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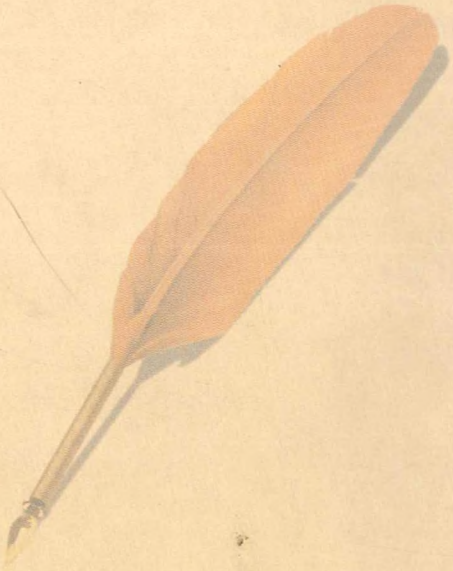

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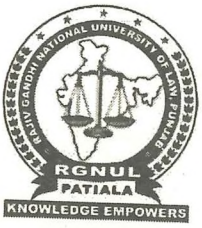

RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB
MOHINDRA KOTHI, THE MALL ROAD, PATIALA - 147 001
TEL.: 0175 – 2304188, 2304491, 2221002 TELEFAX: 0175 - 2304189
E-MAIL: info@rgnul.ac.in WEBSITE www.rgnul.ac.in

true that education for all is a long term goal which needs a clearly defined and transparent blueprint. In a country like ours, the shift from labour society to knowledge society is going to be gradual but to ensure that it is possible requires much more than laws. Poor infrastructure, inadequate facilities, absentism of teachers, low retainment rate of students all contribute negatively. In such a scenario it is rule of the law that needs to be saved from indifferent populace.

And then there are indifferent laws from which the population needs to be saved; *Armed Forces (Special Powers) Act (AFSPA).* It offers immunity from law to Army Officers in disturbed areas. The changing contours of reality have once again questioned the validity and constitutionality of AFSPA. Recent months have seen numerous debates raging around us. The critics call it a tool of State abuse, oppression and discrimination, whereas the State defends it as an effective tool in emergency situations. The Jeevan Reddy Commission Report clearly stated that it is desirable and advisable to repeal the Act altogether. This was recommended back in 2005; over last six years the Act remains, unaltered and unquestioned. Anti-terror laws though replaced and amended from time to time are being stretched and strained to meet the conflicting situation.

Furthermore, information and communication technology has opened up new vistas of interactions at all levels and spheres. Regulatory mechanism is lagging far behind the challenges, giving rise to new areas of conflict - like security and privacy issues.

In the shadow of the looming conflicts and issues within our country, the Arab Spring on the horizon of the world politics suddenly and promisingly brought the power of peoples' voice, at centrestage again. The movement almost

became seamless as it engulfed one country after another. Its impact on the world will be deciphered and talked in the history books. But for effective and intelligent citizens of a State it imparted an important lesson – the need to stand up, take notice and give voice to our concerns.

As academia our concerns can be better articulated through research. Research facilitates dialogues, discussion and debate. It is imperative in today's world for the intellingentia to come out of their convenient pockets of research and raise questions in public discourse. Law encompasses in itself every dimension of study: social theory, politics, history and culture. The dynamics of law and the matrix of its operations, makes it impossible to study it in isolation. Interdisciplinary research makes a holistic view possible. For our convenience we have divided knowledge into specialized fragments but the essential truth remains 'All knowledge is one'. *RGNUL Law Review* appreciates and encourages research which moves across superficial barriers of categories.

Tanya Mander

RGNUL Law Review (RLR)

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CLIMATE CHANGE AND GREEN ECONOMY*

Professor (Dr.) Paramjit S. Jaswal**
Professor (Dr.) Nishtha Jaswal***

1.1 Introduction

Climate Change is a reality today and it may become much more pronounced in the near future. Global average temperature has been rising over the years, and particularly in the last decade. The earth's surface temperature has already risen by 0.74 C in the last 100 years. It is expected that global mean surface temperature will further rise by 1.8° C-6. 4° C by the end of the 21st century and is currently on a trajectory to rise between 4° C and 6° C.

The UN Framework Convention on Climate Change defines "Climate Change" to mean a change of climate, which is attributed directly or indirectly to human activity that alters the composition of global atmosphere and which is in addition to natural climate variability observed over comparable time period[1]. The Fourth Assessment Report (AR4) of the Inter Governmental Panel on Climate Change (IPCC) in the year 2007 has warned the world community by calling warming of the climate as "unequivocal".

1.2 Genesis of the Problem

In order to achieve green economy and sustainable development, environment protection constitutes an integral part of the development process and it cannot be considered in isolation. Peace, development and environment are interdependent and indivisible[2]. Today we are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystem on which we depend for our well being. However, integration of environment and development concerns and greater attention to them will lead to the fulfillment of the basic needs, improved living standard for all, better protected and managed ecosystem and a safer, more prosperous future[3].

There is a close relationship which exists between a healthy environment and green economy which affects the economic condition of the community at large. The problem of environmental pollution is the problem of both developed and

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* This article is based on the paper presented at the International Seminar on *"Global Environment and Disaster Management: Law and Society"* held on 22-24 July, 2011 at Vigyan Bhawan, New Delhi.

** Vice-Chancellor, Rajiv Gandhi National University of Law, Punjab at Patiala
*** Chairperson, Department of Laws, Panjab University, Chandigarh

1 See article 2 of the *UN Framework Convention on Climate Change*

2 Principles 4 and 25 of the *Rio Declaration of 1992*

3 See the *Preamble to the Agenda-21*

under developed or poor nations. As far as developing nations are concerned, "poverty and lack of development" constitute an essential element of the problem of environmental pollution. Infact, the poverty is the worst form of pollution. The poor people who do not have means to get one meal a day, clothes to cover them and shelter to live in, cannot possibly think about the environment protection. For them any method by which they can survive is the best, least caring about its effect on the environment. They are not educated and hence they do not have enough awareness to know or understand the problem. On the other hand, the developed countries have problems of their own. Over production, nuclear radiations, over exploitation of resources, industrial waste in different forms, industrial accidents and the living style of the people are some of the contributing factors for environment problem in the developed countries.

The twentieth century, particularly, in the later half has seen a lot of growth and economic development in almost all the countries. The methods of economic development, which mankind has followed, have adversely affected the green economy and are also creating environmental problem, with the industrial and technological development, mankind has not only improved the economic conditions but also altered the natural ecological balance. Industrialization, urbanization and erosion of biodiversity have affected the natural environment adversely[4].

Air pollution has become a major killer with three million people dying of it every year. Carbon emissions doubled in three decades. Global warming is now a serious threat. US carbon emissions are 16 per cent above 1990 levels, making it a major polluter. Forty per cent of world population now faces chronic shortage of fresh water for daily needs. Half the World's wetlands have been lost and one fifth of 10,000 freshwater species is extinct. Contaminated water kills around 2.2 million people every year. Since 1990, 2.4 per cent of the World's forest have been destroyed. The rate of loss is now 90,000 sq. km. every year. Now two-thirds of the World's farm lands suffer from soil degradation. Half the world's grasslands are over grazed. India is 25 per cent short of its fodder needs. 800 species have become extinct and 11,000 more are threatened. Almost 70 per cent of the world's marine capture is over fished or fully utilized. In North America, 10 fish species went extinct in 1990s. Of the 9,946 known bird species, 70 per cent has declined in numbers[5].

1.3 Causes of Climate Change

Green House Gases trap heat from the sun in the atmosphere, leading to a "Green House Effect", which brings about global warming and climate change. Green

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4 See *T.N. Godavarman Thirumalpad* v. *Union of India*, (2002) 10 SCC 606 at 621; *Karnataka Industrial Area Development Board* v. *O. Kenchappa*, (2006)6 SCC 371 at 380.

5 "10 years later – What on Earth Have" *India Today* 38-39 (02-09-2002).

House Gases include (i) Carbon Dioxide, (ii) Methane, (iii) Nitrous oxide and (iv) Water Vapour. The most relevant gases for climate change are Carbon dioxide (CO_2) and Methane (CH_4). Methane is much less prevalent in the atmosphere but has "Global Warming Potential" that is twenty times that of Carbon dioxide. While most GHG's occur naturally in the atmosphere and are necessary for life to occur on earth, human activities associated with industrialization have sparked a substantial global increase in GHG's since the industrial revolution. It is estimated that 72 per cent of global warming is contributed by Carbon dioxide and 18 per cent by Methane.

Human beings are adding Carbon dioxide (CO_2) to the atmosphere rapidly. The atmospheric concentrations of Carbon dioxide, Methane and Nitrous oxide have grown by about 31 per cent, 151 per cent and 17 per cent respectively, between 1750 and 2000[6].

1.4 The Phenomenon of Green House Effect (GHE)

There is a protective layer of Ozone in stratosphere, that is, in the upper part of the atmosphere. There is also a blanket or layer of Carbon dioxide (CO_2) gas in the lower atmosphere. When the sunlight consisting of ultra violet rays, visible light, and infra-red rays fall on the top of the atmosphere, then first of all the harmful ultraviolet (UV) radiations are absorbed by the Ozone layer. The visible and infra-red rays pass through the layer of Carbon dioxide and fall on the surface of the earth. It must be noted that the infra-red rays coming from the sun are of short wavelength and they pass through the layer of Carbon dioxide easily. The infra-red rays have the unique heating effect in them so they heat the earth and various objects on the surface of earth. Since the earth and its objects become hot, they also start emitting heat rays or infra-red rays. These infra-red rays are of long wavelength. These infra-red rays cannot escape out from the Carbon dioxide layer in the atmosphere. In other words, the blanket of Carbon dioxide gas in the atmosphere traps all the infra-red rays or heat rays in the atmosphere and the atmosphere of the earth is heated up. This heating up of the atmosphere of the earth due to the trapping of infra-red rays of long wavelength by the Carbon dioxide layer in the atmosphere is called Green House Effect (GHE). The thick layer of Carbon dioxide (CO_2) in the atmosphere works like the glass panels of green house or just like the glass windows of the motor car, that allow the sunlight to filter through it, but prevent the heat from being x-radiated in outer space.

1.5 Climate Change and its Effects

Climate Change is a complex phenomenon and it has a direct impact on environment. It poses uncertain, potentially devastating, impacts across all

[6] *See Intergovernmental Panel on Climate Change (IPCC), 2001.*

sectors at the heart of development and presents an unprecedented challenge for the international community.

Climate Change leads to global warming which has devastating effects. Some of these effects are:

Global warming can lead to melting of ice peaks and thereby leading to rise in the sea level. Thus, there is threat to the coastal cities like Mumbai, Chennai and Kolkata, etc. of being immersed under water[7]. It may change the rainfall pattern, which may effect the agricultural outputs in the various regions of the world. It will bring about major changes in water distribution and have impact on water resources. The flow of water in streams located in high altitudes and South East Asia will increase while it will decrease in Central Asia, southern Africa, Australia and the Mediterranean. The other effect of the global warming will be the change of global wind pattern due to more energy being pumped into the atmosphere. The change in weather pattern will have major implications on the pattern of crops. The rise in sea level and its temperature is likely to pose an adverse effect on the coral reef ecosystem. The rise in temperature due to global warming may lead to the death of micro-organism like Phytoplankton, Zooplanktons and bacteria. Due to climatic change, the plant production will be adversely affected and thus there is a danger of extinction of many important species. The global warming will also have social-economic impacts. Many economic sectors, particularly physical infrastructure, will be affected by the climate change. The flooding and landslide will result into a large scale human migration. This will adversely affect the living conditions in other human settlements.

1.6 Global Warming and Action Plan

As we know the cause of global warming is the increase of Carbon dioxide (CO_2) concentration in the atmosphere, so in order to protect ourselves from the harmful effects of the global warming, we should try to control the emission of Carbon dioxide (CO_2) in the atmosphere of the earth. Urbanization, industrialization, increased population, increasing vehicular use, changing life-style and decrease in forest cover are some of the factors responsible for the increased rate of emission of Carbon dioxide CO_2) in the atmosphere of the earth. Today, the atmospheric level of Carbon dioxide (CO_2) is 26 per cent higher than pre-industrial concentration.

In 1992, at Rio-de-Janeiro Conference two important Conventions were signed. The first one was the Convention on Climate Change and the second one was on Biological Diversity. The Convention on Climatic Change puts an obligation on

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7 See *Karnataka Industrial Area Development Board* v. *C. Kenchappa*, (2006) 6 SCC 371 at 380.

every signatory state to take effective steps to reduce the emission of Green House Gases so as to protect the earth and its atmosphere from global warming.

1.7 United Nations Framework Convention on Climate Change

The Intergovernmental Panel of Climate Change (IPCC) published its First Assessment Report in 1990 on the state of the global climate, which had a potent effect on policy makers and the public opinion. The Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC) was established under the auspices of the General Assembly to negotiate the convention text. In 1992, INC finalized the convention text for its adoption in New York and full launch in June at the Rio-de-Janeiro Earth Summit, when 154 states signed it. The Convention on Climate Change was opened for signatures in 1992 at Rio and entered into force on 21 March, 1994. The Conference of the Parties to the Convention (COP) became the Convention's ultimate authority[8].

The Convention meant to provide a starting point for more specific and binding measures to be negotiated later, consequently, its focus is on principles rather than concrete measures. A particularly important principle is that of "common but differentiated responsibility". The Convention for Climate Change sets an overall framework for intergovernmental efforts to tackle the challenge posed by climate change. It recognizes that climate system is shared resource whose stability can be affected by industrial and other emissions of the Carbon dioxide (CO_2) and other Green House Gases.

Under the Convention, Governments gather and share information on Green House Gas emissions, national policies and best practices, launch national strategies for addressing Green House Gas emissions and adapting to expected impacts, including the provision of financial and technological support to developing countries and co-operate in preparing for adaption to the impacts of climate change[9].

The Parties to this Convention acknowledged that change in the Earth's climate and its adverse effects are a common concern of humankind. It was felt that human activities have been substantially increasing the atmospheric concentrations of Green House Gases. These increases enhance the natural Green House Effect, and thus this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind.

The fact is that the largest share of historical and current global emissions of Green House Gases has originated in developed countries and per capita emissions in developing countries are still relatively low and the share of global

8 http://www.cop14.gov.pl/index.php/mode=artykuly&action=main^id=2&menu=36&lang=EN
9 http://unfccc.int/essential_background/convention/items/2627.php

emissions originating in developing countries will grow to meet their social and development needs. The global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.

The Parties to this Convention took note of the pertinent provisions of the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972 and that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

It was felt that steps required to understand and address climate change will be environmentally, socially and economically most effective if they are based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings in these areas and that various actions to address climate change can be justified economically in their own right and can also help in solving other environmental problems.

The parties to the Convention affirmed that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty. The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of Green House Gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner[10].

In order to achieve the objective of the Convention and to implement its provisions, the Parties are guided, *inter alia*, by the following principles:

- They should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.

[10] Article 2 of the *Convention on Climate Change, 1992*

Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

- The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.

- The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of Green House Gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties[11].

- The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

- The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade[12].

Thus, the Parties are committed to formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all Green House Gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaption to climate change.

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11 *Id.*, Article 3.
12 *Ibid.*,

They undertake to promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of Green House Gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors and promote sustainable management[13].

The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties[14].

While implementing this, the situation of Developing Countries with economies vulnerable to adverse effects of climate change measures must be taken into account. The COP Conferences have been held in all parts of the World. The first COP Conference was held in Berlin in 1995 and the recent COP Conference was held in Durban in 2011. In all the COP Conferences the issue of climate change has been addressed within the frame work of Convention on Climate Change. The Intergovernmental Panel on Climate Change, a scientific intergovernmental body set up by the World Meteorological Organisation (WMO) and by the United Nation Environment Programme (UNEP), in its various assessment reports has noticed with concern the climate change and urgent need to tackle this problem. The underlying problem is that the rich North is not providing enough money and technology to help the poor South to develop in ways least harmful to the environment[15].

1.8 Kyoto Conference and Its Impact – Who Will Watch the Watchman?

In December, 1997, World Climate Conference was held at Kyoto (Japan) where a historic accord was signed by the participating countries for mandatory cuts in emission of Green House Gases particularly, by the industrialized nations in the next millennium to help save the planet from global warming. The USA, has committed itself to cut gas emissions by 7 per cent, the European Union by 8 per cent and the host Japan by 6 per cent by 2012 from the base of 1990. It may be mentioned here that USA alone produces 20 per cent of the Green House Gases although it accounts for only 4 per cent of the global population. It is expected that at the present rate the emission of the Green House Gases by the USA in the next 15 years will increase by 34 per cent.

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13 *Id.*, Article 4

14 *Id.*, Article 4(7)

15 *Id.*, Article 4 (9) and (10)

Thus, the proposed cut in the emission of the Green House Gases by USA at the Kyoto becomes totally insignificant. It may be stated that as per the per capita basis the US remains the biggest polluter (19.1 tons per capita), while China is third lowest and India emits the least amount of Carbon dioxide (CO_2) (0.8 tons per capita). In India and China over 80 per cent of the Carbon dioxide (CO_2) that is emitted comes from the burning coal[16]. The Central Government in exercise of the powers conferred by Sections 6,8 and 25 of the *Environment (Protection) Act*, 1986 has enacted the Ozone Depleting Substances (Regulation and Control) Rules, 2006.

The objectives of the Kyoto Protocol were:

(a) to achieve stabilization of Green House Gas concentrations in the atmosphere at a level that would prevent anthropogenic interference with the climate system with in a time-frame sufficient to allow ecosystems to adapt naturally to climate change;

(b) to ensure that food production is not threatened; and

(c) to enable economic development to proceed in a sustainable manner.

The Kyoto Protocol has been guided by article 3 of Framework Convention on Climate Change (FCCC) which lists the principles of:

(a) Benefits of present and future generations

(b) equity, and

(c) common but differentiated responsibilities and respective capabilities of nations[17]

In December, 2011, the COP 17 Climate Change Conference concluded in Durban, South Africa. The key out come out of this conference, agreed upon by the 195 Parties to the Convention, is the launching of the "Durban Platform for Enhanced Action," which was proposed by the European Union. This is a "road map" which will draw up a legal framework for climate action by all countries, with the aim of raising levels of ambition in reducing Green House Gases emissions. This new instrument is to be adopted by 2015 and it is proposed to be implemented w.e.f. 2020. The other major achievement of COP Conference is the formal decision to extend the Kyoto Protocol for the 2nd commitment period which will begin in January 2013 and it will continue upto 2015. This will also avoid the gap between the two commitment periods. It has also been agreed to create Green Climate Fund (GCF). It will act as a major distribution channel for financial assistance from

16 See Civil Services Chronicle, 24-27 (September, 2002). See also B.R. Jindal, Paramjit S. Jaswal and Usha Gupta, *Environmental Studies*, 193-195 (2001).

17 See Anil Agarwal, Sunita Narain and Anju Sharma, *Global Environmental Negotiations*, Vol. 1 at 84 (2001 reprint).

developed countries to developing country, so as to help them its implementing meaningful mitigating efforts.

1.9 Green Economy

The phrase "green economy" has come refer to an economy which has reduced its negative impacts on nature air, water, biodiversity and climate. UNEP defines a green economy as one that results in "improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities" (UNEP 2010). In its simplest expression, a green economy is low carbon, resource efficient, and socially inclusive. In a green economy, growth in income and employment should be driven by public and private investment that reduce carbon emissions and pollution, enhance energy and resource efficiency, and prevent the loss of biodiversity and ecosystem services. Green economy includes many other benefits which our environment provides to the people including adaptation to climate change, poverty alleviation and the potential to serve as a basis for a sustainable economic model.

The key aim for a transition to a green economy is to eliminate the trade-offs between economic growth and investment and gains in environmental quality and social inclusiveness. A major challenge is reconciling the competing economic development aspirations of rich and poor countries in a world economy that is facing increasing climate change, energy insecurity and ecological scarcity. A green economy can meet this challenge by offering a development path that reduces carbon dependency, promotes resource and energy efficiency and lessens environmental degradation.

Transitioning to a green economy has sound economic and social justification. There is a strong case for the government as well as the private sector to engage this economic transformation. For governments, this transition would involve leveling the playing field for greener products by phasing out harmful subsidies, reforming policies and incentives, strengthening market infrastructure, introducing new market based mechanisms, redirecting public investment and green public procurement. For the private sector, this transition would involve responding to these policy reforms and incentives through increased financing and investment as well as building skills and innovation capacities to take advantage of opportunities arising from a green economy[18].

Several concurrent crisis have unfolded during the last decade: climate, biodiversity, fuel, food, water and more recently, in the global financial system. The fuel price shock of 2007-2008 and skyrocketing food and commodity prices, reflect both structural weaknesses and unresolved risks. Currently, there is no international consensus on the problem of global food security or on possible solutions for how to

[18] http://www.unep.ch/etb/publications/Green%20Economy/GER%20Preview%20v2.0.pdf

nourish a population of 9 billion by 2050. Freshwater scarcity is already a global problem, and forecasts suggest a growing gap by 2030 between annual freshwater demand and renewable supply. The outlook for improved sanitation still, looks bleak for over 1.1 billion people and 844 million people still lack access to clean drinking water (World Health Organization and UNICEF 2010). Collectively, these crises are severely impacting the possibility of sustaining prosperity worldwide and achieving the Millennium Development Goals (MDGs) for reducing extreme poverty. They are also compounding persistent social problems, such as job losses, socio-economic insecurity, disease and social instability. The causes of these crises vary, but at a fundamental level they all share a common feature: the gross misallocation of capital. During the last two decades, much capital was poured into property, fossil fuels and structured financial assets with embedded derivatives. However, relatively little in comparison was invested in renewable energy, energy efficiency, public transportation, sustainable agriculture, ecosystem and biodiversity protection and land and water conservation.

Existing policies and market incentives have contributed to this problem of capital misallocation because they allow business to run up significantly, largely accounted for and unchecked social and environmental externalities. To reverse such misallocation requires better public policies, including prices and regulatory measures, to change the perverse incentives that drive this capital misallocation and ignore social and environmental externalities. At the same time, appropriate regulations, policies and public investments to foster changes on the pattern of private investments are increasingly being adopted in the world, especially in the developing countries[19].

UNEP's "Green Economy report, Towards a Green Economy", aims to debunk several myths and misconceptions about "greening the global economy and provides timely and practical guidance to policy makers on what reforms they need to, unlock the productive and employment potential of a green economy.

Perhaps the most prevalent myth is that there is an inescapable trade-off between environmental sustainability and economic progress. There is no substantial evidence that the greening of economies inhibits wealth creation or employment opportunities. To the contrary many green sectors provides significant opportunities for investment growth, and jobs. For this to occur, however, new enabling conditions are required to promote such investments in the transition to a green economy, which in turns calls for urgent action by policy makers.

The second myth is that a green economy is luxury only wealthy countries can afford and perpetuate poverty in developing countries. Contrary to this perception, numerous examples of greening transitions can be found in the developing world,

[19] See UNEP, 2010.

which should be replicated elsewhere. "Towards a Green Economy" brings some of these examples to light and highlights their scope for wider application.

