behind for treating sex as a biological and gender as a socio-cultural construct to bring about a differentiation. The book then delves into the fact of masculinity and patriarchy as reasons precipitating sexual violence against women to reinforce their 'natural' subjugation.

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** Dr. Vandana, 1st edition 2000, published by LexisNexis Buttherworths Wadhwa, Nagpur, pp. li + 569, price Rs. 795/-.

The author follows up the elaborate discussion on rampant, thoughtless and violent expression of masculinity from a feminist perspective with a pragmatic and intelligent discussion, in the process laying out a detailed account of sexual violence as a human rights violation. The author meticulously reviewed sexual violence from the most important angles from the human rights perspective. The close interaction between HIV/AIDS and the resulting sexual violence and vice versa has been exhaustively described with examples and statistics from a number of developing and developed countries. The role of sexual slavery, forced prostitution in the unfortunate spread of the infection leading to severe trauma and violence has been accounted for in detail. Sexual violence perpetrated as a war crime with the notorious and unfortunate example of 'comfort women,' that Japan provided for its soldiers during the World War II, after having forced these women from Korea, Philippines, and Myanmar etc., into sexual slavery subjecting them to systematic rape has been exhaustively researched. The author emphatically describes, in a manner that evokes sympathy, and causes the reader to think about the revelations made by the author.

The flow of the discourse makes a natural progression towards reviewing sexual violence in different contexts in terms of its rampant occurrence, within the confines of the four walls of the family via, Female genital Mutilation (FGM) in several parts of the world, religious pledging for prostitution in the name of God, incest, marital violence, child and forced marriages. The description is explicit, replete with examples, data and thought provoking. The contextual occurrences outside the four corners of the family within the community in the form of rape, sexual harassment, and prostitution followed by the State as the biggest perpetrator and condoner of sexual violence against women in the form of severe custodial violence, rampant international trafficking of girls/young women for purposes of slavery and prostitution and the horrendous sexual violence that women are subjected to as 'spoils of war,' to in turn prove complete victory over the men and dishonouring them during armed conflict has been poignantly depicted and explained.

Rape as the most overt, violent and aggressive forms of sexual violence that cars the physical and mental well being of a woman for life has been meticulously described by the author in the later part of the discourse. The potential occurrence of the violent act as the one crime that every woman lives in silent fear of throughout her life, dictating her personal, and societal choices has been satisfactorily explained with its basis in the

absolute reality of the world. The gruesomeness of the crime of rape has been divided and discussed first conceptually in terms of its origin and modern virulent adaptation in the form of the increasing cases and violence. Secondly, the trauma of the rape victim manifested psychologically and pervading all aspects and choices in her life after the commission of the crime coupled with the societal ostracism in holding the victim accountable for the crime against her has been extremely well depicted. The reasons for the gross underreporting of the crime compared to the over incidence of the crime, in the form 'myths and realities' associated with the commission of rape has been elaborately analyzed. Rape as the result of patriarchal power structures and the disjointed perception of masculine domination and coercion has been competently brought out in explanatory narrative.

The legal aspects of the discourse then succeed descriptive narrative and like the preceding part, the chronology has been beautifully adhered to. The legal journey of rape legislation starts with the different historical perspectives of each legal system to the crime, following it with a world overview of rape legislations internationally based on their separate historical experiences. The most important aspect for a legal scholar from India would be the exhaustive, meticulous and detailed manner in which the history and present day rape legislation in India has been dealt with. The author beautifully crafts the history of rape law in India and follows it up with a descriptive analysis of the crime of rape under Macaulay's penal code.

The present day genesis of rape law in India post 'Mathura case,' in the form of the law commission report and the substantive law and procedure both under the IPC, Cr.P.C. and the Indian Evidence Act has been exhaustively dealt with copious amount of case law of the Supreme Court of India exhaustively dissected, conveys the legal affinity, ease and brilliance of the author. The Proposals suggested by the Law Commission of India and the Cr.P.C. (Amendment) Act 2005 have also been systematically dealt with as part of the description of Indian law on rape. The critical analysis of issues relating to the concept, trial and judicial approaches to rape cases have also been covered with meticulous detail and deliberation, analyzing rape as both in context of society and the law.

Sexual Harassment as an alternative and indirect form of sexual violence has been given a similar in depth and detailed treatment by the author. Sexual harassment as a concept, in terms of its forms and impact on the victim pave the way to the societal attitudes towards sexual harassment in the form of myths created around the violence and the reality of harassment and reasons for underreporting of the crime.

The legal anthology relating to sexual harassment is dealt with exhaustively by the author, reflecting her enormous legal prowess and command on the subject. The author starts with the historical perspectives of sexual harassment and gives an overview of the present day legal scenario internationally. Sexual harassment in India receives enormous attention with details including case law relating to the law on molestation and eve teasing, being followed up by law on sexual harassment in the workplace and the Code of conduct and Draft Bills by the National Commission for Women. Similarly, the critical analysis of the concept, trial and judicial approaches while dealing sexual harassment cases have been thoroughly dealt with before paving the way towards conclusions and suggestions from this in-depth study. The author makes several well thought out suggestions about the definitions, aggravating circumstances, stringency relating to the enforcement mechanisms and details about better evidence gathering, preserving and procedure for appropriate adjudication of sexual violence cases. Author goes a step ahead and proposes the creation of special courts, rape victim counseling centres and compensation for victims so that perpetrators are brought to justice.

The book thus is an intensive discourse on sexual violence against women that covers the crime from sociological, psychological, legal, judicial and legislative aspects. It delves deep into the victim's psyche to garner the reasons, historical, cultural and socio-political behind the sense of guilt and shame. Dr. Vandana indeed has painstakingly researched the subject as is clear from the enormous number of resources she has sought to refer in preparing and writing this book. The book is indeed thorough and diligent in its presentation and would be an informative reference book for legal scholars, teachers, judiciary, practitioners and NGO's.

FORM IV

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Sd/-
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