According to UNEP, investing an additional $ 40 billion a year in the forestry sector could halve the deforestation rates by 2030, increase rate of tree planting by around 140 per cent by 2050, and catalyze the creation of millions of new jobs.

It could also sequester or remove an extra 28 per cent of carbon from the atmosphere, thus playing a key role in combating climate change[20]. Backed by the right kinds of enabling policies, such an investment-equivalent to about two-thirds more than what is spent on the sector today. Infact, there is a critical link between forests and the transition to a low carbon, resource efficient green economy. The Green Economy initiative has identified forestry as one of the ten central sectors capable of propelling a transition to low carbon, resource efficient employment-generating future if backed by investment and forward-looking policies. The host of this year's World Environment Day festivities, India has recently approved a national initiative to increase forest cover over five million hectares, improve quality of forest cover over another five million hectares and improve crucial ecosystem services. Over 80 per cent of the US $ 8 billion *National Rural Employment Guarantee Act*, which underwrites at least 100 days of paid work for rural households in India, is invested in water conservation, irrigation and land development[21].

The Green Economy "in the context of sustainable development and poverty eradication" is also one of two key issues that will be addressed at the Rio+20 summit in Brazil in June 2012. The public and the private sector both have an important role to play in accelerating the transition to a Green Economy. On the one hand, governments must promote policy and technical support to ensure forest-based investments. On the other hand, business and financial institutions need to invest in forest projects, and provide independent and verifiable risk assessments and risk insurance services, amongst others. The United Nations Officials have appealed for greater political will in both developed and developing countries to make the transition to the "green economy" for sustainable development to protect humanity from environmental disaster and economic ruin which might result from current dependence on non-renewable energy.

The Green Economy can take different forms, depending on the context of each country, its level of development, and its geographic location in particular. Some will begin by greening their transport infrastructure, others will prefer to promote ecotourism or organic agriculture. The ability to demonstrate good governance in forestry is becoming increasingly important for countries wishing to participate in

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20 See "UNEP's Green Economy Report" in *U News, Monthly Newsletter of the UN Information Centre*, New Delhi, (June 2011).

21 *Id.*, at 5.

emerging climate change. Good governance in forestry determines whether forest resources are used efficiently, sustainability, and equitably.

Ecosystem Based Adaptations is another solution to the Climate Change and promoting green economy. Climate change may be threatening the long term provision of ecosystem goods and services, but it also presents an opportunity to get our global accounting system "right" and truly move towards a sustainable green economy. This opportunity presents itself through Eco Based Adaptation. An Eco Based Adaptation approach offers a means to encourage development of cost efficient policies and strategies that help people cope with the adverse impacts from climate change, through ecosystem, management, conservation and restoration. Conserving and managing nature protects the resilience of ecosystems and the valuable benefits they provide to society. This is particularly the case for the poorest and most vulnerable people around the world, who strongly depend on natural ecosystems for their livelihoods and who have the least ability to adapt in the face of a changing climate. A further opportunity exists in the green economy is one that can evolve by global consensus with the aim of meeting basic human needs of all people[22].

It is established fact that Ecosystem mitigate climate change. Planet earth is a dynamic geological and biological system. It produces and absorbs carbon and other green house gases through a range of natural cycles and across a wide variety of ecosystems, which has resulted in the past climate patterns. However, human activity has intervened in these natural carbon cycles by:

(1) creating major new sources of carbon emissions from the use of fossil fuels; 78 per cent fossil fuels, 19 per cent renewable resources and 2.8 per cent nuclear resources

(2) releasing carbon through deforestation, forest degradation, agricultural practices and other land use change; and

(3) destroying or transforming natural ecosystems that capture and store carbon. Put crudely, humans activities are now releasing more carbon to the atmosphere than natural systems can absorb.

Terrestrial and Oceanic ecosystems are currently absorbing about half of anthropogenic CO_2 emissions (Oceans c. 24 per cent, land c. 30 per cent[23]). In other words, those people depending most directly on natural ecosystems for their livelihoods are also those who will experience the most immediate benefits from service provision. Eco Based Adaptation solution would be coupled with mitigation

[22] See "The Role of Ecosystem in Developing a Sustainable "Green Economy" in *UNEP Report* (2010).

[23] Cannedell et al 2007. PNAS, See: http://www.pnas.org/content/104/47/18866.full.pdf+html

solutions (e.g. buffering agricultural lands via reforestation) thereby providing both local and global benefits.

Therefore, the solution lies in decreasing fossil fuel based and other green house gas emissions, reducing deforestation and degradation of forests and other ecosystems to expand natural carbon sinks, promoting ecosystems-based adaptation across all sectors, developing strategies to extract growth and employment from the ecosystem restoration based activities (social forestry, coastal zone management, land reclamation to name a few), and centralized nature based solutions within all areas of economic policy development. In addition, using nature as a solution for mitigation and adaptation yields benefits beyond just reducing impacts from climate change-benefits that needs to be valued. The development of the Green Economy can be seen as a method to do this[24].

The Brundtland Commission has defined the Sustainable development as that development which meets the demands of present generation without limiting the need and capacity of the future generations to meet their own demands. The concept of sustainable development is based on various principles including the "Polluter Pays Principle", Precautionary Principle" and "Intergenerational equity".

The Green Economy can be considered synonymous to a sustainable economy that ensures economic systems and conserve natural resources through balancing growth and equity. This conservation and management of ecosystems provides a long term benefit for people while allowing for sustainable growth. The green economy balances natural resources values with other values and take into account the loss in value of ecosystem services due to environmental impacts[25]. The green economy provides a chance to "get the balance sheet right" by accounting for both the current and future value of the benefit ecosystems provide to people.

24 See "The Role of Ecosystem in Developing a Sustainable "Green Economy" in *UNEP Report*, 8 (2010).

25 *Id.*, at p. 9.

TIME FRAME FOR DISPOSAL OF CRIMINAL CASES : JUDICIAL APPROACH IN INDIA

Professor (Dr.) G.I.S. Sandhu*

1.1 Introduction

The speedy justice informed by fairness remains the primary objective of every civilized criminal justice system. It is an accepted norm that justice delayed is justice denied. The paramount considerations of speedy justice are evenly met by promptly punishing the guilty and making the society believe in the efficacy of justice system. Modern society caught in the cob-web complexities of fast changing world, requires a Criminal Justice System that ensures expeditious disposal of criminal cases within the Constitutional parameters. At present the right to speedy and expeditious criminal trial is treated as most valuable and cherished fundamental right guaranteed to our citizens. It is an integral part of right to life or liberty and necessary concomitant of fundamental right guaranteed under Article 21 of the Constitution.[1]

1.1.1 Right to Speedy Criminal Justice-Nature and Scope: As compared to other fundamental rights of the accused the right to speedy justice is vague and elusive. It is not easy to determine at what point of time in a given case this right is violated. Barring some provisions under the Code of Criminal Procedure, 1973[2], there is no specific speedy trial legislation in India. The delay in criminal trial has many facets and speedy disposal of cases is dependent upon number of factors and role of different agencies, those are responsible for the conduct of investigation and trial. It is held that delayed trial is not necessarily an unfair trial,[3] only that delay is considered violative of this right which has resulted in prejudice to the accused. For upholding this right the reliefs allowed by courts are not uniform, which vary from quashing of proceedings or conviction or sentence, alteration in sentence, release on bail, order for expediting trial and directions for disposal of the case within specified time.

1.1.2 Recognition as a Fundamental Right: The Supreme Court in *Maneka Gandhi* v. *Union of India*[4] relieved the Article 21 from the shackles of *Gopalan Case*[5]. It laid down that procedure prescribed for deprivation of life and liberty

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* Registrar-cum-Professor of Law, Rajiv Gandhi National University of Law, Punjab.

1 *Miss Smita Ambalal Patel* v. *Asstt. Director of Enforcement*, 1992 Cri.L.J. 1961 (Bom).

2 See the Code of Criminal Procedure, 1973, Ss. 57, 76, 167, 169, 258, 309, 468-473 and 482.

3 *State of Mahrashtra* v. *Champalal Punjaji Shah*, AIR 1981 SC 1675.

4 AIR 1978 SC 597.

5 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 – Phrase *'Procedure Established by Law'* was interpreted in a restrictive manner to mean *'law of the land'*.

of a person must be reasonable, just and fair and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all, the requirement of Article 21 would not be satisfied.[6] In *Bachan Singh* v. *State of Punjab*[7] the Supreme Court observed that if this Article is expanded in accordance with the interpretive principle indicated in *Maneka Gandhi's* case *supra,* it would read as follows:

> No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.[8]

The Constitutional Bench of the Supreme Court in *Abdul Rehman Antulay* v. *R.S. Nayak*[9] held that:

> After Maneka Gandhi, it can hardly be disputed that the 'law' (which has to be understood in the sense, the expression has been defined in clause (3) (a) of Article 13 of the Constitution) in Article 21 has to answer the test of reasonableness and fairness inherent in Article 19 and 14. In other words, such law should provide a procedure which is fair, reasonable and just. Then alone, would it be in consonance with the command of Article 21. Indeed, whenever necessary, such fairness must be read into such law.

In *Hussainara-I*[10] case Justice Bhagwati speaking for himself and Koshal J. held that speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It was held that, under our Constitution though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted in *Maneka Gandhi* v. *Union of India*[11]. The procedure prescribed by law for depriving a person of his life or personal liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for the determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair and just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.[12]

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6 *Supra* note 3

7 AIR 1980 SC 898

8 *Id.*, at p. 930, para 136. See also *Mithu* v. *State of Punjab*, AIR 1983 SC 473.

9 AIR 1992 SC 1701

10 *Hussainara Khatoon* v. *Home Secretary, State of Bihar*, AIR 1979 SC 1360.

11 *Supra* note 3

12 P.N. Bhagwati, "Human Rights in Criminal Justice System" 27 JILI (1985).

It has been observed by the Apex Court that now, can it be said that a law which does not provide for a reasonably prompt investigation, trial and conclusion of a criminal case is fair, just and reasonable? It is both in the interest of the accused as well as the society that criminal case is concluded soon. If the accused is guilty, he ought to be declared so. Societal interest lies in punishing the guilty and exoneration of the innocent but this determination (of guilt or innocence) must be arrived at with reasonable dispatch – reasonable in all the circumstances of the case. Since, it is the accused who is charged with the offence and is also the person whose life and/or liberty is at peril, it is but fair to say that he has a right to be tried speedily. Correspondingly, it is the obligation of the State to respect and ensure this right.[13]

The courts have been providing relief to the accused on the basis of the delayed criminal proceedings even before the *Hussainara* decisions in *1979.*[14] But ever since its declaration as a fundamental right in these cases the right to speedy trial has been consistently recognized by the Indian Judiciary as implicit in the fundamental right to life and liberty guaranteed under the Article 21 of the Constitution.[15]

1.1.3 Stages Covered in the Right to Speedy Justice: *In A.R.Antulay's* case the Supreme Court laid down the guide lines that the right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation inquiry trial, appeal, revision and re-trial.[16] It further added that the concerns underlying the right to speedy trial from the point of view of the accused are that the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction; the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and undue

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13 *Id.*, at p. 1729 para 49.

14 See, *Machander* v. *State of Hydrabad,* 1955 Cri.L.J. 1644 (SC); Accused persons should not be indefinitely harassed; *Veerbhadra* v. *Ramaswamy Niakar,* 1958 Cri.L.J. 1565 (SC), Court refused to send back proceedings after a gap of five years; *Chajju Ram v. Radhey Sham* (1971) SCR 172, Court refused to order retrial after a period of 10 years; *State of UP* v. *Kapil Deo,* 1972 Cri.L.J.1214, No retrial after a period of 20 years.

15 See *Kedra Pahadiya* v. *State of Bihar,* AIR 1981 SC 939; *State of Maharashra* v. *Champa Lal Panaji Shah,* AIR 1981 Cri. L.J. 1273; *Kedra Pahadiya v. State of Bihar,* AIR 1982 SC 1167; *T V Vatheeswarn* v. *State of Tamil Nadu,* AIR 1983 SC 361; *Shella Barse* v. *Union of India,* AIR 1986 SC 1773; *Raghvir Singh* v. *State of Bihar,* AIR 1987 SC149; *Adbul Rehman Antulay* v. *R.S. Nayak,* AIR 1992 SC 1701; *Kartar Singh* v. *State of Punjab,* 1994 (3) SCC 569; *P.Ramachandra Rao* v. *State of Karnataka,* 2002 (4) SCC 578; *Vakil Parshad Singh* v. *State of Bihar,* AIR 2009 SC 1822; *Mohd. Hussain@ Julfikar Ali* v. *The State (Govt of NCT) Delhi,* MANU/SC/ 0012/2012.

16 *Supra* note 9

delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

The Supreme Court in *Kartar Singh* v. *State of Punjab*[17] also observed that the concept of speedy trial is read into Article 21 as an essential part of fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, enquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted.

The right to speedy justice is also available at the post conviction stage during the execution of the sentence. The Supreme Court in *Vatheeswarn's case*[18] and subsequently in *Sher Singh* v. *State of Punjab*[19] examined the delay in execution of death sentence may result in violation of right to speedy justice enshrined under Article 21 of the Constitution. Therefore, it is a settled law that right to speedy justice encompasses all the stages of criminal justice process from the stage of arrest to the execution of sentence.

1.1.4 Limitations of Accused's Right to Speedy Trial: Reflecting the other side, the Supreme Court in *Champala's case*[20] was of the view that in deciding the question whether there has been a denial of right to speedy trial, the court is entitled to take into consideration whether the defendant himself was responsible for a fair part of the delay and whether he was prejudiced in the preparation of his defence by reason of the delay.[21] Highlighting delaying tactics by the defence, the Supreme Court observed, "It is one of the sad and distressing features of our criminal justice system that an accused person, resolutely minded to delay the day of reckoning, may quite conveniently and comfortably do so, if he can but afford the cost involved, by journeying back and forth, between the court of first instance and the Supreme Court, at frequent interlocutory stages. The Court distinguished such cases from the *Hussainara* like situations where poverty-struck, dumb accused persons, too feeble to protect, languished in prisons for months and years on awaiting trial because of the insensibility of the prosecuting agencies.

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17 (1994) 3 SCC 569

18 *T.V. Vatheeswarn* v. *State of Tamil Nadu*, AIR 1983 SC 361

19 (1983) 2 SCC 344

20 *Supra* note 3

21 *Id.*, at p. 1677 para 2

The Constitutional Bench of the Supreme Court in *Abdul Rehman Antulay* v. *R.S. Nayak*[22] reiterated in its guidelines that "each and every delay does not necessarily prejudice the accused some delays may indeed work in his advantage." How much or what kind of delay denies the accused a speedy trial or causes prejudice to him? How to determine this prejudice? Whether the prejudice is deemed to be excluded where the delay is caused in the economic offences or because of over-crowding of courts or on account of some interim orders passed by Superior Courts?

On the basis of foregoing analysis of the cases, it can be inferred that right to speedy trial is denied when the nature or length of delay can be categorized as unfair which has resulted in prejudice to the accused in the preparation of his defence.

*1.1.5 **Nature of Relief to be given to the Accused for Delay in Proceeding:*** In *A.R. Antulay's case supra* the Constitution Bench of this Court dealt with this aspect of the matter and laid down certain guidelines. The Court on the plea that 'the only consequence on delay is quashing of charges and/or conviction, as the case may be' the Court observed that it may be so. But it do not think that is the only order open to court in a given case, the facts-including the nature of offence – may be such that quashing of charges may not be in the interest of justice. After all, every offence-more so economic offences, those relating to public officials and food adulteration – is an offence against society. It is really the society–the State – that prosecutes the offender. In cases, where quashing of charges/convictions may not be in the interest of justice, the court may pass such appropriate orders as may be deemed just in the circumstances of the case. Such orders may, for example, take the shape of order for expedition of trial and its conclusion within a particular prescribed period, reduction of sentence when the matter comes up after conclusion of trial and conviction, and so on.

1.2 Fixing Time Limits for Criminal Proceedings

Further, it is pertinent to look into another important question of viability of fixing some extreme outer limits, on the expiry of which the infraction of the Constitutional right to speedy trial could be established on the basis of presumptive prejudice. The United States Supreme Court in *Robert Dean Dickey's*[23] case has held that, "...prejudice ceases to be an issue in speedy trial cases once the delay has been sufficiently long to raise a probability of sufficient prejudice..." But what should be the outer time limit when the prejudice ceases to be issue is a very difficult proposition. The Law Commission of India in its Seventy-Seventh Report also recommended a time period of six months for the trial of criminal cases. The Report provided that, "the period would be calculated from the date of filing of the

22 *Supra* note 9
23 US Supreme Court Reports (1970) 26 L Ed 2nd 26

charge sheet or complaint till the date of pronouncement of final judgment. In case of Sessions trials, the above period should also include the time during which proceedings remained pending before the committing magistrate.[24] The Law Commission in its next Report further remarked that regarding cases in which accused are in jail, the target should be four months.[25]

The Supreme Court in *Sheela Barse* v. *Union of India*[26] took up the issue of fixing the time limit for trial of children accused below 16 years of age. The Supreme Court in this case laid down:

> Where a complaint is filed or first information report is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than 7 years, the investigation shall be completed within a period of three months from the date of filing of the complaint or the lodging of the First Information Report and if the investigation is not completed within this time, the case against the child must be treated as closed. If within three months the charge sheet is filed against the child in case of an offence punishable with imprisonment of not more than 7 years the case must be tried and disposed of within a further period of a 6 months at the outside and this period should be inclusive of the time taken up in committal proceedings, if any.[27]

Though the Supreme Court in *Sheela Barse's* case *supra* discussed the requirement of the right to speedy trial generally, yet regarding the time limits for trial, it confined itself to cases of Juveniles delinquents only. It pointed out,

> . . . here we are not concerned with the question of speedy trial for an accused who is not a child below the age of 16 years. That is a question which may have to be considered in some other case where this court may be called upon to examine as to what is the reasonable length of time for a trial beyond which the court would regard the right to speedy trial as violated.[28]

However, an exercise to fix such outer time limits has been undertaken by the Patna High Court in eighties in a series of decisions.[29] In *Ramdharas Ahir's*[30]

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24 *Law Commission of India, the Seventy-Seventh Report* (1978) "Delay and Arrears in Trial Courts." at p. 3 para 1.10

25 *Law Commission of India, the Seventy-Eight Report* (1979), on "Congestion of Under Trial Prisoners in Jail." at p. 14 para 3.7

26 AIR 1986 SC 1773.

27 *Id.*, at p.1778 para 12.

28 *Id.*, at p.1179

29 See (i) *State of Bihar* v. *Ramdharas Ahir*, 1985 Cri.L.J. 584 (Pat) (DB).
(ii) *The State* v. *Maksudan Singh*, AIR 1986 Pat 38 (FB).

case, the Patna High Court laid down specific time limit for one class of cases before it, viz., reversal of clear acquittal on a capital charge. The Chief Justice opined:

> I am firmly of the view that of callous and inordinate prolonged delay of 10 years or more, which in no way arises from the accused's default (or is otherwise not occasioned due to any extraordinary and exceptional reasons) in the context of reversal of clear acquittal on a capital charge would plainly violate Constitutional guarantee of a speedy trial under Article 21. Any procedure or practice which allows such horrendous delays cannot but be labeled as oppressive, arbitrary and fanciful. Indeed, I am some what hesitant in spelling out the aforesaid limit which perhaps errs on the side of strictitude. However, considering the fact that herein one seems to be breaking new ground, I would wish to rest content with the same.

Thereafter, the full bench of the Patna High Court in *State* v. *Maksudan Singh*[31] reaffirmed the outer time limit laid down in *Ramdharas Ahir's* case *supra.* Regarding the prejudice test the Chief Justice expressing the majority view said:

> Inordinately prolonged and callous delay of ten years or more occasioned entirely by the prosecution default, in the context of reversal of clean acquittal on a capital charge, would be per-se prejudicial to the accused.[32]

The outer time limit of ten years prescribed in *Ramdharas Ahir's* case was further elaborated by way of clarification in *Maksudan Singh's* case, as:

> Ramdharas Ahir's case must not be misunderstood or misconstrued to mean that a delay less than ten years would not in any case amount to prejudice. Indeed what it lays down is the extreme outer limit of time, whereafter grave prejudice to the accused must be presumed and the infraction of the Constitutional right would be plainly established. It does not even remotely lay down that in a lesser period than ten years an accused person would not be able to show the circumstances pointing to the patent prejudice which may entitle the invocation of Art. 21.

(iii) *Madheshwardhari Singh v. State*, AIR 1986 Pat 324 (FB).
(iv) *Surya Narain Singh* v. *State*, AIR 1987 Pat 219.
(v) *Anurag Baitha* v. *State*, AIR 1987 Pat 274 (FB).

30 *State of Bihar* v. *Ramdharas Ahir*, 1985 Cri.L.J. 584 (Pat) (DB).

31 *The State* v. *Maksudan Singh*, AIR 1986 Pat 38 (FB).

32 *Id.*, at p. 47 para 20 (6)

In *Madheshwardhari Singh* v. *State of Bihar*[33] the Full Bench of Patna High Court laid down the outer time limit of seven years for the investigation and trial of offences other than capital ones. The High Court supported this rule by taking clue from the Supreme Court decision in *S. Guin* v. *Grindlays Bank Ltd.*[34] in which the Apex Court quashed the order for retrial passed by High Court. The Supreme Court keeping in view the nature of acts alleged to have been committed held that a fresh trial nearly seven years after the alleged incident is bound to result in harassment and abuse of judicial process. The Patna High Court observed that in the above referred Supreme Court decision, delay was itself the ground for setting aside the order of the High Court without any attempt to apportion the causes thereof or any blame in this context appertaining to the accused. The Court laid down the rule as:

> . . . a callous and inordinate delay of seven years or more (which does not arise from the default of the accused or is otherwise not occasioned by any extraordinary or exceptional reason) in investigation and original trial for offences other than capital ones plainly violate the Constitutional guarantee of a speedy public trial under Article 21.[35]

Similarly, the Patna High Court in *Surya Narain Singh* v. *State of Bihar*[36] prescribed the outer time limit for the investigation and original trials of pending and future capital offences punishable with death. For the pending cases the court observed:

> A callous and inordinately prolonged delay of ten years or more (which does not arise from the default of the accused or is otherwise not occasioned by any extraordinary or exceptional reason) in the investigation and original trials of pending cases for capital offences punishable with death would plainly violate the Constitutional guarantee of a speedy public trial under Article 21.[37]

In *Surya Narain* case *supra* the Chief Justice also opined:

> I would hold that as regards the investigation and original trials for capital offences in future a time frame of five years appears to be more than reasonable. To formulate the principle, it must be held that a callous and inordinately prolonged delay of five years or more

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33 AIR 1986 Pat 324 (FB)
34 AIR 1986 SC 289.
35 *Supra* note 27
36 AIR 1987 Pat 219 (224) (FB)
37 *Id.*, at p. 231 para 25.

> (which does not arise from the default of the accused or is otherwise not occasioned by any extraordinary on exceptional reasons) in investigation and original trial would plainly attract the Constitutional guarantee of a speedy public trial under Article 21.[38]

Again, in *Anurag Baitha* v. *State of Bihar*,[39] the Patna High Court in its full bench decision took up the question of time limit for hearing substantive appeals in capital cases as follows:

> . . . it must be held that barring exceptions the reasonable period of time for the hearing of substantive appeals on capital charges pending in the High Court must be broadly placed at one year. Once it is so fixed, it is plain that on the ratio of Kashmira Singh's case[40] an appellant would become entitled to claim bail on the ground of delay in hearing the appeal itself, unless there are cogent grounds for acting otherwise.[41]

To the above stated rule of one year time limit for the appeals against conviction on capital charge the High Court recognized certain horrendous capital crimes, which are shocking to the conscience of the society as exceptions. The categorization, which is said to be not exhaustive is, multiple and mass murders on caste and tribal considerations, dacoity coupled with murder, rape with murder, bride burning, terrorist crime, day light bank robbery, abduction for ransom followed by murder, indiscriminate use of firearms and bombs in murder disturbing public order.[42] The Court held:

> . . . persons convicted in trial therefore cannot rightfully claim their liberty during the pendency of their appeal and till they are either purged of the crime by serving their sentence or are acquitted thereof.[43]

The Chief Justice of the Patna High Court further emphasized the need for release on bail on the admission of appeal itself in some cases:

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38 *Id.*, at p. 224

39 AIR 1987 Pat 274 (FB).

40 *Kashmira Singh* v. *State of Punjab*, AIR 1977 SC 2147. The Supreme Court in this case held, "...so long as the Supreme Court is not in a position to hear the appeal of an accused within a reasonable period of time, the court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in case where special leave has been granted to the accused to appeal against his conviction and sentence."

41 AIR 1987 Pat 274 (FB), at p. 290 para 34.

42 *Id.*, at pp. 289-290 paras 31, 32, 33 and 34.

43 *Ibid.*

> Indeed, I am of the view that so long as delay in the hearing of such appeals extends to three or four years the persons who are vicariously convicted on capital charges with the aid of S. 34 or 149 Penal Code may well be granted bail on the admission of the appeal itself during the pendency of its hearing after such time. It is however, made clear that this can apply only to the run of the mill cases and not to the peculiar and exceptionally heinous crimes...[44] The cases of convicts to whom the primal role in the capital crime is attributed and are held guilty on the substantive charge of murder or other capital offences are undoubtedly on somewhat different footing and the same concession may not be extended to them in routine. Even in their cases... barring the peculiarly heinous crimes...there will be no alternative but to extend the concession of bail under this class of cases as well if the insistent claim of the convicts for hearing of the appeal cannot be acceded to and their appeals are not adjudicated upon within the reasonable time frame of one year.[45]

It was further held that the only alternative therefore, is that the substantive appeals of this nature for peculiarly grave crimes, where grant of bail is inappropriate, should be listed out of turn and disposed of within the time frame of one year or as nearly thereto as would be within the bounds of possibility.[46]

The above discussion, leads to the inference that some judicial attempts were made by the Patna High Court in different decisions to specifically lay down certain time limits for adjudication of criminal cases, on the expiry of which Constitutional right to speedy trial could be presumed to be infracted. In such cases prejudice to the accused could be presumed on the expiry of specific time itself, which in view of the Patna High Court is the 'extreme outer limit'. The Court opined that the rule of 'presumptive prejudice' must not be misconstrued to mean that delay of less than the prescribed 'outer limit' would not in any case amount to prejudice. In a period lesser than the outer limit the accused may establish circumstances pointing to the patent prejudice which may entitle him to invoke the guarantee of speedy trial under Article 21. As a necessary inference it can be said that accused should not be required to prove prejudice on the expiry of the outer time limit and he can claim the violation of the right to speedy trial, *ipso-facto*.

1.3 Judicial Approach Disapproving Fixed Time Limits

There had been dissenting opinion in some of the above referred Patna High Court Cases. On the question of fixing of specific time limits, Justice P.S.

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44 *Ibid.*
45 *Id.*, at p. 289, para 29.
46 *Id.*, para 30.

Sahey of the Patna High Court gave a dissenting opinion in *Maksudan Singh's*[47] case in the minority judgment by observing that:

> Courts are fully alive of the problem and there is always hue and cry for speedy disposal of cases pending in different courts starting right from the lower courts to the highest court. It is often said that due to long delay, people in general and litigants in particular are losing faith in the manner the courts are functioning and the procedure. The law makers are also fully conscious of this problem and still no steps have been taken to fix any time limit for the disposal of any type of criminal cases...In that situation will it be proper for the court to fix any time limit even in cases relating to appeal against acquittal involving capital punishment? In my opinion the answer must be in the negative.[48]

Also, Justice H.S. Abidi in the minority judgment, in *Anurag Baitha*,[49] a full bench decision, did not favour the time limits laid down by the majority. It was observed that it will be denial of justice or distortion of justice if the courts with a view to clear up the arrears and to cover up the lapses on the part of the State clear off the cases in hasty and slipshod manner and so the criminals are let loose and they go scot free. This is not the purpose of the law and the Constitution of a civilized society in which we are living.[50] With regard to the time limit of one year fixed by the majority for hearing appeal on conviction in capital cases it was held that:

> . . . by fixing despotic period of one year without any criteria without looking to the conditions of the court and alarming decrease in number of courts and with the best possible efforts of the Government including the head of the judiciary to provide the judicial system with proportional and proper paraphernalia will be to set at naught the considerations at the time of refusing suspension or sentence and grant of trial...[51] The legislature in its wisdom did not think proper to fix any period and otherwise also it would not have been possible for the legislature to have fixed a period.[52]

Similarly the Bombay High Court in *State of Maharashtra* v. *Arun Swalaram*[53] held that:

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47 *Supra* note 25.
48 *Id.*, at p. 49 para 30
49 *Supra* note 33.
50 *Id.*, at p. 297 para 54
51 *Id.*, at p. 301 para 66.
52 *Id.*, para 68.
53 1988 Cri.L.J. 1918 (Bom).

> We, without the full data before us cannot lay down what should be reasonable time within which investigation trials and appeals should be completed. Every case will have to be decided on the facts of that case bearing in mind that the accused have a fundamental right to a speedy trial under Article 21 of the Constitution.[54]

The Supreme Court in *State of Andhra Pradesh* v. *P.V. Pavithran*[55] held that no general and wide proposition of law can be formulated that whenever there is inordinate delay on the part of the investigating agency in completing the investigation, such delay, *ipso facto*, would provide ground for quashing First Information Report or the proceeding arising there from.[56]

The Constitutional bench of the Supreme Court in *Abdul Rehman Antulay* v. *R.S. Nayak*[57] heard a bunch of criminal appeals before the Supreme Court involving this question of law. Appeal filed by the State of Bihar in *Maheshwardhari Singh's* case decided by full bench decision of Patna High Court was also one of them. The Constitutional Bench of the Supreme Court in *A.R. Antulay's* case reviewed the law on the Constitutional right to speedy trial. On the question of the fixing of time limits the court observed:

> But then speedy trials or other expressions conveying the said concept are necessarily relative in nature. One may ask-speedy means, how speedy? How long a delay is too long? We do not think it is possible to lay down any time schedule for conclusion of criminal proceedings. The nature of the offence, number of accused, the number of witnesses, the work load in the particular court, means of communication and several other circumstances have to be kept in mind... .Some offences by their very nature e.g. conspiracy cases, cases of misappropriation, embezzlement, fraud, forgery, sedition, acquisition of disproportionate assets by public servants and high public officials take longer time for investigation and trial. Then again work load in each court, district, region and state, varies... . In many places requisite numbers of courts are not available. In some places, frequent strikes by members of Bar interfere with the work schedules. In short, it is not possible in the very nature of the things and present day circumstances to draw a time limit beyond which a criminal proceedings will not be allowed to go...Except for the

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54 *Ibid.*

55 AIR 1990 SC 1266.

56 *Id.*, at p. 1266 paras 10 and 12. See also *V.K. Aggarwal* v. *Vasant Raj*, AIR 1988 SC 1106. Delay of 20 years was not considered a ground for not proceeding further with the matter, in as much as the offence was a serious one.

57 *Supra* note 9

> Patna F.B. decision under appeal no other decision of any High Court in this country taking such a view has been brought to our notice.

The above decision of the Apex Court has clearly ruled out the viability of fixing any outer time limit for the criminal proceedings to uphold the Constitutional right to speedy trial. The Court also observed that while determining whether undue delay has in fact occurred (resulting in violation of Right to Speedy Trial), one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on what is called, the systemic delays. It is true that it is obligation of the State to ensure a speedy trial and state includes judiciary as well, but a realist and practical approach should be adapted in such matters instead of pedantic one.[58] Therefore to determine whether there is violation of right to speedy trial the matter was left to be decided on facts of individual case and no specific time limits were thought to be neither advisable nor feasible to draw or prescribe an outer time limit for conclusion of all criminal proceedings.

1.3.1 Time limit for Execution of Death Sentence also not Accepted: In *Vatheeswarn's* case[59] the Supreme Court held that delay exceeding two years in the execution of death sentence is violative of Article 21 of the Constitution. The cause of delay is immaterial when the sentence is death. The court said that delay exceeding two years should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand quashing of the sentence of death. In a subsequent case of *Sher Singh v. State of Punjab*[60] the Supreme Court in a larger bench held that the prolonged delay in execution of death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But the Court ruled that no hard and fast rule can be laid down. The time limit of two years was not approved keeping in view the common experience of the time normally consumed by the litigative process and the proceedings before the executive. However, courts are taking into consideration the delay and overall circumstances to substitute the death sentence for life imprisonment.[61]

1.4 Other Judicial Attempts to Prescribe Time Limits

Since the delay in disposal of criminal cases is posing a serious problem with the mounting arrears of cases and prolonged detention of under trials in jails. Even petty cases like traffic violation and other less serious offences remain

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58 *Id.*, para 54 (5)
59 *Supra* note 17
60 *Supra* note 18
61 See *Javed Ahmed Abdul Hamid* v. *State of Maharashtra,* AIR 1985 SC 231

pending in the courts for years. With a view to dispose of such long pending cases the Supreme Court in four cases[62] decided during 1996 to 1999 issued certain guidelines/directions/ clarifications for expeditious disposal of cases and also to release the accused on bail. In *Common Cause a Registered Society* v. *Union of India*[63] (hereinafter referred as *Common Cause (I))* a two judge bench of the Supreme Court issued a set of directions in 1996[64] for grant of bail and quashing of proceedings on account of delay in disposal in as under:

1.4.1 Directions for Release on Bail: The Court held that where an accused is charged with an offence under Indian Panel Code or any other law for imprisonment not exceeding three years with or without five and trials are pending for more than one year and the accused has not been released and is jail for a period exceeding six months or more, the concerned Criminal Court was directed to release the accused on bail or on personal bond as per section 437 of the Code of Criminal Procedure, 1973. Similarly in offences punishable with imprisonment not exceeding five years and seven years if the trials of the cases were pending for two years and accused were in jail for more than six months or more than one year respectively, the accused were directed to be released on bail.

1.4.2 Direction for Closing of Proceeding: The Court in *Common Cause (I) supra* also directed to close the proceedings on expiry of certain time limits in specified categories of cases. In traffic offences the Court directed that the proceedings to be closed and accused to be discharged on lapse of two years on account of non-serving of summons to the accused or for any other reason whatsoever. In other category of offences under Indian Penal Code, 1860 or any other law for the time being in force, if (i) the cases were compoundable with the permission of the court and trial has not commenced for a period of more than two years; ii) the cases pertaining to offences which were compoundable and bailable and trial has not commenced for a period of more than two years; (iii) the cases in relating to offences punishable with fine only and are not of recurring nature and trial has not commenced for a period of more than one year; (iv) cases punishable with imprisonment for one year with or without fine and trial is pending for more than one year; and cases pertaining to offences punishable with imprisonment upto three years with or without fine and trial has not commenced for more than two years, the trial

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62 *Common Cause A Registered Society* v. *Union of India*, (1996) 4 SCC 33
Common Cause A Registered Society v. *Union of India*, (1997) 10 SCC 729
Raj Deo Sharma v. *The State of Bihar*, (1998) 8 SCC 507
Raj Deo Sharma v. *The State of Bihar*, (1999) 7 SCC 604

63 *Common Cause A Registered Society* v. *Union of India*, (1996) 4 SCC 33

courts were directed to close these cases on the ground of delay in commencement of trial.

The Court further directed that the accused were not be released on bail or proceeding were not to be closed as above in cases of offences involving (a) corruption misappropriation of public funds, cheating, (b) smuggling, foreign exchange violation and offences under the Narcotics Drugs and Psychotropic Substances Act, (c) Essential Commodities Act, Food Adulteration Act, Acts dealing with environment or any other economic offences, (d) offences under Arms Act, Explosive Substances Act, Terrorists and Disruptive Activities Act, (e) offences relating to the Army, Navy and Air Force, (f) offences against public tranquility, (g) offences relating to public servants, (h) offences relating to coins and Government stamp, (i) offences relating to elections, (j) offences relating to giving false evidence and offences against public justice, (k) any other type of offences against the State (I) offences under the Taxing enactments and (m) offences of defamation as defined in Section 499 IPC. The above list was further expanded in *Common Cause, a Registered Society* v. *Union of India and Others*[65] hereinafter referred as *Common Cause (II)*. The offences are (n) matrimonial offences under Indian Penal Code including Section 498-A or under any other law for the time being in force, (o) offences under the Negotiable Instruments Act including offences under Section 138 thereof, (p) offences relating to criminal misappropriation of property of the complainant as well as offences relating to criminal breach of trust under Indian Penal Code or under any other law for the time being in force, (q) offences under Section 304-A of the Indian Penal Code or any offence pertaining to rash and negligent acts which are made punishable under any other law for the time being in force, (r) offences affecting the public health, safety, convenience, decency and morals as listed in Chapter XIV of the Indian Penal Code or such offences under any other law for the time being in force.

The Court further clarified that aforesaid directions are applicable not only to the cases pending on date of judgment but also to cases which may be instituted thereafter. As and when, a particular case would get covered by one or the other direction appropriate orders shall be passed by the concerned court without any delay.

*1.4.3 **Directions to Close Prosecution Evidence:*** In addition to the above said directions the matter was further undertaken by three judge bench of the Supreme Court in *Raj Deo Sharma* v. *State of Bihar,*[66] hereinafter referred as *Raj Deo Sharma (I),* laid down guidelines for closing the prosecution evidence on expiry of period laid down by the Court while dealing with long pendency

[65] (1997) 10 SCC 729
[66] (1998) 7 SCC 507

of criminal cases in the trial courts of the State of Bihar. The Court also referred to the guidelines laid by the Constitutional Bench of the Supreme Court in *A.R. Antulay's case*[67] *supra* along with observations of the Constitutional Bench in the *Kartar Singh* v. *State of Punjab.*[68] The Court in *Raj Deo Sharma (I)* observed that, "it has become necessary to consider the matter at some length and lay down the additional guidelines in view of the large pendency of the cases before the Special Court, Patna for more than two decades by now. There may be similar pendency in other States also."[69] The Court further observed that "the Cr.P.C. is comprehensive enough to enable the – Magistrate to close the prosecution if the prosecution is unable to produce its witnesses inspite of repeated opportunities. Section 309(1) Cr.P.C. support the above view as it enjoins expeditious holding of the proceedings and continuous examination of witnesses from day today. The section also provides for recording reasons for adjourning the case beyond the following day." After these considerations the Court thought to supplement the propositions laid down by the Constitution Bench in *Antulay's* case *supra* with the following directions:

(i) In cases where the trial is for an offence punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail or not, the court shall close the prosecution evidence on completion of a period of two years from the date of recording the plea of the accused on the charges framed whether the prosecution has examined all the witnesses or not, within the said period and the court can proceed to the next step provided by law for the trial of the case.

(ii) In such cases as mentioned above if the accused has been in jail for a period of not less than one half of the maximum period of punishment prescribed for the offence, the trial court shall release the accused on bail forthwith on such conditions as it deems fit.

(iii) If the above offence under trial is punishable with imprisonment for a period exceeding 7 years, whether the accused is in jail or not, the court shall close the prosecution evidence on completion of three years from the date of recording the plea of the accused on the charge framed, whether the prosecution has examined all the witnesses or not within the said period and the court can proceed to the next step provided by law for the trial of the case, unless for very exceptional

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67 *Supra* note 9

68 1994 (3) SCC 569- The concept of speedy trial is read into Article 21 as an essential part of fundamental right to life and liberty guaranteed and preserved under out Constitution. ...In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Cr.P.C.

69 *Supra* note 66 para 14

reasons to be recorded and in the interest of justice the court considers it necessary to grant further time to the prosecution to adduce evidence beyond the aforesaid time limit.

(iv) But if the inability for completing the prosecution within the aforesaid period is attributable to the conduct of the accused in protracting the trial, no court is obliged to close the prosecution evidence within the aforesaid period in any of the cases covered by clauses (i) to (iii).

(v) Where the trial has been stayed by orders of court or by operation of law such time during which the stay was in force shall be excluded from the aforesaid period for closing prosecution evidence.

The Court said that above directions were issued in addition to and without prejudice to the directions issued by the Court in Common *Cause* Cases *(I) and (II).*

The matter was again examined by the Court in *Raj Deo Sharma* v. *The State of Bihar*[70], hereinafter referred as *Raj Deo Sharma (II).* The Court clarified the directions given be the Supreme Court in *Raj Deo Sharma (I.* that it had not fixed an outer time limit for conclusion of all criminal proceedings in a case. Nor did it go counter to the decisions of the Constitution Benches of the Supreme Court in *A.R. Antulay* and *Kartar Singh* cases *supra*; it had only followed the mandate of Article 21. The Court further said that whole idea was to speed up the trial in criminal cases to prevent the prosecution from becoming a persecution of the person arrayed in a criminal trial. No trial can be allowed to prolong indefinitely due to the lethargy of the prosecuting agency or the State machinery and that is the raison d'etre in prescribing the time frame within which prosecution evidence must be closed [71]

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70 AIR 1999 SC 3524

71 There were further clarifications that the discretion of the courts in granting further time (exercisable "for very exceptional reasons to be recorded and in the interest of justice" as for the Direction No. (iii) above can be imposed in respect of Direction No. (i) as well.[71] The Court also added that absence of the presiding officer in a trial court (either on account of physical disability or due to delay in taking over the charge of the court) is a valid cause which disables the prosecution from adducing evidence.[71] The Court further added that if the tenure of the office of a particular person as public prosecutor expires he shall continue to hold office and function as a public prosecutor until his successor takes charge from him. If the office of the public prosecutor falls vacant on account of any other reason, a period of three months shall be excluded from the periods fixed under Directions No. (i) and (ii) for enabling the State Government to appoint a public prosecutor to that office. A further rider was also added that an additional period of one year could be claimed by the prosecution in respect of prosecutions which were pending on the date of judgment of Raj *Deo Sharma (I)* and the court concerned would be free to grant such extension if the court considers it necessary in the interest of administration of criminal justice including the time when the said judgment in *Raj Deo Sharma (I)* was suspended during that proceeding of *Raj Deo Sharma (II).*

Justice Srinivasam who shared the majority view with Justice K.T. Thomas in *Raj Deo Sharma (II)* added that the Court has laid down the guidelines for closing of the prosecution in certain circumstances. There is a difference between fixing the time limit for disposal trial and fixing time limit for the prosecution to complete its evidence. It is also open for the prosecution to place the relevant facts before the court and seek further time for producing its evidence.[72]

One of the judges of the three-judge Bench Justice M.B. Shah gave the minority view in *Raj Deo Sharma - II* that prescribing time limit would be against the decisions rendered by the Constitution Bench of this Court in *A.R. Antulay* and *Kartar Singh* cases *supra* as well as other decisions referred by the Judge. It was held that such time limits are not provided by Criminal Procedure Code or by any other statutory provision. It would have an adverse effect in implementation of criminal law. The reasons for delay have been summarized as, (1) Dilatory proceedings; (2) Absence of effective steps towards radical simplification and streamlining of criminal procedure; (3) multi-tier appeals/revision applications and diversion to disposal of interlocutory matters; (4) Heavy dockets; mounting arrears delayed service of process and (5) Judiciary, starved by executive by neglect of basic necessities and amenities, enabling smooth functioning.

1.5 Disapproval of Time Limits by Another Constitutional Bench

Again another constitutional bench of the Supreme Court in *P. Ramachandra Rao* v. *State of Karnataka*[73] again reviewed the issue of limits prescribed by the Apex Court in *Common Cause* and *Raj Deo* cases *supra*. The Court observed that:

> Prescribing periods of limitation at the end of which the trial court would be obliged to terminate the proceedings and necessarily acquit or discharge the accused, and further, making such directions applicable to all the cases in the present and for the future amounts to legislation, which, in our opinion, cannot be done by judicial directives and within the arena of the judicial law-making power available to constitutional courts, howsoever liberally we may internet Articles 32, 21, 141 and 142 of the Constitution. The dividing line in fine but perceptible. Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature.

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72 *Supra* note 70 Justice Sriniwasan, para 4

73 (2002) 4 SCC 578, See also *State through CBI* v. *Dr. Naryan Waman and Another*, (2002) 7 SCC 6; *State of Rajasthan* v. *Ikbal Hussen*, (2004) 12 SCC 499

> Binding directions can be issued for enforcing the law and appropriate directions may issue, including laying down of time limits or chalking out a calendar for proceedings to follow, to redeem the injustice done or for taking care of rights violated, in a given case or set of cases, depending on facts brought to the notice of court. This is permissible for judiciary to do. But it may not, like legislature, enact a provision akin to or on the lines of Chapter XXXVI of the Code of Criminal Procedure, 1973[74].
>
> The other reason why the bars of limitation enacted in *Common Cause (I), Common Cause (II) and Raj Deo Sharma (II) and Raj Deo Sharma (II)* cannot be sustained is that these decisions though two or three judge Bench decisions run counter to that extent to the dictum of Constitution Bench in *A.R. Antulay's* case and therefore cannot be said to be good law to the extent they are in breach of the doctrine of precedents.

The Supreme Court in *P Ramachandra Rao's* case *supra* concluded that, "It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe can outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in *Common Cause (I), Raj Deo Sharma (I) and Raj Deo Sharma (II)* could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in *Common Cause Case* (I), *Raj Deo Sharma cases* (I) and (II). The Supreme Court in *Sajjan Kumar* v. *Central Bureau of Investigation*[75] also concluded that normally in serious offences prosecution is launched by the state and a court of law has no power to throw away prosecution solely on the ground of delay. The proceedings cannot be quashed merely on the ground of delay. Available material before the court has to be tested in the context of prejudice to the accused only at the trial".[76]

*1.5.1 **Prescribed Time Limits may be Taken as Reminder by the Courts:*** The Supreme Court *in P Ramachandra Rao* case *supra* observed that at the most the periods of time prescribed in those decisions *(Common Cause and Raj Deo* cases*)* can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in *A.R. Antulay's* case and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Hover the Court said such

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74 *Id.*, para 30
75 (2010) 9 SCC 368
76 *Id.*, para 25

time-limits cannot and will not by themselves be treated by any Court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused.

*1.5.2 **Release on Bail due to Delay in Trial*:** The Constitutional Bench *in P. Ramachandra Rao* case *supra* did not interfered with the directions made in *Common Cause and Raj Deo* cases for the reason that those were not subject matter of the reference or the appeals before the constitutional bench. The Court also observed that different consideration arise before the criminal courts while dealing with termination of a trial or proceedings and dealing with right of accused to be enlarged on bail.[77]

*1.5.3 **Competence of the Apex Court to Issue Directions:*** The Apex Court in *P Ramachandra Rao's* case *supra* further concluded that it was deleting the bars of limitation on the twin grounds that it amounts to judicial legislation, which is not permissible, and because they run counter to the doctrine of binding precedents. The larger question of powers of the court to pass orders and issue directions in public interest or in social action litigations, specially by reference to Articles 32, 141; 142 and 144 of the Constitution, was not the subject matter of reference before the Court and that judgment should not be read as an interpretation of those Articles of the Constitution and laying down, defining or limiting the scope of the powers exercisable there under by this Court. Justice Doraiswamy Raju also clarified on the powers of the Apex Court by observing that:

> ...the fact that the founding fathers of our Constitution designed and deliberately, perhaps, did not envisage the imposition of any jurisdiction embargo on this Court, except in Article 363 of the Constitution of India is significant and sufficient enough, in my view, to identify the depth and width or extent of this powers. The other fetters devised or perceived on its exercise of powers or jurisdiction to entertain/deal with a matter were merely self-imposed for one or the other reason assigned therefor and they could not stand in the way of or deter this Court in any manner from rising up to respond in a given situation as and when necessitated and effectively play its role in accommodating the Constitution to changing circumstances and enduring values as a 'Sentinel on the qui vive' to preserve and safeguard the Constitution, protect and enforce the fundamental rights and other constitutional mandates – which constitute the inviolable rights of the people as well as those features, which formed its

[77] Now there is an amendment of the Code of Criminal Procedure, 1973 through an Amendment Act no.25 of 2005 that inserted Section 436A prescribing maximum period when an under trial prisoner can be detained.

> basic structure too and considered to be even beyond the reach of any subsequent constitutional amendment.[78]

It was further made clear that the Supreme Court in *A.R. Antulay's* case *supra* had chosen to decline the request for fixation of any period of time limit for trial of offences not on any total want or lack of jurisdiction in the Court, but for the reason that it was "neither advisable nor practicable to fix any such time limit and that the non-fixation does not ineffectuate the guarantee or right to speedy trial.[79]

1.5.4 Delay as Ground for Termination of Proceedings: Inspite of the fact that there are no prescribed time limits the courts are providing relief to the accused by termination of the proceedings on the ground of delay. The Supreme Court in *Vakil Prasad Singh* v. *State of Bihar*[80] concluded after reference of relevant case law that the right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular class of cases. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration of all the attending circumstances. When the court comes to the conclusion that right to speedy trial of the accused has been infringed, the charges or the conviction as the case may be, may be quashed unless the court feels that having regard to nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time frame for conclusion of trial.[81] Similarly in *Pankaj Kumar* v. *State of Maharashtra and others*[82] that lackadaisical manner of investigation spread over a period of four years and inordinate delay of over eight year in commencement of trial (excluding period when the record of the trial court was in the high Court) was manifestly clear. Therefore, the Supreme Court quashed the proceeding on violation of constitutional right to speedy investigation and trial. The Supreme Court in *Mohd. Hussain @ Julfikar Ali* v. *State (Govt. of NCT) Delhi*[83], found that Appellant before it, a Pakistani national was convicted and awarded to death sentence without proper legal aid at the trial.

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78 *Id.*, para 42

79 *Id.*, para 43

80 (2009) 3 SCC 355, The Supreme Court keeping in view inordinate delay of more than two decades in investigation and trial of the case in hand held that further continuance of criminal proceedings was unwarranted and deserve to be quashed, despite the fact that allegation against him were quite serious.

81 *Id.*, para 15

82 AIR 2008 SC 3077 See also *Moti Lal Saraf* v. *State of Jammu and Kashmir* ,AIR 2007 SC 56; *Rakesh Kumar* v. *State through CBI*, (1986) Supp. SCC 505; *Srinivas Gopal* v. *Union Territory of Arunachal Pradesh* MANU/SC/0581/1988; *T.J. Stephen* v. *Parle Bottling Co (P) Ltd.* (1988) Supp. SCC 458

83 MANU /SC/0012/2012 , Criminal Appeal No. 1991 of 2006 Decided on 11.01. 2012

One of the two judges Justice H. I. Datta ordered for *de novo* trial as per law and directed to conclude trial as expeditiously as possible but within an outer limit of three months.[84] But the other Judge Justice Chandramauli Kr. Parsad observed that right to speedy trial is a fundamental right and a rigid time limit is not countenanced but on the facts of the case before the Court the Judge was of the opinion that after such a distance of time that would be travesty of justice to direct for the Appellant *de novo* trial, as such conviction and sentence of the Appellant were held to be vitiated not on merit but on the ground that his trial was not fair and just.

1.6 Conclusion

On the basis of the foregoing discussion it can be said that it has been settled beyond doubt that right to speedy criminal justice in a fundamental right of the accused implied in Article 21 of the Constitution that requires a procedure to be fair, just and reasonable to deprive a person of life or liberty. Delay in disposal of criminal cases would vitiate such procedure and may result in violation of Article 21. The factors responsible for delay are many and diverse, these include systemic delays and role of accused himself in the delay. Ever since the declaration of right to speedy trial as a fundamental right in 1979 in *Hussainara* cases, the judiciary has consistently acknowledged its status and availability at all stage of criminal justice process *viz.* from arrest to execution of sentence. At the same time problem of delay in disposal of criminal cases is continuously plugging the system.

Delay in disposal of criminal proceedings generally results in prejudice to the accused though in some cases he himself may be responsible for delay. This is acknowledged in the judicial decisions that when the prejudice has resulted to an accused because of delay his right to speedy justice is violated. But the whole situation remains elusive in the criminal justice process, because of difficulty in determining that at what point of time the right to speedy justice is denied to the accused. Therefore, in the absence of legislatively prescribed time limits, the question of fixing time limits for different stages in a criminal case has been a matter for judicial attention in number of decision of the High Courts and the Apex Court. The Patna High Court and the Apex Court in some of decisions laid down certain fixed time limits for the present and the future cases. In view the impact of implementation of the said guidelines on time limits the matter came up before the constitutional benches of the Apex Court twice in 1992 and 2002. In view of the multifaceted causes of delay, fixed time limits for all cases has not been found viable in the prevailing situation. However, the accused has inalienable right to be tried expeditiously as a fundamental right. The courts are to allow the appropriate remedy keeping in

[84] *Id.*, para 21

view all the facts of a given case. The High Courts and Supreme Court are providing relief in the cases those are coming before them. The lower courts are only empowered with the statutory provisions of the Code of Criminal Procedure to regulate the proceedings.

It is a fact that problem of delayed criminal justice is still prevailing inspite of the recognition of the right to speedy criminal justice as a fundamental right of the accused. This only points towards the inefficacy of the present system to cope with the problem. There is no doubt that the Apex Court is the ultimate protector of fundamental rights of the citizens and has power and means to ensure justice in the ever changing situations. Still there has not been a consistent judicial approach to devise means for expeditious disposal of cases, other than recognition of right to speedy criminal justice as a fundamental right. As such, relief is only provided after the occurrence of inordinate delay resulting in prejudice to the accused. This is further subject to consideration of exceptional circumstances / facts of a particular case. Therefore, to give real meaning to the right to speedy justice there is a need for comprehensive speedy trial legislation that should address all procedural and systemic issues alongwith strengthening of investigating and judicial set-up; otherwise cherished right to speedy criminal justice would only remain illusory and vague.

WORKING OF THE *CONSUMER PROTECTION ACT*, 1986 *VIS-À-VIS* MEDICAL NEGLIGENCE : INADEQUACIES AND SUGGESTIONS

Dr. Sushila*

Medical profession is one of the oldest professions of the world and is the most humanitarian one. There is no better service than to serve the suffering, wounded and the sick. Inherent in the concept of any profession is a code of conduct, containing the basic ethics that underline the moral values that govern professional practice and is aimed at upholding its dignity. Medical ethics underpin the values at the heart of the practitioner-client relationship. In the recent times, professionals are developing a tendency to forget that the self-regulation which is at the heart of their profession is a privilege and not a right and a profession obtains this privilege in return for an implicit contract with society to provide good, competent and accountable service to the public. It must always be kept in mind that this is a noble profession and the aim must be to serve humanity, otherwise this dignified profession will lose its true worth.

Medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient. The oldest expression of this basic principle comes from Hippocrates, an early Greek physician, born in 460 BC who came to be known as the 'Father of Medicine' and had devoted his entire life to the advancement of medical science. He formulated a code of conduct in the form of the Hippocratic Oath[1], as he realized that knowledge and skill were not enough for a physician without a code of standards and ideals. He coined an oath of integrity for

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* Assistant Professor of Law, National Law University, Delhi.

1 *Hipocratic Oath*

I swear by Apollo the physician, by Aesculapius, Hygiea and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and my judgment, the following Oath:

To consider dear to me as my parents him who taught me this art; to live in common with him and if necessary to share my goods with him; to look upon his children as my own brothers and teach them this art if they so desire without fee or written promise; to impart to my sons and the sons of the master who taught me and the disciples who have enrolled themselves and have agreed to the rules of the profession, but to these alone, the precepts and the instruction. I will prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will, prescribe a deadly drug, nor give advice which may cause his death. Nor will I give a woman a pessary to procure abortion. But I will preserve the purity of my life and my art. I will not cut for stone, even for patients in whom the disease is manifest; I will leave this operation to be performed by practitioners (specialists in this art). In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction and especially from the pleasures of love with women or with men, be they free or slaves. All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal. If I keep this oath faithfully, may I enjoy my life and practise my I art, respected by all men and in all times; but if I swerve from it or violate it, may the reverse be my lot.

physicians, a code of standards and ideals to which they must swear to adhere in the practice of their profession. This continues till date to be the oath administered to doctors when they join the profession.

Many people argue that the original Hippocratic Oath is inappropriate in a society that has seen drastic socio-economic, political and moral changes, since the time of Hippocrates. Certain parts of the original oath such as teaching the master's sons the secrets of medicine without fees and the promise not to bring a knife to another's body but to leave it to 'practitioners of the craft' have been rendered obsolete as the modernisatin of education has led to the teaching of medical science in institutions of higher learning, and specialisation in medicine has led to physicians who specialize a variety of fields including surgery. Similarly, the legalisation of abortion and physician assisted suicide in certain parts of the world, has made it awkward for some medical practitioners there to carry on in the tradition of the original oath.

This has led to the modification of the oath to something better suited for present times. One of the most widely used versions is *The Declaration of Geneva*[2] which was adopted by the General Assembly of the World Medical Association at Geneva in the year 1948. Written with the medical crimes committed in Nazi Germany in view, it is a "declaration of physicians' dedication to the humanitarian goals of medicine." It is also perhaps the only one to mention treating people equally, without regard as to race, religion, social standing and political affiliations.

In recent times the self-regulatory standards in the profession have shown a decline and this can be attributed to the overwhelming impact of commercialization of the sector. There are reports against doctors of exploitative medical practices, misuse of diagnostic procedures, brokering deals for sale of human organs, etc. It cannot be denied that black sheep have entered the profession and that the profession has been unable to isolate them effectively. The need for external regulation to supplement professional self-regulation is constantly growing. The high costs and investments involved in the delivery of medical care have made it an entrepreneurial activity wherein the professionals look to reaping maximum returns on such investment. Medical practice has always had a place of honour in society; currently the balance between service and business is shifting disturbingly towards business and this calls for improved and effective regulation, whether internal or external. There is need for

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[2] *The Geneva Declaration*
I solemnly pledge myself to the service of humanity. I will give to my teachers the respect and gratitude which is their due. I will practise my profession with conscience and dignity. The health of my patient will be my first consideration. I will respect the secrets which are confided in me. I will maintain by all means in my power the honour and noble traditions of the medical profession. My colleagues will be my brothers and sisters. I will not permit consideration of religion, nationality, race or social standing to intervene between my duty and my patient. I will maintain the utmost respect for human life even under threat. I will not use my medical knowledge contrary to the laws of humanity. I make these promises solemnly, freely and upon my honour.

introspection by doctors individually and collectively. They must rise to the occasion and enforce discipline and high standards in the profession by assuming an active role.

Till recently the patients did not have any effective adjudicative body for getting their grievances redressed. The *Indian Medical Council Act*, 1956 as amended in the year 1964, provides in Section 20A that regulations made by the Council may specify which violations shall constitute misconduct. Professional misconduct so specified can be visited by the punishment of suspension or even deletion from the rolls of the erring doctor. This arrangement does not have the desired deterrent effect because Council members are prone to play soft *vis-à-vis* their conferees. Secondly, the Council was available only at the State Headquarters, in that way hardly accessible to the majority of patients. At any rate the Council has no power to award compensation to the patients for the injury sustained. There are of course provisions in Civil and Criminal Law offering remedies to aggrieved patients. But criminal law was pressed into service only in cases of death and even in that respect prosecution was not always alert. The civil law remedy was available in principle because any sub-court could be approached for getting damages. But the patients have to pay court fees. The trial was long on account of the elaborate rules of procedure and strict principles of evidence applicable before those courts. This involved delay and heavy expenditure, which deterred the beleaguered patients. The resulting position was that the doctors were practically assured of immunity in case of misdeeds. However, it is to be said that their community as a whole behaved much better than other corps.[3]

With the advent of *Consumer Protection Act*, 1986 creating Consumer Disputes Redressal Agencies (CDRAs) there is drastic change. This was immediately resented by the community of doctors who raised their shields and challenged the applicability of the Act to them. The reason, put forth by them was threefold.

The first set of reasons was regarding the interest of the patients. There could be unwillingness on the part of doctors to treat high-risk cases or cases of emergency for a fear of being dragged to the consumer courts in case anything goes wrong. There would definitely be a rise of cost on account of the insurance which the doctors would be compelled to take, moreover over-investigation in order to be on the safe side also involves high costs, which would ultimately be borne by the patients.

The second set of reasons referred to was the nature of the relation between the doctor and the patient. There has ever been a relation of trust and faith between the doctor and the patient in India. The function of the doctor was a noble and service oriented one and not to be equated with that of traders solely aiming at profit motive.

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[3] David Annoussamy, "Medical Profession and the *Consumer Protection Act*", Vol.41, *Journal of Indian Law Institute*, (1999) p.460.

The third set of reasons was regarding the capability of the adjudicative bodies created by the Act to deal with medical cases. There could be no doctor in the adjudicative body and moreover two members out of the three are non-judicial and could constitute a majority whose decision could be erratic on account of their not being either medical or legal experts.

The reasons put forth by the community of doctors though some of them were based on facts could not outweigh the advantages provided by the remedies under the Act. Doctors have not also been able to point out any case of unfair or incongruous decision rendered by the adjudicative agencies under the Act which would have been caused by the ignorance of medical realities.[4]

The *Consumer Protection Act*, 1986 was enacted by the Parliament to provide for better protection of the interests of consumers. The question of applicability of the Consumer Protection, 1986 to the medical services was set at rest by the Supreme Court in *Indian Medical Association* v. *V.P. Shantha.*[5] The Supreme Court after going deeply into the provisions of the *Consumer Protection Act*, 1986 held that the language used by the law makers was wide enough to cover the services rendered by doctors as well.

From the working of the *Consumer Protection Act*, 1986, the following defects/deficiencies are noticed in its working which are discussed below alongwith the suggestions to remedy the same.

1.1 Exclusion of Government Hospitals from the Purview of the *Consumer Protection Act*, 1986

As per the interpretation of the provisions of the *Consumer Protection Act*, 1986 *qua* the patients getting treatment in the government-owned hospitals *vis-à-vis* private hospitals, it is settled[6], that if the 'service' is provided free of cost which means that if the patient goes to the government hospital rendering free service, where the doctor out of sheer negligence, administers wrong treatment, the complaint is not maintainable under the *Consumer Protection Act*, 1986 by the patient or the voluntary consumer association; whereas if the patient goes to a private hospital and gets service for consideration and even if there is slight deficiency in service offered, the complaint under the *Consumer Protection Act*, 1986 is maintainable before the Consumer Forum for compensation/damages for such deficiency in service. The first objection to such a distinction being carved out is that the poor patients who have to go to government hospitals would be deprived of the benefit of the *Consumer Protection Act*, 1986 for getting compensation/damages for deficiency in services offered by the doctor and consequent damages sustained; whereas a rich

4 *Ibid.*
5 AIR 1996 SC 550.
6 *Ibid.*

patient who has taken treatment in a private nursing home after paying money for the treatment can get quick compensation/damages by filing a complaint before the Consumer Forum for the deficiency in service in the treatment. Is this the object of the *Consumer Protection Act*, 1986? The answer to this question would be simply in the negative. Article 14 of the Constitution of India lays down that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India.[7]

Therefore, the classification that if a person takes treatment in the government hospital rendering free service, he cannot maintain the claim for compensation/damages for deficiency in service of the doctor before consumer court under the *Consumer Protection Act*, 1986 while in case he takes the treatment in the private hospital or from private medical practitioner, he can maintain such a claim in the Consumer Forum under the *Consumer Protection Act*, 1986 is hit by Article 14 of the Constitution of India as it is not based on any reasonable classification, especially when the doctors in the government hospitals and those working in the private hospitals or nursing homes are equally qualified and almost getting the same pay and allowances and required to have the same professional skill in handling the patients. Accordingly, it is suggested that this anomaly should be done away with by the parliament at the earliest.

1.2 Dismissal of Complaints due to Absence of Expert Evidence

The role of the expert medical witness is to inform the judge so as to guide him to the correct conclusions. It must be for the judge to guess the weight and usefulness of such assistance as he is given and to reach his own conclusions accordingly. The expert evidence must be adduced to prove the allegation of negligence by the doctor.

It may be pointed out that a large number of complaints alleging medical negligence were dismissed by the consumer fora as complainants could not adduce expert evidence. The basic tenor behind such orders is that the complainant must produce the expert opinion or evidence in support of allegation of medical negligence. If such evidence is not produced, most of the cases are decided against the complainant.

It is common experience that the complainant is not able to discharge his heavy onus as required under the present law and hence the complaints or appeals are dismissed. In spite of the efforts made by the complainant/appellant to produce doctor as a witness, generally the doctors do not appear. A doctor evades deposing as an expert witness before the consumer fora as he is unwilling to depose against his own professional colleagues due to spirit of medical fraternity. In some cases the complainants or appellants are not in a position to bear the cost of TA/DA of such

[7] The *Constitution of India*, 1950, *Article 14* - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

expert doctors. The Consumer Fora have no funds at their disposal to meet such expenses. To cope with the above problem, a panel of expert doctors, both at the State and District levels, may be prepared, who may be summoned by the Fora and their TA/DA and professional fees be paid from the State Funds.

In this connection, it is pertinent to mention here that the Courts are referring to and relying upon the medical literature adduced by the parties in support of their cases. This practice also goes a long way to help the complainants in cases of medical negligence as expert opinion by way of medical literature overcomes considerably the handicap faced by them in obtaining the oral testimonies of the expert witnesses.

1.3 Lack of Representative of Medical Profession in the Composition of the Consumer Fora

The provisions[8] of the *Consumer Protection Act*, 1986 do not provide for inclusion of representatives of medical profession in the composition of consumer fora. It is, therefore, submitted that the *Consumer Protection Act*, 1986 be amended to include the representative of medical profession in the composition of consumer fora so that when a case of medical negligence comes up before the forum, the same can be decided in a professional manner as a medical expert can help in appreciating the expert evidence and medical literature more effectively. This will go a long way in improving the quality of judgments and such a procedure will also inspire confidence of the medical fraternity.

1.4 Complicated Questions of Facts – Consumer Fora not Proper

The Supreme Court in *Indian Medical Association v. V.P. Shantha*[9], held that it is no doubt true that sometimes complicated questions requiring recording of evidence of experts may arise in a complaint about deficiency in service based on the ground of negligence in rendering medical service by a medical practitioner, but this, would not be so in all complaints about deficiency in rendering services by a medical practitioner. There may be cases which do not raise such complicated question and the deficiency in service may be due to obvious fault which can be easily established, such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the outpatient card containing the warning or use of wrong gas during the course of administering anaesthesia or leaving inside a patient swab or other items or operating equipments after surgery. The Supreme Court held in this case that these issues can be speedily disposed of by the procedure that is being followed by the Consumer Disputes Redressal Agencies and there is no reasons why complaint regarding deficiency in service in such cases should not be adjudicated by the agencies under the Act.

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8 the *Consumer Protection Act*, 1986, Ss. 10, 16 and 20.

9 AIR 1996 SC 550.

However, the Supreme Court also observed that in complaints involving complicated issues requiring recording of evidence of experts, the complainant can be asked to approach the civil court for appropriate relief. It further held that section 3 of the Act which prescribes that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, preserves the right of the consumer to approach the civil court for necessary relief[10].

It is submitted that once the jurisdiction has been conferred on an adjudicative body, it has to deal with it, however complicated the matter may be. Merely because a litigant's case involves complicated facts, he/she cannot be deprived of the remedies available under the benevolent provisions of the law.

It is also to be said that the agencies under the Act have been vested all the powers of a civil court for the purpose of enquiring into the matter. Further the agencies presided over by at least by a District Judge would not lack expertise in collecting and analyzing evidence. Of course if the patient prefers to take his matter before a civil court that is altogether a different matter, but a patient cannot knock at several doors for the same cause of actions simultaneously or successively.

Thus a consumer has to approach the civil courts in view of the law laid down by the Supreme Court in cases involving complicated issues and therefore, he has to suffer the expensive and protracted procedure of the civil courts.

1.5 No Guidelines to Assess Compensation

The *Consumer Protection Act*, 1986 leaves the appreciation and determination of the amount of compensation for negligence to the adjudicating agencies. The Act rests content with mandating the forum to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by him due to the negligence of the opposite party. This means that the CDRAs need not compute accurately the loss, it will rather award a certain amount taking into account all the circumstances of the case.

The discretion as given has led to much variation from one forum to another as regards the amount awarded by way of compensation. Of course the amount is bound to vary according to the dimension of the loss. But one fact, which is noticed, is that for the same injury of loss, the amount awarded by way of compensation has varied from Rs.1,000 to Rs.1,00,000.

This defect however has been remedied by the courts by applying the principles of assessment of Law of Tort to the cases under the *Consumer Protection Act*, 1986. However, a statutory formula delineating the factors to be taken into account while awarding compensation by the Consumer Disputes Redressal Agencies will be in

[10] *Supra* note 8, S. 3

order and would bring certainty and uniformity in the orders granting compensation/damages.

1.6 Settlement Through Permanent Lok Adalat

The *Legal Services Authority Act*, 1987 provides for pre-litigation conciliation and settlement through the agency of permanent Lok Adalat in case of public utility services. Section 22A of the Act defines in clause (b) thereof 'public utility service' as, *inter alia*, any service in hospital or dispensary. Section 22B of the Act mandates the establishment of permanent Lok Adalats for exercising jurisdiction in respect of public utility services. In terms of Section 22C of the Act, any party to a dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for the settlement of dispute where the value of property in dispute does not exceed ten lakh rupees. After an application is made under this section, the Permanent Lok Adalat shall conduct conciliation proceedings to assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner. If the parties fail to reach at an agreement on the settlement of the dispute, the Permanent Lok Adalat shall decide the dispute. An award made by Permanent Lok Adalat on merits or in terms of a settlement agreement shall be final and binding on all the parties thereto and on persons claiming under them. The procedure before the Permanent Lok Adalat is cheaper besides being speedier to render justice to the parties in an effective manner.[11]

It is thus suggested that lok adalats should be popularized through public awareness as the same could offer speedier and cheaper justice to the victims of medical negligence.

1.7 Frivolous and Vexatious Complaints before Consumer Disputes Redressal Agencies

Instances are many where complainants indulge in speculative litigation and adventure subjecting the medical professionals to unnecessary harassment. In order to discourage such complaints, the Consumer Disputes Redressal Agencies should invoke Section 26 of the *Consumer Protection Act*, 1986 which mandates that where a complaint instituted before the Consumer Forum is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the Opposite Party such costs, not exceeding ten thousand rupees. Moreover, in certain cases false mediclaim cases are also lodged against insurance companies before the Consumer Fora because a nominal court fee is payable. It is essential that such tendencies are firmly curbed and abuse of *Consumer Protection Act*, 1986 is discouraged by invoking the aforesaid provision.

[11] the *Legal Services Authority Act*, 1987, Ss. 22A, 22B, 22C, 22D and 22E.

1.8 Use of Professional Indemnity Insurance Policy by Doctors

It is advisable to take an insurance cover for professional pursuits. Its advantages are more than one. The medical man gets an insurance cover so that he can practise his profession with more confidence and security. And by taking insurance, one is not only using a safeguard against professional disasters but also making way for easy settlement of claims put up by the ones who have suffered.

1.9 Lack of Provision for Access to Medical Records

The patients in medical negligence cases suffer from a serious handicap in as much as no duty is cast on the hospitals to supply the medical records to the patients pertaining to treatment. In the absence of these documents, it becomes very difficult for the patients to sustain their claims before the consumer fora based on medical negligence.

It is submitted that the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002[12] casts an obligation on the *physicians* to supply the medical records to the patients/ authorized attendant or legal authorities, if any request is made in this behalf.

A similar obligation should also be cast on the hospitals to supply the records. Moreover, it is stated that as far as government hospitals are concerned, the provisions of the *Right to Information Act*, 2005 can also be invoked to ask for the medical records.

1.10 'Defensive Medicine' on the Increase

Defensive medicine is a deviation from what the physician believes is sound practice, and is generally so regarded, induced by a threat of liability. Practice of using defensive medicine by doctors implies ordering every possible laboratory test, x-ray, scan and second opinion by doctors solely to protect themselves from the future claims of negligence.

Defensive medicine consists of adopting procedures which are not for the benefit of the patient but are safeguards against the possibility of the patient making a claim for negligence.[13]

In a study conducted by Pollack[14] through a survey of 4020 practising physicians, of whom 35 percent responded, the practicising physicians were asked whether concern about legal liability had led them to make any of 15 specific practice changes. It was found that over 80 percent doctors checked at least one option. The result indicated

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[12] Regulation 1.3

[13] *White House v. Jordan*, [1980] 1 All ER 650 at p.659.

[14] Pollack, R.S., *Clinical Aspects of Malpractice*, New Jersey : Medical Economics Company, Book Division (1980).

that 48 percent doctors ordered more tests to avoid risks, 44 percent maintained more detailed patients' records, 40 percent used more consultations, 30 percent stopped performing certain procedures, 25 percent accepted new patients more selectively, 24 percent scheduled more follow-up visits, 20 percent used consent forms for more procedures, 18 percent hospitalized more cases, 17 percent stuck closer to recommended drug dosages, 16 percent took more extensive initial histories and 14 percent delegated fewer medical procedures. In this study only 30 percent of the respondents were subjected to threats of suits and only 20 percent had formal claims filed against them and only 10 percent had been in litigation.

In a study conducted through a survey in the year 1984, by American College of Surgeons[15], it has been reported that doctors often stopped performing certain procedures or stopped practising in a particular area of specialization for reasons associated with malpractice litigation. It was found that 40 percent doctors were no longer accepting high risk cases in consultations and 28 percent were not performing certain procedures solely because of risks of malpractice suits.

Gleicner[16], expressed the view that the defensive practices entailed more than just ordering extra tests. He observed that obstetricians in the US were performing caesarean sections at a rate much higher than that anywhere in the world. However, he expressed that clear definition of defensive practice, its nature and reliable estimates of its extent were difficult to find.

Reynolds[17] found that the cost of unnecessary medical practices was difficult to estimate and might vary from 15 percent of the total expenditure for physicians' services to 30 percent of the total cost of healthcare.

Quam et al.[18] in their study reported that 40 percent of physicians admitted ordering additional tests and 27 percent carried out additional procedures as a response to the fear of litigation. They stated that it added 5 percent to the total US healthcare expenditure. The same survey reported an appreciable improvement in record-keeping because of the fear of litigation.

This kind of defensive practice would greatly escalate medical costs and also make medical services inaccessible to many indigent patients. In a country

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15 Professional Liability Survey Report (1984), Chicago : American College of Surgeons, as cited in "Professional Liability : No Fault Solution". *New England Journal of Medicine* (1990), Vol. 332, No. 9, pp. 627-631.

16 Gleicner, N., "Caesarean Section Rates in United States : The Short Term Failure of the National Consensus Development Conference in 1980", *Journal of American Medical Association JAMA* (1984), Vol.2, No.52, pp.3273-6.

17 Reynolds, R.A., J.A. Rizzo and M.L. Gongalez, "The Cost of Medical Professional Liability", *Journal of American Medical Association JAMA* (1987), Vol.252, pp.2776-81.

18 Quam, L., R. Dingwall and P. Fenn, "Medical Malpractice in Perspective : The American Experience", *British Medical Journal*, June 1987, pp.1529-1531.

like India where only 35 percent of the population is able to avail modern medical facilities, 'defensive medicine' becomes 'offensive medicine'.

1.11 Development in Patient Care

1.11.1 Medical Ombudsman

Creation of ombudsman would enable the consumers to have speedy and effective redressal of their complaints. This practice is being followed in the UK. The National Consumer Council (NCC) was set up in UK in 1975[19] with a specified upper limit of compensation. If a consumer decides not to accept the decision he can still take legal action. The service provided by the ombudsman is free of charge and reviewed from time to time.[20] The system of ombudsman have been successfully adopted by a leading English daily in India.[21]

The service of the ombudsman is useful to those consumers who are reluctant to take legal remedy because of the costs or delays of litigations or because of lack of familiarity with the law and the legal system or access to the legal services. Keeping in view that the Indian patients have the same reasons for not seeking redressal under the law, it is desirable that health institutions individually or collectively set up ombudsman to deal with disputes.

Having an ombudsman in India would not only give the hospitals the opportunity to redress the grievances of patients but also improve and maintain public confidence. It could provide health institutions with the valuable information about the causes of dissatisfaction amongst their patients, which enable them to improve their services. By this system, the burden of the legal system can be reduced and many of the complaints can be solved by the ombudsman.

1.11.2 No Fault Compensation Programme

Under 'no fault' compensation programme[22], the objective is to provide a quick, cost-effective and fair means of compensating victims of medical accidents. The 'no-fault' prefix means that the victims do not have to prove in a court of law but to pursue the appropriate board that the damage has resulted from someone else's

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[19] Metha, R.R.S., "Personal Banking Services : UK Examples", *Prajnan*, June 1988, pp.235-239.

[20] Lamont, Linda, "When Things Go Wrong : Patients' Reaction", *ODA News Review (An Overseas Doctors' Association Review)*, Vol.3, Issue No.12 (March-April 1994), p.11.

[21] The Times of India has introduced the system of ombudsman. It appointed Justice P.N. Bhagwati, retired Chief Justice of India, as the ombudsman, the Hindu has also appointed a Reader Editor.

[22] Havard, John, " 'No fault' Compensation for Medical Accident", *Medical Science Law* (1992), Vol. 32, No. 3, p. 187-197.

negligence and has occurred in circumstances which qualify within the conditions laid down by 'no-fault' scheme.

The 'no fault' prefix does not mean that it will no longer be necessary to investigate the reasons for a medical accident or to attribute blame for any blameworthy conduct which may have contributed to the damage caused by the accident. Indeed, it is an essential component of any 'no-fault' scheme for compensating victims of medical accidents that effective procedures should be followed to investigate the circumstances of such accidents including provisions for penalizing doctors having acted carelessly in causing the accident. Under this the affected patients and his relation may be paid compensation without any inquest by the insurance companies from a fund equally contributed by patient, doctor, institution, and the government.[23] According to Havard, one of the consequences of the introduction of a 'no fault' scheme is improvement in the chances of detecting careless and incompetent medical treatment.[24]

As there are some whose injuries are highly significant but do not wish to pursue compensation because of the financial risks involved, would be willing to pursue the case under 'no fault' scheme.

The necessary condition for a claim to qualify under the 'no fault' scheme is whether the injury could have been prevented by an alternative diagnostic or medical procedure or by performing the procedure differently.[25]

Havard[26] felt that the cost and the delays involved in the present law of torts created formidable obstacles and there was little prospects of any radical reform in it. Therefore, a properly constructed 'no-fault' compensation scheme offers a feasible alternative which would be acceptable to most of the victims. In USA such a system has been introduced in the States of Virginia, Florida and New York, Sweden and the Netherland in Europe and New Zealand have been practising this 'no-fault' system for medical injuries since 1990.[27]

It is submitted that 'no fault' compensation programme as has been adopted by the USA, should be adopted in India also to provide a quick, cost-effective and fair means of compensating the victims of medical accidents. In such programme, the compensation is paid by the insurance company from a fund equally contributed by the doctor, health institution, patient and the government. Such a suggestion has also been given by the Supreme Court in cases of failed sterilization operations by

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23 Grover, N.K., "Doctor-Patient Relationship : Today", Karol Bagh, *Medical Society (KBMS) Newsletter*, October 1998.

24 Havard, John, op.cit.

25 *Ibid.*

26 *Ibid.*

27 Indian Medical Association, *Consumer Protection Act vis-à-vis* Medical Profession, Indian Medical Association (IMA's) Policy Document (New Delhi – IMA House) (1993).

devising an appropriate insurance policy or an insurance scheme, which would provide coverage for such claims where a child is born even after a sterilization operation.[28]

1.11.3 Patients' Charter

Citizens' charter is a comprehensive programme to raise quality, increase choice, secure better values and extend accountability. It can be modified to suit changing circumstances. The charter sees the services through the eyes of those who use them. It is a programme to raise the quality, extend accommodation, carry out the services fairly, effectively and courteously. The charter defines the minimum needs of the people which should be fulfilled.[29]

The citizens' charter gives the citizen, published standards and results, choice and competition to improve quality, responsiveness and value for money to get the best possible service within the resources the nation can afford. This gives more power and freedom to the citizen to choose and also ensures that the citizens' voice is heard. The scheme of citizens' charter has been implemented in United Kingdom for all public services including National Health Services.[30] Citizens' charter in health services deals with requirements of the health services to be rendered to people or society.

In India, the National Consumer Council in 1994, made an expert group comprised of representative from consumer groups, the Indian Medical Association, and the Medical Council of India to develop patients' charter which was notified by the Government of India in 1996 by the Ministry of Civil Supplies, Consumer Affairs and Public Distribution.[31] The 'patients' charter' specifies the rights and duties of the patient. The charter can be of immense help to patients if implemented properly.

A recommendation on these lines was also made in Thiruvananthapuram Declaration[32]

1.11.4 Medical Audit

Medical audit is a method of objective evaluation of the quality of medical care. This is conducted by the service providers themselves (in house; the doctors and hospital administrators) supervised by a peer group. It facilitates self-assessment, by

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28 *State of Punjab v. Shiv Ram*, AIR 2005 SC 3280.

29 Singh, Puspa and Hem Chandra, "'Citizens' Charter versus Medical Ethics and Health Legislation", *Journal of the Indian Medical Association, JIMA*, Vol.96, No.9 (September 1998), p. 282.

30 *Ibid.*

31 Grover, N.K., "Doctor-Patient Relationship Today", *KBMS Newsletter*, October 1998.

32 Report of the National Workshop on Accessibility & Affordability of Quality Health Services in India held at Thiruvananthapuram on 10- 12 September 2004, jointly organized by the Indian Medical Association and Consumer Coordination Council.

looking at current medical practices, comparing them with set standards of medical care and suggesting changes for implementation and improvements.[33] It helps detect deficiency in medical services provided, to improve attitude, skill and knowledge of the providers and to ensure collective responsibility and accountability.

Medical audit is designed to measure the care received by patients as judged by established standards and criteria. The purpose is to identify both strengths and weaknesses of policies and procedures, and ultimately to correct deficiency or deviation from accepted standards.[34]

Medical audit involves audit of structure, process, outcome, patient satisfaction and cost. An effective medical adult system for improving health care facilities should have a performance parameter. The medical audit should help improve cost efficiency, consistency and quality of care as per the changing market demand in cases of quality ethics and the consumer laws.

The medical audit encourages doctors and nurses to coordinate their plans for patient care, improve their communication, identify needs for revision of policies and procedures and reassess equipment, personnel and other aspects of patient care.

1.11.5 Quality Control Circle

A quality control circle is a small group of usually eight to ten staff members who work in the same department under the same supervision. They meet voluntarily on a regular basis to identify, analyse and develop solution to problems in their specific work area. Each member must be committed to improve work methods, patient satisfaction, employee satisfaction and reduction in cost and be willing to work. This may require data collection and presentation to peers and management. Some problems can be solved directly by the circles, others can be presented to management with recommended solutions.[35] The circle evaluates the success of its solutions and it is committed to make them work. Documentation of quality control circle's activities becomes part of the overall hospital quality assurance program.

The operative precept in the concept of quality control circles (QCC) is "the man wearing the shoe knows best where it pinches", which means the employee working at the micro level is the one who is most familiar with the problems related to his work area. Therefore, the employees' innate familiarity and their ability are together used to find the solutions of the problems. In this process, congruence is made between the organizational and the individual goal.

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[33] Mathew, N.M., "Quality Health Care : A Mirage or Reality?", *Health for the Millions*, March-April 1987, p. 39.

[34] Purkayastha, P.K., "Liability and Accountability : With Reference to Operating Room Technique", *Health Administrator*, Vol.4, No.2 (December 1993, p.128).

[35] *Ibid.*

Though many organizations in the manufacturing sector have adopted the concept of QCC, the State Bank of India, Bhopal, Quality Circle has been the first instance of successful integration of the philosophy of QCC in a service industry.[36] The quality circles in banks have yielded results that are truly novel. The problems that the staff learnt to live with or had ignored hitherto, were solved. There has been an attitudinal metamorphosis among the members of QCCs. This radical transformation in the work ethics has manifested itself in more responsible behavioural patterns and improved services.

The health institutions can adopt this concept in order to improve the services provided to patients. Services provided by the health institutions cannot improve unless the employees at all levels including the hospital administrators, doctors or other paramedical staff are deeply involved.

1.11.6 Patient-centred Approach

This approach encourages doctors to include patients as 'partners' in health care process. It encourages patients to ask questions, to seek a second opinion, and to share responsibility for medical decision.[37] This approach requires effective doctor-patient communication.

The doctor-patient communication has been described as an integral component of quality medical care.[38] Poor communication on the part of the doctor is a major factor leading to patients' and relatives' dissatisfaction with care.[39] Frank communication with the patients and their relatives avoids many problems. A patient has the right to full information about diagnosis and treatment possibilities. In this approach, the doctor should give the necessary information in a way that is comprehensible to the patient, which is the cornerstone of developing better patient-doctor relationship. This approach requires that information should be formal, honest, decent and truthful.[40]

In this approach, the patient must be well-informed in order to make health care decisions and work intelligently in partnership with the doctor.[41] Effective patient-doctor communication can dispel uncertainty and fear and enhance healing and patient satisfaction.

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36 Sinha, M.K., "Quality Circle in Banks : The Bhopal Circle Experience", *State Bank of India Monthly Review*, December 1986, p. 584.

37 *Consumer Reports*, "How is Your Doctor Treating You?", February 1995, Vol. 60, No. 2, p. 82.

38 World Health Organisation, Doctor-Patient : Interaction and Communication : A Document (Switzerland : Division of Mental Health , WHO) (1993), p. 1.

39 *Ibid.*

40 Navrange, Jayan, "CPA and Doctors", *Imates*, Indian Medical Association, Pune Branch, January 1994, p. 8.

41 American College of Physicians, *Ethics Manual*, 3rd ed. (U.S.A.: American College of Physicians) (1993), p. 9.

In addition, this requires doctor to disclose to patients the information about procedural or judgement errors made in course of care, if such information significantly affects care of the patients.[42]

1.11.7 Lack of Awareness of the Consumer Protection Act, 1986

Even after two decades of its coming into force, the awareness of patients regarding the *Consumer Protection Act*, 1986 is far from satisfactory. The remarks of Balachandran[43] that "consumer activist who happens to glance through the consumer grievances published in the media every week, will be shockingly disturbed to realize that even some of the educated, enlightened and otherwise well-informed consumers are neither aware of their rights as consumer nor of the existence of the Consumer Disputes Redressal Forums in the country", is supported by empirical findings.[44]

A large majority of patients are grossly ignorant about the existence of various consumer grievance redressal agencies under the *Consumer Protection Act*, 1986 therefore, adequate consumer awareness should be created through consumer education. It is suggested that the Central and the State Consumer Protection Councils should take urgent steps towards creating awareness about the provisions of the *Consumer Protection Act*, 1986. The Central Government should make use of their Information and Broadcasting Department for this purpose. The Ministry of Consumer Affairs, Food and Public Distribution through its multi media publicity campaign 'Jago Grahak Jago' has started awareness programmes about the rights of the consumers. Voluntary consumer organizations should also come forward to supplement the government efforts in various ways, such as putting banners, placing of sign boards, distribution of brochures or through programmes in powerful media like television, and pamphlets giving necessary information about the various consumer forums whereby a consumer can file his complaints against deficiency in medical services.

For this purpose, voluntary consumer organizations need strengthening; and it is, therefore, necessary that the government provide adequate resources to registered voluntary consumer associations. In many countries where the consumer movement is at an advanced stage, the government provide financial and other support to consumer associations. The government of India should, therefore, evolve a sound policy of extending adequate financial aid to consumer associations. The Ministry of Civil Supplies, Consumer Affairs and Public Distribution of the Government of

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42 *Ibid.*

43 Balachandran, M.K., "Consumer Awareness in Consumer Protection", *Upbhokta Jagran*, March 1993, p. 7.

44 Renu Sobti, *Medical Services and Consumer Protection in India*, (2001) at p. 280.
A large majority of the patients (79.6 percent) were found to be unaware of the CPA. Also, a large majority of graduates (82.4 percent) and even quite a large number of post-graduates and professionally qualified (42.6 percent) were unaware of the CPA.

The consumer fora should hold Lok Adalats as an alternative mode of settlement, where the issue involved is very simple and easily disposable.

The advantages of Lok Adalat are to cut down delays, make it less expensive and to reduce legal technicalities in resolving cases. In the State of Punjab, the system of settling consumer grievances at the initial stage by using the services of NGOs and the concerned departments is prevalent. It has been reported that only a few Consumer Fora have started Lok Adalats[52].

It is suggested that additional Benches should be constituted in the States to deal with heavy workload. Further, the process of selection of members and presiding officers should be initiated earlier by anticipating the vacancies which might arise in future.

Law, whether civil, criminal or consumer, can only set the outer limit of acceptable conduct, *i.e.*, minimum standards of professional care and skill, while leaving the question of ideal to the profession itself.

[52] Seminar of the Presidents, State Consumer Disputes Redressal Commissions & Secretaries in-charge, Department of Consumer Affairs in the States/UTs held on 29-30 April 2006, organized by National Consumer Disputes Redressal Commission, New Delhi.

RIGHTS OF CONSUMERS *VIS-À-VIS* GENETICALLY MODIFIED FOODS IN INDIA: A REVIEW OF DRACONIAN CLAUSES OF THE BRAI BILL[1], 2009'*

Dr. Ashish Virk**
Dr. Aman A. Cheema***

1.1 Consumer's Right to Information: Perils of Genetic Modified Foods

> The 20th century as been characterized by three developments of great political importance: the growth of democracy, the growth of corporate power, and the growth of corporate propaganda as a means of protecting corporate power against democracy.
>
> **Alex Carey- Australian Social Scientist**

The idea of establishment of Biotechnology Regulatory Authority of India, through BRAI Bill, by the Government of India is the best instance of the growth of corporate propaganda as a means of protecting corporate power against democracy. The bill if passed in the same format will not only lead to food dictatorship of multinationals but will also take away the citizen's right to speech and expression[2] enshrined in Art.19 (1) (a) of the Indian Constitution, will put restrictions on the consumer's right to information[3] about the food being consumed, right to public participation in debates on GM Foods etc. This will result in bringing a shame to the Indian democratic structure; the country which heighten of being of the people, for the people and, by the people. The bill has a number of most disconcerting provisions that cause profound concerns among all because there has always been a demand for a democratic debate before bringing in genetic engineering technology[4]

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1 The Biotechnology Regulatory Authority of India Bill, 2009 is crafted by the Department of Biotechnology, a wing of the Ministry of Science and Technology headed by Prithviraj Chavan, Government of India. The Cabinet on 16th August, 2010, cleared the creation of the BRAI Bill. For more information visit <http://stockmarkettoday.in/2010/08/17>, (20th October, 2010).

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** Assistant Professor of Law, Panjab University Regional Centre, Ludhiana, Punjab.
*** Assistant Professor of Law, Panjab University Regional Centre, Ludhiana, Punjab

2 BRAI Bill, 2009, S. 63.

3 BRAI Bill, 2009, S. 27.

4 Genetic Engineering (GE) usually involves taking genes from one species and inserting them into another in an attempt to transfer a desired trait or character. This is done for plants too in which they are engineered with genes taken from bacteria, viruses, insects, animals or even humans. It is the deliberate, controlled manipulation of the genes in an organism with the intent of making that organism better in some way. This is usually done independently from the natural reproductive process. The product is a so-called genetically modified organism (GMO). To date, most of the effort in genetic engineering has been focused on agriculture, which results

into the arena of food in India. Environmental activists, religious organizations, public interest groups, professional associations and other scientists and government officials have all raised concerns about GM foods, and criticized agri-business for pursuing profit without concern for potential hazards, and the government for failing to exercise adequate regulatory oversight. It seems that everyone has a strong opinion against GM foods, including the Prince of Wales[5]. However, in assessing the benefits and risks involved in the use of modern biotechnology, there are series of issues to be addressed so that informed decisions may be made. The issues include risk assessment and risk management within the effective regulatory legal system. Some of the concerns of the consumers and risks towards GE foods faced by consumers and their opinion on the issue are summed under.

1.1.1 Genetically Modified Foods and International Public Opinion

The way our food is being tinkered around with, necessitates that consumers demand safe and sustainable food. World over, governments have either banned or have ensured adequate choice for their citizens on GM food. The European Union, China, Brazil, Japan, Australia, Russia are some of the examples where the governments have made the labelling of GM foods mandatory. Numerous surveys have highlighted a discrepancy between government attitudes and those of the public. However, people's concerns are frequently dismissed as irrational, and based upon a lack of understanding; yet despite attempts by both government and biotech industry to educate the public, opposition to GE foods has continued to grow[6].

- A poll in the UK by MORI revealed that 58% of the people surveyed were opposed to GE Food, 7% more than in an identical poll held two years before. Hence, the support for GE Foods had fallen from 31% to 22%. 61% said that they did not want to eat GE Food, 73% were concerned that GE crops could interbreed with wild plants and cause genetic pollution, and 77% wanted a ban on growing until the impacts of GE crops have not fully assessed.[7]

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in GM foods. Genetically Modified (GM) or Genetically Engineered (GE) foods are developed and marketed because there is some perceived advantage either to the producer or consumer of these foods. This is meant to translate into a product with a lower price, greater benefit (in terms of durability or nutritional value) or both.

5 A Royal View by the Prince of Wales in BBC Reith Lectures 2000. Ruse Michael, David Castle. 2002. Genetically Modified Foods: Debating Biotechnology. New York: Prometheus Books. pp. 11-15.

6 Coghlan A. June 1993. Gene Industry Fails to Win Hearts and Minds. *New Scientist* (June 1993), pp. 23-30.

7 'Genetic Engineering : A Review of Developments in 1998'. January 1999. *Gene-watch Briefing*. No. 5. p.4.

- A referendum held in Austria resulted in 1.2 million people, a fifth of the electorate, signing a people's petition to ban GE Foods, deliberate releases of GEOs and the patenting of life.[8]

- A Time magazine poll found that 81% of American consumers believe GE Foods should be labelled. 58% of the people surveyed also said that if GE Foods were labelled they would avoid purchasing them.[9]

Hence, the above discussed survey show that people worldwide are concerned with the long term impacts of GE Foods and Agriculture on their health, the entire environment, and the ecosystem. It is because of these reasons that public opinion about the organic farming is supportive and people have started preferring organic foods for consumption. In 1997, organic sales in the United States grew by more than 20% for the 7th year in a row. An industry survey conducted by the biotech company Novartis showed that 54% of Americans would favour organic products if only they had the choice.[10] In UK, demand for organic products, which has accelerated since the debate about GE hit the headlines, is growing so quickly that 75% of the organic produce sold has to be imported. In France too, according to the Minister of Economy and Finances, farmers can hardly keep up with the consumer demand that rose by 25% in 1996 alone.[11] In Denmark, organic foods already claim 15% of the market, and demand is predicted to reach 20% by the year 2000.[12]

On the same hand people are also becoming aware of the fact that the future direction of agricultural research is being dictated by commercial interests. Despite the fact that public demand for organic products is growing so rapidly, the British Government in 1998 spent 54.2 million on research and development into agricultural biotechnology compared to a mere 1.8 million on research on organic farming. Similarly, in USA, a study by Organic Farming Research Foundation found that out of 30,000 federally financed research projects, those determined to organic remained less than 0.1%.[13] Similarly, India has refused to recognise the threat of genetic pollution. Legally, no separation of GM seeds/ foods from non GM foods/ seeds is required. There is no binding law on labelling GM foods, GM contamination is deemed 'natural' under law, and food

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8 European Environment (April 22, 1997). Vol. 498. pp. 8-9.

9 Butler Declan., "Long Term effect of GM Crops Serves up Food for Thought". *Nature* 11 April 1999, Vol. 398. pp. 651-56.

10 Gilman Stephen, 'Why Subsidize the Wrong Kinds of Plants?'. *Letters to the Editor, The New York Times* (22 April 1999), pp. A12-13.

11 Merriman Jane, *Euro Stores Cash in on "Frankenstein Food" Fears*. London: Reuters (20 April 1999), pp. 34-37.

12 Toth J., "No Longer Backyard Business". *Fairfield Weekly Reader*. USA: 607 W. Broadway (11-19 September 1997), pp. 26-49.

13 Butler Declan, 'Long Term effect of GM Crops Serves up Food for Thought'. *Nature* (22 April 1999), Vol. 398. pp. 651-56.

businesses in India are also not required to make any effort to inform their consumers regarding GM foods, the critical areas which will be dealt in the next part of paper.

1.1.2 Effects on Human Health

The human effects of foods grown through GE crop varieties depends on the specific content of the food itself and may have harmful effects on human health. In United States, a quarter of all people report that they have an adverse reaction to one or more foods, most commonly dairy products, eggs, wheat, and nuts; foods which contain proteins, the basic building materials of a cell. For people who are unable to tolerate certain proteins, eating even trace amounts of foods containing them cause allergic reactions, which range from minor discomfort to serious illness and even death. During genetic engineering, genes are transferred from one organism to another and so this gene transfer results in the production of new proteins, which results in allergy. Moreover, most genes being introduced into GE plants come from sources which have never been part of human diet and so there is no way of knowing whether or not the products of these genes will cause allergic reactions. Some people could develop sensitivity to a GE food gradually after being exposed to it over time, whereas others might have an acute allergic reaction after eating a minute amount.[14] Antibiotic resistance is another effect on health. The marker genes used in GE foods confer resistance to antibiotics commonly used in human and veterinary medicine. Some scientists believe that eating GE foods containing these marker genes could encourage 'gut bacteria' to develop antibiotic resistance. In U.K., antibiotic resistance bacteria kill more people every year than road accidents. The main causes suspected for the build-up of resistant bacteria are the overuse of antibiotics in medicine and animal feed.[15]

1.1.3 Risks to the Environment

Among the potential ecological risks is increased weediness. Due to cross-pollination pollen from GM crops spreads to non-GM crops in the nearby fields. This may allow the spread of traits such as herbicide-resistance[16] from GM plants to non-target plants, with the latter potentially developing into

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[14] Sloan A., M. Powers, "A Perspective on Popular Perspectives of Adverse Reactions to Foods", *Journal of Allergy and Clinical Immunology*. 1986, Vol. 78. pp. 127-133.

[15] Halle Martyn, "A Pill to Beat the Hospital Superbug", *Daily Mail*, 30 March 1999, pp. 5-6.

[16] Herbicide Resistance is an inherited ability of a plant to survive and reproduce following exposure to a dose of herbicide that would normally be lethal to the wild life. In a plant, resistance may occur naturally due to selection or it may be induced to such techniques such as genetic engineering. For more information, Prather Timothy's Herbicide Resistance: Definition and Management Strategies, <http://anrcatalog.ucdavis.edu/pdf/8012.pdf>, (30 November, 2009).

weeds. A number of conservation agencies, such as the Royal Society for the Protection of Birds and English Nature in UK, have warned about the damage to wildlife that could occur if large area of land is sprayed with broad spectrum herbicides such as Roundup. They fear that the increased use of these herbicides will kill the weeds which support the insects and produce the seeds fed on by birds. This could be the final blow for such bird species as the skylark, corn bunting and linnet, already in decline due to industralised farming practices.[17]

Insect- resistant crops are another gift of biotechnology. BT (Bacillus Thuringiensis) is a soil bacterium which produces a toxin. The experiments by New York University researchers have found that active forms of BT, like those found in some types of transgenic crops, do not disappear when added to soil, but instead become rapidly bound to soil particles. The accumulations of these toxins, which could be released into the soil as farmers incorporate plant material into the ground after harvest, could represent a serious risk to soil ecosystems. An experiment at the Scottish Crop Research Institute proved that potatoes that had been engineered to be resistant to insect pests could also harm beneficial insects which would further disturb the food chain.[18]

As of today, there is no single genetically modified food crop which is commercially cultivated (mostly performed for research purposes), and so the threat of contamination is looming at large. Once a GM crop is introduced in the environment, even if it is in field trials, it has the capacity to multiply and spread uncontrollably. Controlling it is impossible, and eventually the entire crop species can become genetically modified. Contamination from GM crops is perhaps the biggest threat as far as biodiversity and thus food security are concerned. In India this risk also has additional dimensions as field trials are hardly monitored and there is little compliance to the regulations laid out to prevent contamination. There are enough evidences to these violations and it has been documented every year, across the country. The existing regulatory mechanism in India has not been able to stop the uncontrolled illegal spread of GMO's in the food chain, a fact that has been acknowledged by the Genetic Engineering Approval Authority itself.[19] The newly drafted bill on the area will increase the problems of Indian consumers instead of addressing them. Therefore, the Indian consumers have started questioning GE foods and want genuine legal responses to their queries.

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[17] Anderson Luke, *Genetic Engineering, Food, and Our Environment.* Vermont: Chelsea Green Publishing Company (2000), at pp. 23-27.

[18] *Id.*, at pp. 27-29.

[19] Greenpeace, "Safe Food Guide: A Consumer's Guide to GM Free Food". For more information visit, < http://www.scribd.com/doc/19598324/Safe-Food-Guide>, (13 December 2009).

1.2 Law on Genetically Modified Foods: A Critical Review

'It took us 60 years to realize that DDT might have estrogenic activities and affect humans, but we are now being asked to believe that everything is OK with GE Foods because we haven't seen any dead bodies yet.' **Suzanne Wuerthele (Scientist)**

In India, there has not been a particular law could regulate biotechnology in the food and farming sector. Department of Biotechnology (DBT) constituted under the Ministry of Science and Technology is the nodal agency for its policy, promotion, research and development, international cooperation and manufacturing activities; together with DBT, Genetic Engineering and Approval Committee (GEAC) constituted under Ministry of Environment and Forests (MoEF) is the leading regulatory body in the area of Biotechnology in India. Several committees have also been constituted under the above mentioned ministries to regulate the activities which involve handling, manufacturing, storing, testing, and release of genetic modified materials in the country. These committees have statutory authority. Most of the members of these committees are from the scientific community and staff of DBT and MoEF. The most important committees are: The Institutional Bio-safety Committees (IBSC), responsible for the local implementation of guidelines, Review Committee on Genetic Manipulations (RCGM) responsible for issuing permits; GEAC responsible for monitoring the large scale and commercial use of transgenic materials. Hence, the Biotechnology industry in India is not governed by single law but various enactments[20] depending upon their relevance/applicability on case to case basis. As, India does not have a separate statute to govern the regulation of GMOs in farming and food systems the entire sector is only regulated by executive orders and rules under the acts which can be easily changeable and altered by the regulators. Adding fuel to fire is the simultaneous implementation of *Food Safety and Standards Act*, 2006 and *Prevention of Food Adulteration Act*, 1954.[21]

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[20] the *Environment Protection Act*, 1986; EXIM Policy; *Foreign Exchange Management Act*, 1999; Laws pertaining to Intellectual Property Rights; Rules for the Manufacture, Use/Import/Export and Storage of Hazardous Micro Organisms/Genetically Engineered Organisms or Cells, 1989 notified by Ministry of Environment & Forests on 5 December 1989 under *Environment and Protection Act*, 1986; Revised Recombinant DNA Safety Guidelines; Guidelines for Research in Transgenic Plants & Guidelines for Toxity and Allergenicity Evaluation of Transgenic Seeds, Plants and Plant Parts, 1998; National Seed Policy, 2002; *Seeds Act*, 1966; The Plants, Fruits and Seeds [Regulation of import in India] Order 1989 issued under the *Destructive Insects and Pests Act*, 1914; Guidelines for Generating Preclinical and Clinical Data for DNA Therapeutics, 1999; *Drugs & Cosmetic Act*, 1940 along with Drugs and Cosmetic Rules; Drug Policy, 2002; *Biological Diversity Act*.

[21] The Parliament of India enacted a new law in 2006 on food and its regulation, The *Food Safety and Standards Act*, 2006, to be administered by the Ministry of Health and Family Welfare, Department of Health and Family Welfare instead of the Ministry of Food Processing Industries. (S.O.1757(E).-Food Safety and Standard (Removal of Difficulties) Order, 2007, Published in

Hence, due to the legal lacunas this sector remains neglected; however, the Parliament of India has drafted a separate authority through the bill for this area, BRAI Bill, 2009, it has already been criticized by many sections of society. The next part of the paper will critically access the bill.

1.3 Critical Assessment of BRAI Bill, 2009

The Biotechnology Regulatory Authority of India Bill, 2009 is an ominous legislation which aims at the formation of Biotechnology Regulatory Authority of India. It has been drafted by Department of Biotechnology of the Ministry of Science and Technology, which in itself creates a doubt about it being bias as the department is formulated to promote biotechnology as the universal remedy for all problems. The bill aims to establish an autocratic authority which will completely strip the citizens of their right to participate in making the decisions on what they grow and eat through an undemocratic, secretive system that can not be challenged under the laws of the country. The lack of a proper statute and the absence of a credible regulatory regime is something which is the concern of all, more so when the country has already witnessed the debate generated around Bt.

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the Gazette of India (extraordinary) Part-II, section 3, sub-section (ii) vide S.O. 1757(E), dated, 15thOctober, 2007.) The objective of the Act 'is to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto'. The new law aimed to replace the acts and orders relating to various food sectors in country and to be administered and monitored by Food Safety and Standard Authority of India. (The *Prevention of Food Adulteration Act*, 1954 (37 of 1954), The Fruit Products Order, 1955. The Meat Food Products Order, 1973. The Vegetable Oil Products (Control) Order, 1947. The Edible Oil Packaging (Regulation) Order, 1998. The Solvent Extracted Oil, De oiled Meal, and Edible Flour (Control) Order, 1967. The Milk and Milk Products Order, 1992. Any Other Order Issued under the *Essential Commodities Act*, 1955 (10 of 1955) relating to food.) Under the implementation of Section 97 of FSSA, 2006, the *Prevention of Food Adulteration Act*, 1954, (PFAA) needs to be repealed; however, the notification to this effect has not been issued by the government yet. Under such circumstances the PFAA, 1954, is still into practice and implemented, though in pursuance to Section 90 of FSSA, 2006, all work and subjects of PFA Division along with the entire staff has been transferred from Directorate General of Health Services, Ministry of Health and Family Welfare to Food Safety and Standards Authority of India. This all has led to confusion in the actual working of the food departments, and serious issues relating to food sector is under neglect. (A Circular issued for Implementation of FSSA, 2006 and transfer of PFA Work to Food Authority by Dr. Dhir Singh, Assistant Director General (PFA), dated 12 February, 2009. For more information visit official website of Ministry of Health and Family Welfare,<http://www.mohfw.nic.in/Implementation%20of%20FSSA%20and%20transfer%20of%20the%20PFA%20work%20to%20Food%20Authority.pdf>, (1 December 2009). The government needs to clear this confusion immediately by officially repealing PFAA, 1954, and notifying it in the official gazette; so as to save the food sector of India from exploitive objectives of international cooperates.

Cotton[22] and Bt. Brinjal[23]. Some of the important concerns which had cropped up since the bill has been formulated are critically discussed below:

- ***Section 2***[24] of the bill clearly violates the federal structure of our country which is an essential feature of the Indian Constitution. Through this section the Union government will take full control over agriculture which is basically an exclusive State subject under List II of the 7th Schedule of the Constitution.[25] The bill proposes to override all laws made by the State Government and will gain exclusive control over item 14[26] of the State list. The State governments restricted decision making powers through State Biotechnology Regulatory Advisory Committees is a setup which is completely opposite to the present setup under GEAC where final decisions on any GE crop lies on State governments. Moreover, with this kind of working open air field trials cannot be observed, challenged by the State governments.

- The bill under ***Section 11(1)*** states the establishment of a three member committee consisting of scientists only. This regulator body will give

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22 In July 2009, the authority clearly indicated in its 95th meeting on 8 July 2009 that it so far has not been able to control the contamination of illegal *Bt-cotton* that has taken place in several states across the country for over two years. In the Warangal district of Andhra Pradesh, India, more than 70 Indian shepherds report that 25 percent of their herds died within 5-7 days of continuous grazing on the leaves and pods of harvested Bt cotton plants. The shepherds noticed that the sheep became dull or depressed two to three days after grazing on the plants. They developed 'reddish and erosive' lesions in the mouth, became bloated, had episodes of blackish diarrhea, and sometimes had red-colored urine. Post-mortem examinations of the animals revealed the presence of black patches in the small intestines, enlarged bile ducts, discolored livers, and the accumulation of pericardial fluid. Investigators suspect that the deaths were likely due to the Bt toxin in the leaves and pods of the Bt cotton plants. Researchers from the Centre for Sustainable Agriculture and the group Anthra later submit a report on the sheep deaths to India's GEAC, but the government agency dismisses the reports as 'exaggerated.' For more information visit, <http://www.historycommons.org/entity.jsp?entity=genetic_engineering_approval_committee_1>, (12 December 2009).

23 Various references are made towards doubts raised as to reliability to the tests relating to human safety of *Bt-Brinjal* since these tests were carried out by the applicants themselves and not by the independent laboratory. The recent decision (9 February 2010) of MOEF towards temporary suspension of commercialization of Bt-Brinjal for public consideration is a positive step. The decision of public consultations on the basis of precautionary principle, enhances public policy decision on the regulation of large scale utilization of technology that bear an environmental and public health risk; however, this decision relates to Bt-Brinjal alone, so precautionary principle needs to be legalized so that it can be compulsorily applied to all GE crops and foods. Chowdhury Nupur, Nidhi Srivastava. 10-16 April 2010. 'Decision on Bt- Brinjal: Legal Issues.' *Economic and Political Weekly.* Vol. XLV No. 15. pp. 18-21, 28.

24 BRAI Bill, 2009, S. 2 - It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of organisms, products and processes of modern biotechnology industry.

25 the *Constitution of India*, Article 246

26 Item14: Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

clearance to all genetically modified commercial applications. Hence, the committee formulated under this bill will not be a regulatory body but merely an approval agency. Moreover, the body denies the representation of farmers, consumers, and civil society at large even though they will be affected directly by the GMOs, GM crops and GM foods.

- ***Section 27*** read with ***Section 3(h)***[27] of the bill put restrictions on the consumer's right to information regarding the consumption of food. The legislation has brought in clauses on retaining confidential commercial information instead of expressly having clauses on information disclosure and public scrutiny before final decision making. Hence, these sections of the bill will super cede the *Right to Information Act*, 2005 as the PIO will have no power to scrutinize the questions raised by the applicants regarding the marketing and consumption of GM foods.

- ***Section 63***[28] of the bill is the most draconian clause of the entire bill. It takes away the individual's fundamental right to speech and expression. The clause also puts restrictions on the media for expressing their opinion about the safety of GM foods for the consumers as 'media will manifest whatever is thought of by man.'[29] The provision is also against the spirit of precautionary principle[30] which should be the cornerstone of the biotechnology law and policy in India. The law should be very

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27 *Supra* note 24, S. 27: 1) In case an application to be submitted under sub-section (1) of Section 24 or sub-section (1) of Section 26 require the disclosure of confidential commercial information, such information shall, notwithstanding anything contained in the *Right to Information Act*, 2005, be retained as confidential by the Authority and not be disclosed to any other party. 2) If the authority is satisfied that the public interest out-weights the disclosure of confidential commercial information or such disclosure shall not harm to any person, it may refuse to retain that the information as confidential commercial information. 3(h) Confidential Commercial Information mean a trade secret or any other information which has a commercial or other value which would be, or could reasonably be expected to be, destroyed or diminished if such information was disclosed; or such other information which relates to lawful commercial or financial affairs of a person, organization or undertaking dealing with organisms or products specified under Part I or Part II or Part III of Schedule I which, if disclosed, could adversely affect such person, organization or undertaking.

28 *Id.*, S. 63 - Whosoever, without any evidence or scientific record misleads the public about the safety of the organisms and products specified in Part I or Part II or Part III of the Schedule I, shall be punished with imprisonment for a term which shall not be less than six months but which may extend to one year and with fine, which may extend to two lakh rupees or with both.

29 Justice A.N. Ray in Bennett Coleman & Co. & Others v. UOI & Others 1973 AIR 106; 1973 SCR (2) 757.

30 United Nations Convention on Biological Diversity, 1992, Article 1: Precautionary Principle ensures the adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on trans-boundary movements.

careful because even if there is no scientific consensus on the harm ensued; evidence of potential harm is enough to stop GM crops from being released in to the environment and GM foods being consumed by the consumers. Hence, the said provision is constitutional and if passed can certainly make a mark for food colonization or food dictatorship in the country.

- Through *Section 81*[31] of the bill various insertions and amendments in the already enacted legislations will be made to implement the provisions of the bill. Section 37-A in the *Drugs and Cosmetics Act*, 1940[32] will be inserted and Section 13 of the *Food Safety and Standards Act*, 2006 will be amended by omitting sub-clause 3(c) of the section.[33] These insertions and amendments will not only curtail power regarding GMOs from the existing bodies like Food Safety and Standards Authority of India under the Ministry of Health, but will also question the consumer's right to safe and healthy food under Article 21[34] of the Indian Constitution.

- The provisions of the bill violate the international principle of public consent enshrined in the Cartagena Protocol[35] to which India is a signatory. The proposed legislation has no clauses on public participation.

- The establishment of the Appellate Tribunal is other weak clause in the proposed legislation. The provisions give exclusive jurisdiction to the

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31 *Supra* note 27, S. 81 - Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

32 S. 37-A - Nothing contained in this section shall apply to the genetically modified or engineered organisms or any matter or thing connected with it to which are covered under the *Biotechnology Regulatory Authority of India Act*, 2009.

33 the *Food Safety and Standards Act*, 2006, S. 13 (3) - Without prejudice to the provisions of sub-section (1), the Food Authority may establish as many Scientific Panels as it considers necessary in addition to the Panels on: (c) genetically modified organisms and foods;

34 P.U.C.L. v. UOI & Others, Writ Petition No. 196 of 2001.

35 Public Awareness and Participation-Cartagena Protocol, Article 23: 1. The Parties shall:(a) Promote and facilitate public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking also into account risks to human health. In doing so, the Parties shall cooperate, as appropriate, with other States and international bodies; (b) Endeavour to ensure that public awareness and education encompass access to information on living modified organisms identified in accordance with this Protocol that may be imported. 2. The Parties shall, in accordance with their respective laws and regulations, consult the public in the decision-making process regarding living modified organisms and shall make the results of such decisions available to the public, while respecting confidential information in accordance with Article 21. 3. Each Party shall endeavour to inform its public about the means of public access to the Bio-safety Clearing-House.

tribunal to hear arguments on the issues concerning biotechnology. If anyone wants to appeal against the decisions of this tribunal the only option left is the apex country of the country.

- The present bill neglects basic areas of biotechnology such as nano-biotechnology, organ transplantation, assisted reproductive technologies etc. and is confined only to genetically modified organisms (GMOs), even though the ambit of term 'biotechnology' is quite wide and involves all other above mentioned areas as well.

- The authority to be established under the bill raises doubt about the already existing committees, for the regulation of GMOs in India, that are Review Committee on Genetic Manipulation (RCGM) of the Department of Biotechnology and the Genetic Engineering Approval Committee (GEAC) of the Ministry of Environment and Forests.

1.4 Conclusion and Suggestions

'The world's 'Most Hated Corporation' - award winner Monsanto is not going to give up that easily. They have their ways. They want it by hook or by crook and they are quite good at it.' **Umendra Dutt, GM-Free & Safe Foods, Punjab**

The one-gene-one-trait concept, the very basis of gene technology, is fundamentally wrong which has been proved by the US National Human Genome Research Institute. An exhaustive four year effort by the 35 groups of scientists from all over the world has resulted in the conclusion that it has proven beyond any doubt that the genes work in the different way than believed when gene technology was conceived in 1973. The genes work in networks where the effect of every gene is decided by the interaction with many other genes as well with its environment. This research shatters the very basis of every risk assessment of all kinds of commercial biotechnology products including GM foods.[36] Therefore, the country needs to prevent GM foods, if it cannot completely eliminate, before India faces a catastrophe like The Showa Denko Tryptophan Disaster[37]- an example of fatal substantial

[36] New Finding Challenge Established Views on Human Genome, National Human Research Institute, US Department of Health and Human Services, 2007. For more information visit <http://www.genome.gov/25521554>, (20 November 2010).

[37] 37 persons died and 1500 were permanently disabled in a disease called Eosinophilia Myalgia Syndrome (EMS) caused by some extremely poisonous substance present in a tryptophan food supplement, which was produced by GE bacteria at the Japanese firm Showa Denko. It was so aggressive that it damaged several organ systems including heart, lungs, muscles, joints, liver, skin and nervous system. No cure for the chronic sufferers has been found since the disaster in late 1989. William C. Buss, Julie Stepanek et. al., "EBT, A Tryptophan Contaminant Associated with Eosinophilia Myalgia Syndrome, is Incorporated into Proteins during Translation as an Amino Acid Analog", *Autoimmunity*, Vol. 25 Issue 1, September 1996, pp. 33-45.

equivalence.[38] Hence, we need to make strict laws to label and regulate GM foods available in Indian market to protect not only environment and agriculture from depleting but also to protect the consumer's right to safe food and healthy life enshrined under Article 21 of the Indian Constitution. Below are some of the suggestions which are recommended by the researchers in the present area, especially in the BRAI Bill.

- Marketing of GM foods should be permitted only if the product is adequately and clearly labelled, mentioning the contents of the foods as it will protect the consumer's right to information regarding the food being consumed. The *Food Safety and Standards Act*, 2006, imposes the duty on the scientific panels to constitute a team of experts which could work to frame labelling laws for such kinds of foods[39], though no initiative has been taken by the conserved authorities till now. GM foods should be sold with the label, so a consumer will know and can decide accordingly, his preference to eat traditional food or GM food. Every consumer has a right to choose safe food and avoid GM food for various reasons, primarily health concerns, ethics, and environmental sustainability. Hence, it should be the legal responsibility of food

[38] Recognizing that the development of GM Foods was progressing rapidly, the WHO convened an expert consultation in 1990 on the 'Assessment of Biotechnology in Food Production and Processing as Related to Food Safety.' The consultation recommended that more structured approach towards safety assessment for GE foods should be developed. It was further refined from time to time through expert consultation meetings held in 1993, and then in Rome in 1996. It finally led to the development of concept of 'Substantial Equivalence.' The concept requires that measures of safety assessment of foods should show that a genetically modified variety is as safe as its traditional counterparts, through a consideration of intended and untended effects. The comparison should result in one of the three conclusions. The GMO or the food product obtained from it is substantially equivalent to a conventional counterpart. In such cases no further safety assessment is required; The GMO or the food product obtained from it is substantially equivalent to a conventional counterpart except for a few clearly defined differences. In these cases the safety implications of the differences need to be fully assessed; The GMO or the food product obtained from it is not substantially equivalent to a conventional counterpart, either because the differences cannot be defined or because there is no existing counterpart to compare it with. In such cases it does not mean that the food is unsafe; however, there would be a need for extensive data to be provided to demonstrate its safety. The concept of 'Substantial Equivalence' has been legally integrated into safety assessment procedures and are used by regulatory authorities in many countries like EU, Australia, Canada, United States etc. In India, regulatory body called, GEAC, is an inter-ministerial committee under the Ministry of Environmental and Forests, which is the final nodal agency for the approval of any import, export, transport, manufacture, process, use or sale of any genetically engineered organisms/substances or cells. The enforcement of the regulations framed under the committee to prevent the accidental release of GM crops during field trials is almost absent. This has led to several mishaps in the last few years. In a similar manner, the imports of GM grains and processed foods have also been poorly monitored. Tomlinson Nick. 2002. The *Concept of Substantial Equivalence*. New York: Prometheus Books. pp. 201-06.

[39] the *Food Safety and Standards Act*, 2006, S. 13(3) (g).

businesses to be aware of this right of the consumer, and act towards providing this choice to the consumers.

- The BRAI should be technically competent body as it will be the sole regulatory body on biotechnology in India; as the bill is silent on the composition, qualification and expertise required by its members as well as the Chairman. Hence, it is recommended that persons having expertise and knowledge in the field of Bio-Safety Assessment, Environment Assessment, and Environmental Impact Assessment should also staff this authority. Moreover the Chairman of the authority should be of high competence and experience in the regulation of GM crops and GM foods.

- There should be effective mechanism of checks and balances of the functioning of authority through various other boards and councils like Inter-Ministerial Advisory Board and the National Biotechnology Advisory Council. The authority should work for the benefit of the farmers and consumers and should not become a tool in the hands of corporations like Monsanto. The present structure of the authority creates a doubt in the minds of many that the authority will ignore the interests of all other sectors and will work for the development of biotechnology only. This apprehension should be put to rest by introducing effective ways to curb the powers of the authority.

- It should be made legally compulsory for the authority to submit an annual report in the Parliament regarding the decisions taken by it on the GM products like crops, foods etc and its impact on the society.

- The law should have adequate provisions for post market surveillance and monitoring of GM products especially in the food sector so as to prevent the disasters like The Showa Denko Tryptophan Disaster in India; moreover, if unfortunately any disaster occurs provisions of the act should provide for speedy remedy to the victims through monetary compensation and other rehabilitative avenues.

- Statutory National Bioethics Commission should be established by the government. This will enhance the participatory process in the country and will also address to the needs of small farmers, agriculture and most importantly Indian consumers.

- The *Right to Information Act*, 2005, is been considered as one of the best tools for ensuring transparency in governance. It has immensely helped the citizen to exercise his/her democratic rights to know about how our governments takes decisions and has been empowering the public on various issues. A Central Information Commission order has even been made mandatory for the over all bio safety. It also permits the disclosure

of the data to the public presented by the company to the regulatory authority, even when a GE crop is in the field at a trial stage. This order is the result of a long appeal by the Greenpeace, an NGO working for the safety of food for the consumers in India. After a long struggle a consumer can now review the entire data on the GE crops and enables participation on the civil society in this critical area. Hence, Section 27 of the BRAI Bill should be deleted because it not only restricts the consumer's right to knowledge about the food being consumed by him but also finishes the basic purpose of *Right to Information Act*, 2005.

- The law should not only access the environmental and ecological impact of GM crops but should have statutory improved food safety tests and mechanisms for long term monitoring of human health after the release of GM foods in the markets and consumed by the consumers.

- Article 23 of the Cartagena Protocol which requires public consultation and participation in decision making process should be addressed by the bill. This can be effectively done by incorporating the views and role of various NGOs, scientific bodies, farmer organizations, consumer firms etc. This will not only increase public participation but will also enhance the confidence of people on the authority.

- As required by the Article 26 of Bio-safety Protocol, the law should address the socio-economic impact of biotechnology on the traditional farming, income of the farmers, impact on traditional crops and its varieties, employment issues, food security of the country, trade and marketing of GM crops and foods, cultural practices and community well-being at large. It should look into the problems that can be faced by these indigenous people after GM crops and foods are introduced in the country.

- India should make a comparative study of various other gene technology/biotechnology international laws on the current area before passing of this bill such as, *Finland's Gene Technology Act*, 1995, *Norway's Gene Technology Act*, 1993, Austria's and Swiss Gene Technology Laws, as these are some of the legislations which have provided a domestic liabilities and redress regimes for the adverse effects of GM foods on the consumers.

THE OBLIGATION OF NON-PARTY STATES TO THE INTERNATIONAL CRIMINAL COURT

Dr. Sukhwinder Kaur Virk*

1.1 Introduction

The International Criminal Court (ICC) was created by an international treaty i.e. the Rome Statute[1] which was adopted on 17 July 1998 and entered into force on 1 July 2002. The adoption of the Rome Statue has made a valuable contribution in the development of international Criminal Law and international human rights law. The ICC is the first permanent, independent treaty based judicial institution to put an end impunity for the perpetrators of the most serious crimes concerning the international community. The Preamble of the Rome Statute of the ICC affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[2] The Preamble also emphasizes that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction."[3] The Rome Statute recognizes the importance of cooperation of states for the effective operation of the ICC. Since the adoption of the Rome Statute in 1998, one hundred and sixteen States[4] have ratified the Statute. Nearly all of South America and European Countries and about half of the countries of Africa have ratified the Rome Statute. It is significant progress of the ICC to achieve its aim. The ICC is not intended to punish any state but only individuals, government officials[5] and military commanders[6] who misuse the power and commit atrocities towards human beings. The Court has jurisdiction over persons for the commission of genocide, war crimes, crimes against humanity and crime of aggression.[7] The Rome Statute has individualized the international criminal responsibility.[8] Though the Court does not have universal jurisdiction but it may exercise jurisdiction if the accused is a national of State Party[9] and the crime takes place on the territory of the State Party.[10] If a State which is not a party to the Statute,

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* Guest Faculty, Rajiv Gandhi National University of Law, Punjab Patiala.

1 The Rome Statute of the International Criminal Court, see UNDOC. CONF. 183/9, 17 July, 1998.

2 The Rome Statute, Preamble, Para 4.

3 *Id.*, Para 10.

4 'Coalition for the International Criminal Court' available at <www.iccnow.org./documents/ RATIFICATIONS by Region-11-July-2011-eng,pdf>

5 *Supra* note 2, Article 27.

6 *Id.*, Article 28.

7 *Supra* note 2, Article 5.

8 *Id.*, Article 25.

9 *Id.*, Article 12 (2) (b).

10 *Id.*, Article 12 (2) (a).

accepts the jurisdiction of the Court then Court can also exercise its jurisdiction.[11] Apart from this, if a situation is referred to the Court by the Security Council[12] irrespective of the nationality of the accused or the location of the crime, the Court can also exercise its jurisdiction. Article 13(b) of the Rome Statute clearly provides that "the court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute-if a situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." The Rome Statute gives priority to the national judicial system. Paragraph 10 of the Preamble and Article 1 of the Rome Statute clearly states that – "International Criminal Court shall be complementary to national criminal jurisdiction." The court can exercise its jurisdiction only when national systems are unwilling and unable to investigate and prosecute the serious crimes.

Once the ICC was established, the attention and eyes of the international community got focussed on practical issues viz. whether it would play an effective role for giving criminal justice or not. The effectiveness of the Court depends upon the cooperation of the international community. The performance of functions not only depends upon the adequate financial budget and staff, but also on States co-operation.

The ICC needs co-operation of States Parties as well as States that are not parties[13] to the Statute. The Court needs the cooperation of large and small States because it has neither police force nor armed forces of its own under its jurisdiction to administer its rules and implement its decisions. This Article mainly focuses on the obligation of non-party States to co-operate with the ICC.

1.2 Historical Background

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) created by a decision of the UN Security Council on the basis of Chapter VII of the UN Charter.[14] A general obligation to cooperate with the Tribunals (ICTY and ICTR) is stated in the Security Council Resolutions.[15] Article 28 of the ICTY Statute stipulates the general duty on

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[11] *Id.*, Article 12 (3).

[12] *Id.*, Article 13(b).

[13] Generally, the states not parties to the Statute are called non party states hence the term non-party states has been frequently used in this Article.

[14] UN Security Council Resolution 827 (1993) of 25 May 1993 and 925 (1994) of 8 November 1994.

[15] Security Council Resolution 827 (1993) Paragraph 4 and of the Security Council Resolution 955 (1994) para 2 stated as follows: 'The security council decides that all states shall cooperate fully with the International Tribunal and its organs in accordance with the present Resolution and the Statute of the International Tribunal and that consequently all states shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the statute including the obligation of states to comply with requests for assistance or orders issued by a Trail Chamber under Article 29 and Article 28 of the Statute.

States to co-operate and obligation for legal assistance. Article 28 of the ICTR contains identical language.[16]

Another important basis for cooperation of States with the ICTY and ICTR is that two Additional Rules have been laid down in the Rule of Procedure and Evidence adopted in pursuant to Article 15 of the Statute of the ICTY and Article 14 of the Statute of the ICTR.[17] Hence, the obligations are imposed upon all member States of the UN through the resolutions of the Security Council adopted under Chapter VII of the UN Charter.

The Geneva Conventions 1949 also contains the provision to ensure respect for international humanitarian law on basis of customary international law. Article 1 of the Geneva Conventions, 1949 provides, "The High Contracting Parties undertake to respect and ensure respect for the present convention in all circumstances." This Article ensures that every State whether it has ratified the treaty or not, the obligations must be assumed. Article 89 of the Additional Protocol 1 to the Geneva Convention 1949 lays down that "In Situation of serious violations of conventions or of this protocol, the High contracting parties undertake to act jointly or individually, in cooperation with the United Nations and in conformity with the UN Charter."

1.3 The Obligation of Non-Party States to Cooperate

Generally treaties are binding upon states those are parties to the same and such States are obliged to cooperate. Vienna Convention on the law of Treaties 1969[18] provides that the third party i.e., the state which is not a party to the treaty is not bound to adhere its (treaty's) provisions. According to said Convention the obligation of such States parties from the moment when it gives consent to treaty. Article 34 of the Vienna Convention provides that "A treaty does not create either obligations or rights for a third State without its consent." But the convention differs the obligation of States parties and non-party States to cooperate under international law. Article 35 of

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[16] The ICTY Statute, Article 29 and the ICTR Statute, Article 28, read as follows:
1. States shall cooperate with the International Tribunal in the investigation and Prosecution of persons accused of committing serious violations of International humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a trial chamber, including, but not limited to:
   a) the identification of location of person;
   b) the taking of testimony and the production of evidence;
   c) the service of document;
   d) the arrest and detention of persons;
   e) the surrenders or the transfer of the accused to the International Tribunal.

[17] UN Security Council Resolution 1019 (1995), 1031 (1995), 1034 (1995), 1207 (1998) and 1224 (1999) all of which confirm the obligations for states arising out of resolution 827 (1993) and the Statute of the ICTY; In Resolution 978 (1995) the Security Council did the same with regard to co-operation with the ICTR. All these Resolutions have been adopted under Chapter VII of the UN Charter.

[18] The Vienna Convention on the Law of Treaties, 1969, UN DOC. A/CONF./36/27, 1969.

Court. Abu Garda has been charged with the war crimes of attacking peacekeepers, murder and pillage.[27]

The Sudanese authorities and all states parties to the Rome Statute received a request for the arrest and surrender of Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Al-Abd Rahman (Ali Kushoyb)[28] According to Article 59 (1) of the Statute, once they have received the requests, the States concerned shall immediately take steps to arrest the person in question.[29] Moreover, once there is order to be surrendered, the person shall be delivered to the Court.[30] On March 2009, the ICC issued a warrant of arrest for Omar-Al-Bashir.[31] Since the referral, three public arrest warrants have been issued against Ahmad Harun, Ali Kushab and Omar Hassan Ahmad Al-Basir, None of the three outstanding arrest warrants have been executed as the Sudanese government has openly defied and consistently refused to co-operate with the Court and the international community.[32] On 8 June 2011, the ICC Prosecutor presented his periodic report to the Security Council on the Court's investigation of the Situation in Darfur, Sudan. Security Council Resolution 1593, which referred the situation in Darfur to the ICC, requests the Prosecutor to report to the Security Council after every six months on the Darfur investigation. As per Resolution 1593 and Article 25 and 103 of the UN Charter, there is obligation of the government of Sudan to fully co-operate with the Court. So it is clear that all non-party states including Sudan must co-operate and assist the ICC. The Situation in Darfur was the first case in which the Security Council triggered the International Criminal Courts investigation mechanism in accordance with Article 13(b) of the Statute while Sudan is not party to the International Criminal Court.

1.3.1.2 Situation in Libya and the Security Council

A Section of the people of Libya revolted against their oppressive government in February 2011. The Police and the other government forces opened fire on the protesters which resulted killings and injuries. On 26 February 2011, the Security Council decided unanimously in its resolution 1970[33] to refer the situation in the Libya since 15 February 2011 to the ICC. On 3 March 2011, the ICC prosecutor announced his decision to open an investigation to the situation which was assigned

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27 "Rebels Charged with War Crimes in Sudan", *Washington Post*, 18 May 2009.

28 Ahmad Muhammad Harun (Ahmad Harun), former Minister of State for the Interior of Government of Sudan and Ali-Muhammad Ali Abd-Al-Rahman (AliKushoyb) is a former senior leader of the Militia/janajaweed 'Situation : Darfur, Sudan", available at <www.iccnow,org/<med=darfur> (Last accessed on 20 February 2010).

29 *Supra* note 2, Article 59(1)

30 *Id.*, Article 59 (7).

31 'Issues a Warrant of Arrest for Omar-Al-Bashir, President of Sudan", available at <www.icc-cpi.int/menus/ICC/press> (Last accessed on 15 July 2010).

32 "Cases and Situation, Darfur" available at <www.coalitionfortheicc.org/ (last accessed on 10 July 2011).

33 Security Council Resolution 1970 of 26 February 2011.

by the Presidency to the Pre-Trial Chamber I. On June 2011, the Court has issued warrants of arrest against Libyan President Muammar Mohammad Abu Minary Gaddaffi (Muammar Gaddafi)[34], Said Al-Islam Gaddafi[35] and Abdullah Al-Senussi.[36] Pre-Trail Chamber I considers that there are reasonable grounds to believe that under Article 25(3) (a) of the Rome Statute, Muammar Gaddafi and Saif Al-Islam Gaddafi are criminally responsible as indirect co-perpetrator and Abdullah Al- Senussi is Criminally responsible as indirect perpetrator for two counts of crimes against humanity; murder, within the meaning of Article 7(1)(a) of the Rome Statute and persecution, within the meaning of Article 7(1)(h) of the Statute.[37] The Security Council unanimously adopted Resolution whereby it imposed an arms embargo on Libya, imposed targeted sanctions travel bans and asset freezers and referred the situation in Libya to the ICC.[38] This is the Second Situation which is referred by the Security Council to the ICC after the Darfur.

The Security Council directed the Libyan authorities to cooperate fully with the ICC in its investigations of the situation in Libya since 15 February 2011, while recognizing that the country is not a party to the Rome Statute.

1.4 Mandatory Obligation of Non-party States

In certain cases, non-party States may have a mandatory obligation to co-operate with the ICC. Article 12(3) of the Rome Statute deals with the obligation on non-party States to co-operate the ICC. Article 12(3) contains, "If the acceptance of a State which is not a party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall co-operate with the Court without any delay or exception in accordance with Part 9." It means when a State which is not a party to the Statute, accept the jurisdiction of the Court then that State is bound to co-operate the Court.

Cote d'Ivoire, which is not a party to the Statute, has accepted the jurisdiction of the ICC on 18 April 2003. More recently, on 3 may 2011 the President of Cote d'Ivoire reconfirmed the country's acceptance of this jurisdiction. On 19 May 2011, in an official letter, the ICC Prosecutor informed the president of the Court of his intention

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[34] Muammar Gaddafi is Commander of the Armed Forces of the Libyan Arab Jamahiriya and acting as Libyan Head of the State. 'Situation in the Libyan Arab Jamahiriya' available at www.icc-cpi.int/Menus/ICC/Situations+and+cases/situation/ICC011/> (Last Accessed on 10 July 2011).

[35] Saif Al-Islam Gaddafi is Honorary Chairman of the Gaddafi International Charity and Development Foundation and acting as the Libyan *defecto* Prime Minister.

[36] Abdulah Al-Senussi is Colonel in the Libyan Armed Forces and Current head of the Military Intelligence.

[37] "Situation in the Libyan Arab Jamahiriya" available at <www.icc-cpi,int/menus/ICC/Situation +and+cases/Situation/ICC0111/> (Last Accessed on 10 July 2011).

[38] "Security Council, adopt Resolution 1970 (2011) with respect to Libya" Available at www.ejiltalk.org/security-council-adopts-resolution-1970-2011> Last accessed on 10 July 2011

to submit a request to the pre-Trial Chamber I for authorisation to open the investigation of the situation in Cote d'Ivoire since 28 November 2010. On 20 may 2011, the ICC's Presidency assigned the situation in the Republic of Cote d'Ivoire to Pre-Trial Chamber II.[39] Hence now the State Cote d'Ivoire is bound to oblige to co-operate the Court under Article 12 (3) of the Rome Statute.

1.5 Consequences of Non-Cooperation by Non-Party States

The ICC hopes that all States concerned will co-operate with the Court. The Rome Statute provides that the Assembly of States Parties they consider any question of relating to non-cooperation in pursuant to Article 87(5) and (7) of the Statute.[40] If non-cooperation by States concerns situations referred by the Security Council to the ICC, the Court may refer the matter to the Security Council.[41] If non-party States have reached the agreement with the ICC on cooperation under Article 87(5) but it fails to perform those obligations after reaching at an agreement then that State should assume State responsibility under international law. If the matter is referred by the Security Council to the Court, the ICC may inform the Security Council of the failure of cooperation of non-party states. Then Security Council has authority to deal with it in accordance with the UN charter. The Security Council can adopt a resolution under Chapter VII of the Charter of the United Nations which is binding on all the UN member States. Hence, whether States which are parties to the ICC or not, all are obliged to co-operate the ICC under Chapter VII of the UN Charter. It should be noted here that If the Case has not been referred to the Court by the Security Council, the Court has no legal grounds for referring it to the Security Council Court because Court is not a subsidiary of the Security Council nor it is an organ of the United Nations.

1.6 Conclusion

One hundred and sixteen States of the world till this date, have ratified the Rome Statute of the ICC. Although the ICC has hope to obtain the support of the entire international community but its capacity and resources are limited yet. Though the international criminal court is able to handle certain important situations, the fight against international crimes and the quest for international justice would continue depending upon the co-operation of all States, irrespective of the question whether they are States parties or non-party States. Apart from this, co-operation from international organizations particularly the UN should also be ensured.

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39 'The Court Today' available at <www.icc-cpi.int/icc docs/PTDS/publications/the Court Today Eng.pdf.> (last accessed on 10 July 2011).

40 *Supra* note 2, Article 112 (2) (f).

41 Zhu Wenqi, "On Co-operation by States not Party to the International Criminal Court", *International Review of the Red Cross*, Vol. 88, No. 861, March 2006, p. 106.

PREVENTION OF CORRUPTION : INTERNATIONAL LAW PERSPECTIVE

Rangaswamy D*
Dr. Ramesh**

1.1 Introduction

Corruption is emerging as one of the gravest threat and serious obstacle to economic growth, democracy, and political stability in countries across the globe at all stages of political and economic development. This holds true at both the domestic as well as international level. Indeed, with the growing globalization of markets of services, goods and people, accompanied by the internationalization of illegal activities, the international dimension of corruption gains in significance. There is a wide spread perception that the level and pervasiveness of corruption gains significance.[1] As a result, reducing corruption becomes a priority at both the national and international levels and it requires concerted efforts, exchange of experience and a certain degree of standardization.

Although it is true that countries differ in their anticorruption strategies, it is nowadays increasingly possible to cooperate and exchange information on successful practices. International cooperation is indispensable to combat corruption and promote Accountability, Transparency and the Rule of law. It is also important in providing the international community with procedures and methodologies aimed at assessing the efficacy of measures taken and in facilitating the promotion of compatible efforts against corruption. It is intended to offer to those countries which express their interest in receiving it a coordinated set of possible anticorruption activities, grouped in modules in order to guarantee flexibility and sustainability in relation to their different contexts and needs.

1.2 Conceptual Analysis

Corruption has different meanings in different societies. It is due to difficulty in establishing a clear border between legal and illegal, between merit and bribe in deferent societies.[2] Various approaches to define corruption can be placed into five groups. These are public-interest-centred, market centred, public-office-cenetred, public-opinion-cenetred and legalistic. Proponents of the public-interest-centered

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* Assistant Professor of Law, Government Law College, Ramanagara, Karnataka.
** Associate Professor of Law, Department of Studies and Research in Law, University of Mysore, Mysore.

1 Harriss-White, B. and G. White, "Editorial Introduction: Corruption, Liberalization and Democracy", in B. Harris-White and G. White (eds), *Liberalization and the New Corruption*, Vol. 27, No. 2, 1996, at p. 1.

2 Rose-Ackerman, S. *Corruption and Government Causes, Consequences, and Reform*, Cambridge University Press, Cambridge (2005), p.5

approach believe that corruption is in some way injurious to or destructive of public interest.[3] Market-centered enthusiasts suggest that norms governing public office have shifted from a mandatory pricing model to a free-market model, thereby considerably changing the nature of corruption.[4] Public-office-centered protagonists stress the fact that misuse by incumbents of public office for private gain is corruption.[5] Those who believe in public-opinion-centered definitions of corruption emphasize the perspectives of public opinion about the conduct of politicians, government and probity of public servants.[6] Others have suggested looking at corruption purely in terms of legal criteria in view of the problems inherent in determining rules and norms which govern public interest, behaviour and authority.[7]

Differences of opinion still exist as to the meaning of the term corruption. This is primarily because individuals look at corruption from their own vantage points influenced by surrounding environment. But what is heartening is that in recent years corruption is viewed from a much broader perspective rather than looking at it from moral and functional angles only. In addition to this various conventions defines corruption in different ways those are:

1.2.1 Inter-American Convention Against Corruption (OAS, 1996)

This Convention is applicable to the following acts of corruption[8]:

a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for

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3 Rogow, A.A. and H.D. Laswell, "The Definition of Corruption" in A.J. Heidenheimer (ed.), *Political Corruption: Readings in Comparative Analysis*, Holt, Rinehart and Winstan, New York (1970), p.54

4 Tilman, R.O. (1970). "Black Market Bureaucracy" in A.J. Heidenheimer (ed.), *Political Corruption: Readings in Comparative Analysis*. New York: Holt, Renehart and Winston (1970), p.64

5 Theobald, R. *Corruption Development and Underdevelopment*, London: Macmillan (1990), p.2.

6 Leys, C. "What is the Problem about Corruption?" in A.J. Heidenheimer (ed.), *Political Corruption: Readings in Comparative Perspective*. New York: Holt, Rinehart and Winston (1970), pp. 31-37

7 Scott, J.C. *Comparative Political Corruption*, Englewood Cliffs, N.J. Princeton Hall, Inc. (1972).

8 The Inter-American Convention Against Corruption (1997), Article 6 (1).

another person or entity, in exchange for any act or omission in the performance of his public functions;

c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party;

d. The fraudulent use or concealment of property derived from any of the acts referred to in this article; and

e. Participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any association or conspiracy to commit, any of the acts referred to in this article.

1.2.2 United Nations Convention against Corruption, 2003

The convention defines the Bribery to mean[9];

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

1.2.3 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997

The Convention defines corruption as follows[10]:

> "any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business".[11]

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9 The United Nations Convention Against Corruption (2003), Article 15.

10 The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), Article 1 (1).

11 In addition to Article 1 (1), Article 1 (2) of the Convention define corruption to include Incitement, Aiding and Abetting, or Authorisation of an act of Bribery of a foreign public official.

1.2.4 Treaty on European Union on the Fight against Corruption, 1997

The Treaty on European Union defines passive Corruption to mean;

> "The deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind what so ever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute passive corruption"12.

If we look into the various definition and existing literature on corruption it come to know that there is no universally accepted definition for corruption. This is due to the ambiguity and controversy result from the fact that a number of competing approaches to understanding corruption are available. In view of the multitude of approaches and views on corruption it is not easy to agree on a unanimous definition of the term.

Among various definitions, the general definition of corruption can be traced with the definition of AAPAM (African Association for Public Administration and Management). According to this definition the broader definition of corruption refers to "use of one's official position for personal and group gain and that includes unethical actions like bribery, nepotism, patronage, conflict of interest, divided loyalty, influence-peddling, moonlighting, misuse or stealing of government property, selling of favours, receiving kickbacks, embezzlement, fraud, extortion, misappropriation, under- or over-invoicing, court tempering, phony travel and administrative documents and use of regulation as bureaucratic capital.[13]

Corruption in my point of view, it is a form of anti-social, illegal, dishonest behaviour by an individual or social group who are in authority, which confers unjust or fraudulent benefits on its perpetrators and is inconsistent with the established legal norms and prescribed moral ethos of the land and is likely to subvert or diminish the capacity of the legitimate authorities to provide fully for the material and spiritual well being of all members of society in a just and equitable manner.

1.3 Historical Overview of Corruption

Corruption has been an age-old phenomenon, deep-rooted evil and a universal malady afflicting each and every society in one form or another at one time or

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12 The Treaty on European Union on the Fight against Corruption (1997), Article 2 (1).

13 AAPAM, "Ethics and Accountability in African Public Services" Report of the XIII round Table of the African Association for Public Administration and Management held at Mababane, Swaziland, 2-6 December 1991.

another.[14] History of anti corruption strategies goes back to various holly religious literatures like Bible, Korana and Zuardic law. It seems to have existed ever since man learnt to organise himself collectively. According to Ralph Braibanti,[15] Government corruption is found in all forms of bureaucracy and in all periods of political development.

Corruption was spread widespread in Western Countries in ancient and medieval times. Bribery of judges was a problem in the history of the Egyptians, Babylonians, and Hebrews. Using their position as priests, the sons of Eli extorted more than their share of the sacrifices from the people.[16]

Kautilya who is the ancient statesman of Indian politics, realise the importance of civil service in providing good administration. He describes in graphic detail the duties, responsibilities and qualification for appointment to high public offices."Just as it is impossible not to taste a drop of honey or poison that is placed at the tip of ones tongue, so it is impossible for one dealing with the government funds not to taste at least a little bit of the Kings wealth"[17] "Just as it is impossible to know when a fish moving deep under water cannot be possibly found out either as drinking or not drinking water, so it is impossible to find out when government servants in charge if undertakings misappropriate money"[18]

1.4 Consequences of Corruption

Corruption either it may be political or administrative symptom for good governance and serious threat to state and its overall development. Practice of corruption and existence of corrupt officials or public servants in the administration is a menace to the society and it is a serious threat for proper functioning of Governments and implementation of laws.

Corruption eats away at the foundations of trust between people and their rulers. It exemplifies the two key weaknesses of the development state: the unholy marriage of political and economic power whereby money buys influence and power attacks , money and the softness of the state, to use economist Gunnar Myrdal's term- it is inability to apply and enforce its own laws and regulations..... It is a symptom of government incompetence and in itself further undermines government's ability to rule.[19] The impact of corruption can be placed under following heads:

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[14] Padhay, K.S. *Corruption in Politics: A Case Study*, B.R. Publishing Corporation, New Delhi (1986), p.1

[15] Ralph .Braibanthi "Reflections on Bureaucratic Corruption", *Public Administration*, winter, London (1962) p. 357.

[16] Joseph J, Centuria, "Political Corruption", *Encyclopedia of Social Sciences*, pp.448-452; Peter H. Odegard, "Political Corruption in the United States", *"Encyclopedia of Social Sciences"*, pp. 452-454.

[17] Arthashastra Book II, Chapter II, Section 32.

[18] Arthashastra Book II, Chapter II, Section 33.

[19] Harrison, *Inside the Third World*, Harmondsworth, England: Penguin (1981), pp. 367- 368.

1.4.1 Economic Impact

Corruption is a serious economic issue as it adversely affects the country's economic development and achievement of developmental goals. It promotes inefficiencies in utilisation of resources, distorts the markets, compromises quality, destroys the environment and of late has become a serious threat to national security. It adds to the deprivation of the poor and weaker sections of the economy.

Corruption at the highest levels distorts competition so denying the public access to the competitive marketplace. It induces wrong decisions resulting in: wrong projects, wrong prices, wrong contractors, substandard delivery to recoup overpricing, promotes corruption at lower levels and eroded public confidence in leaders. At lower levels, petty corruptions are damaging because they add to transaction costs, exclude those who cannot pay, foster contempt for public servants amongst public and erode capacity for revenue collection.[20]

Adverse effects of corruption on growth have been statistically corroborated from cross-country data. Based on the corruption rankings data assembled from the business and international communities in seventy countries finds a significant negative association between the Corruption Index and the rates of investment and economic growth. A one standard deviation improvement in the Corruption Index is estimated to be associated with an increase in the investment rate by about 3 percent of the Gross Domestic Product.[21]

This peculiar relationship has been called "a parasitic symbiosis between the public and private sectors," in which the business groups become a "parasitic state class" or a "state-dependent bourgeoisie."[22] The point is that the ties between the ruling group and the large-scale or foreign entrepreneurs which are fostered by corruption hinder the development of a private, indigenous, independent bourgeoisie. They also contribute to an increase in the alienation felt by those groups excluded from the advantages of corruption.

1.4.2 Social Impact

The most heated debate on corruption concerns whether its effects on the welfare of a society are positive or negative. It was argued for years that corruption must be condemned for its inherent evil and negative consequences on society.[23] This so-called moral or traditional position was disputed in the 1960s by those who

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[20] Pope, J., "National Integrity Programs" in P. Lengseth and K. Galt (eds.), *Partnership for Governance*, Proceedings of a Conference held in Copenhagen on 31 May 1996, pp. 23-26.

[21] For details see Bardhan, Pranab. "Corruption and Development: A Review of Issues", *Journal of Economic Literature*, 35 (1997).

[22] Robert Dowse, "Conceptualizing Corruption", Book review in Government and Opposition, (Summer 1977), p.254.

[23] See Ronald Wraith and Edgar Simpkins, *Corruption in Developing Nations*, Allen and Unwin, London (1963).

contended that corruption may full fill societal needs that would otherwise go unheeded. Proponents of this position are usually referred to as revisionists or functionalists.[24]

Some argue that corruption contributes to economic development because it serves as an instrument for the allocation of scarce resources, makes investment possible, and strengthens the private sector vis-a-vis the public sector by reducing uncertainty. Through corrupt activity, investors can be assured that the government will not intervene in their affairs. As funds are increasingly channelled into the investment, greater competition and efficiency will result due to such flow.[25]

However, the damaging effects of corruption on investment and economic growth are widely recognised. But corruption also has adverse effects on human development. First, corruption reduces the availability and increases the cost of basic social services. Access to core social services can be easily restricted with the intention to make corrupt gains. For instance, a government doctor may deliberately store away free medicines until he is bribed, a police inspector may deny a First Information Report to a victim until he is paid a kickback, and a principal may refuse to admit a child in a school until he is paid under-the counter.

Since obtaining access to basic public services normally requires an illegal cash payment, corruption also raises the price of these services. Second, in addition to a decrease in total government expenditure (due to tax evasion), corruption also shifts government expenditure from priority social sector spending to areas, where the opportunities for rent-seeking are greater and the possibilities for detection are lower. Allocating government funds to a few large defense contracts or mega-projects may seem more attractive to corrupt bureaucrats and politicians than spending the same money to build numerous rural health clinics. Similarly, there may be a temptation to choose more complex technology (where detecting improper valuation or over invoicing is more difficult) than simpler, and more appropriate technology.

1.4.3 Political Impact

Politically, corruption increases injustice and disregard for rule of law. Basic human rights and freedoms come under threat, as key judicial decisions are based on the extent of corrupt bribes given to court officials rather than on the innocence

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[24] For review, see Gabriel Ben-Dor, "Corruption, Institutionalization, and Political Development the Revisionist Theses Revisited," *Comparative Political Studies* (April 1974), pp. 63-83: Simcha B. Werner, "The Development of Political Corruption: A Case Study of Israel," *Political Studies*, 31 (December 1983), pp. 620-639.

[25] Economic arguments are found in Nathaniel Leff, "Economic Development through Bureaucratic Corruption," *American Behavioural Scientist*, (8 November 1964), pp. 8-14, and David Bayley, "The Effects of Corruption in a Developing Nation," *Western Political Quarterly*, 19 (December 1966), pp. 719-732.

or guilt of the parties concerned. Police investigations and arrests may be based on political victimisation or personal vendettas rather than on solid legal grounds.

Corruption may dissipate the important asset of political legitimacy, which most governments seek to preserve and build on. One of the major tasks of any regime is the building of its own legitimacy a resource which will enable it to gain more easily the support and the assistance of the public in connection with development. By destroying the legitimacy of political structure in the eyes of those who have power to do something about the situation; corruption can contribute to instability and possible national disintegration.

Politicians and civil servants as an elite should give purpose to national effort. In so doing they cannot avoid setting an example others will follow. If the elite is believed to be widely and thoroughly corrupt, the man-in-the street will see little reason why he too should not gather what he can for himself and his loved ones. So corruption among an elite not only debases standards popularly perceived, it forces people to undertake the underhanded approach out of self-defence. They feel they must resort to corrupt practices just to get their due, not to secure in ordinate returns.

And more important fact is that corruption may threaten the democratic development. People may existing poor socials-economic conditions and widespread corruption link with the process of democratization, which in turn creates serious obstacles for further democratization. Thus as we have seen high and rising corruption by effecting on the effectiveness of social spending; eroding the tax and custom administrations; and destroying the legitimacy of existing political system may affect very negatively on the political and economic development.

According to Theodor M. Smith (1971) "Corruption may tend to destroy some of a new nation's greatest potential assets, the enthusiasm, idealism and sympathy of its youth. In the event that the idealism and enthusiasm of the younger generation turns to cynicism, not only political stability but long run economic development efforts are bound to be affected."[26]

Several scholars argue that incumbents can utilize corruption to maintain their control of the political arena because it allows manipulation of access to resources, positions, and wealth. Strategic groups must acquiesce in incumbent demands in order to obtain the goods and services they desire. Corruption in these cases is a mechanism for buying political loyalty. The ability to manipulate access fosters

[26] Smith M. Theodore. *Corruption Tradition and Change* (1971), Quoted in Heidenheimer, J. Arnold, Michaek Johnston and Victor T. Le Vine, *Political Corruption*, New Jersey: Transaction Publishers (1993).

dependency on the regime and thereby contributes to the survival of the ruling elites.

1.5 Prevention of Corruption- Need of Global Dimension

Globalization processes have profoundly shaped the political, social economic and cultural landscapes at local, national, regional and international levels. National social policy has been increasingly affected by global economic competition as well as global interdependence. Ongoing welfare reforms across the world have changed the relationship between the state and its citizen, as well as the relationship among nation states.

Just as National Integrity Systems are essential to combating corruption at the national level, a coordinated approach must also be used to combat globalized corruption. First and foremost fact which is necessitated the coordinated approach is that there must be an increased understanding by legislators, the executive and civil society of the complexities of globalization and corruption. This should include expanded access to research and information on these issues, as well as global measurement instruments that are credible and include as many players in the corruption 'game' as possible.[27]

Second, developments in the 1980s and 1990s against the backdrop of increasing economic liberalization, third wave of democratization and floating of good governance agenda have heightened expectations that an effective and root-and-branch cure of corruption may be found.[28] Third, the coming into prominence of such concepts as decentralization, accountability and transparency, human rights, rule of law and sustainable development have considerably influenced efforts to minimize political and administrative corruption in many countries.[29] In addition to this, the control of corruption by various regional and international institutions and mechanisms and study of such mechanisms under the context of Globalisation is very much required for the following reasons;

- developing an international code of conduct for political officials, banks, the private sector and other actors in society;

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[27] The desire was expressed by a number of parliamentarians to work with TI to improve the Corruption Perception Index so that it encourages developed countries to assume responsibility for their role in globalized corruption. One participant stressed that 'knowledge is power' in underscoring the importance of parliamentarians understanding the global dimensions of corruption.

[28] See *Supra* note 1 Harriss-White, B. and G. White, p. 2.

[29] Mohammad Mohabbat Khan. *Political and Administrative Corruption: Concepts, Comparative experiences and Bangladesh case*, Working paper prepared for Transparency International-Bangladesh Chapter, p. 2, available at http://www.ti-bangladesh.org/ accessed on 20 December 2010.

- creating and strengthening inter-parliamentary unions among various nations for the effective eradication of corruption.;
- improving co-ordination between policy makers and investigators, particularly in establishing systems or conventions that shed light on offshore accounts held by elected officials under investigation;
- ensuring conformity of anti-corruption laws and regulations to other countries in the region;
- drafting regional conventions on anti-corruption.

1.6 Existing International and Regional Legal Mechanism on Corruption

In a globalizing world, the strategies to prevent, detect and punish corrupt acts must be formulated at both the national and international levels. National laws, institutions and actors must be invoked in the fight against corruption. However, without action and cooperation at the international level, countries may find corruption seeping over their borders into impunity. New regional and international tools, institutions and actors need to be mobilized, and are being mobilized, to ensure that countries harmonize their efforts to deter and contain corruption. There are a number of international and regional legal instruments that are in force against this cancerous corruption they are as follows:

1.7 U.N. Convention against Corruption (UNCAC) 2003[30]

The new United Nations Convention against Corruption has enormous significance in global action against Corruption. It proves that a destructive practice as old as history can no longer be tolerated. It manifests the realization that the world of the 21st century needs new rules to become a better place for all peoples. It demonstrates that core values, such as respect for the rule of law, probity, accountability, integrity and transparency must be safeguarded and promoted as the bedrock of development for all.

Over the course of eight chapters and seventy-one articles, the convention sets forth in detail a variety of measures states are obligated to take to strengthen international efforts to fight corruption of public officials, whether in the form of bribery, embezzlement, money laundering, or related acts.4 In chapter 2 (Articles 5 to 14),

[30] In December 2000, the UN General Assembly decided to establish an Ad hoc Committee for the Negotiation of a Convention on Corruption. (See GA Res. 55/61, 4 December 2000). After seven negotiating sessions held in Vienna from January 2002 to October 2003, the Committee transmitted a final text to the General Assembly. (See Report of the Ad hoc Committee for the Negotiation of a Convention Against Corruption on the Work of its First to Seventh Sessions, UN Doc. A/58/422 (7 October 2003). For the Committee's Interpretive notes on the Convention, see UN Doc. A/58/422/Add.l (7 October 2003). On 31 October 2003, the General Assembly adopted the UN Convention Against Corruption.

the convention sets forth a series of preventive measures that states must undertake, including the adoption of anticorruption policies and practices, and the use of a body (or bodies) to ensure implementation of those policies and practices. Article 13(1) provides for the participation by civil society on the following terms.

The Convention mandates that each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information; (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula; (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption.

1.8 United Nations Convention on Transnational Organised Crime, 2003[31]

The Convention represents a major step forward in the fight against transnational organized crime and signifies the recognition of UN Member States that this is a serious and growing problem that can only be solved through close international cooperation. The Convention, concluded at the 10th session of the Ad Hoc Committee established by the General Assembly to deal with this problem, is a legally binding instrument committing States that ratify it to taking a series of measures against transnational organized crime. These include the creation of domestic criminal offences to combat the problem, and the adoption of new, sweeping frameworks for mutual legal assistance, extradition, law-enforcement cooperation and technical assistance and training.

Due to this Convention, the States Parties will be able to rely on one another in investigating, prosecuting and punishing crimes committed by organized criminal groups where either the crimes or the groups who commit them have some element of transnational involvement. This should make it much more difficult for offenders and organized criminal groups to take advantage of gaps in national law, jurisdictional problems or a lack of accurate information about the full scope of their activities.

[31] The United Nations Convention on Transnational Organized Crime, Resolution 55/25 of 15 November 2000. Signed by 147 countries; ratified by 122 countries (as of 5 July 2006); Came into force on 29 September 2003 and requires corruption by public officials to be established as a Criminal Offence.

The Convention deals with the fight against organized crime in general and some of the major activities in which transnational organized crime is commonly involved, such as money laundering, corruption and the obstruction of investigations or prosecutions. To supplement the Convention, two Protocols also tackle specific areas of transnational organized crime that are of particular concern to UN Member States.[32]

1.9 Organisation for Economic Cooperation and Development (OECD) Anti-bribery Convention, 1997[33]

The Organization for Economic Cooperation and Development (OECD) Anti-bribery Convention, which is also called as Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, requires State parties to criminalize bribery of foreign public officials by their citizens or corporations.

The Convention considered that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.

The Convention mandates that each party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

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[32] In specific terms, Article 9 of the Convention speaks about Criminalization of Corruption. Article 9 (1) of the Convention says that: Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
(*a*) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
(*b*) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

[33] The Convention was signed in December 1997 by representatives of 34 countries, including all 29 OECD member States and five non-members .It entered into force in February 1999. As of May 2001, 32 of the signatory nations, including all the OECD members, had ratified the convention, and ratification by the others was expected shortly. As of the same date, 28 participating nations had adopted implementing legislation, with other enactments in process. For discussion of the status of the Convention and the OECD implementation procedure, see OECD, Report by the CIME: Implementation of the Convention on Bribery in International Business Transactions and the 1997 Revised Recommendations, Doc. No. C/MIN (2001), pp. 5 and 11.

1.10 European Union (EU)

As a safeguard instrument for ensuring a common area of freedom, security and justice, fighting corruption was seen among the priorities of the European Union, as early as the Treaty on European Union:

"[...] the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by [...] preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;
- closer cooperation between judicial and other competent authorities of the Member States including cooperation through the European Judicial Cooperation Unit ("Eurojust"), in accordance with the provisions of Articles 31 and 32;
- approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e)".[34]

Council of Europe Criminal Law Convention on Corruption, 1999[35] approved by the Committee of Ministers of the Council of Europe; opened to signing on January 27th, 1999 is another important instrument against corruption in European Union. The Convention deals with the crimes of active and passive bribery of public officials, active and passive trading in influence, laundering of the proceeds of corruption, accounting crimes linked to corruption, active and passive bribery in the private sector, and facilitation and complicity in these crimes.

1.11 Inter-American Convention against Corruption (IACAC), 1996[36]

The IACAC was designed with three major objectives: (1) to prevent corrupt practices, (2) to criminalize and punish corrupt practices, and (3) to ensure

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[34] European Commission, (2002), *Official Journal* C 325, 24 December 2002.

[35] The Council of Europe Criminal Law Convention on Corruption (CoE Criminal Convention) was the third multinational anti-corruption convention to be adopted and was negotiated by the member states of the Council of Europe, along with the participation of a number of observers, including Canada, Japan, Mexico and the United States. It represents a European regional consensus on what states should in the areas of criminalisation and international cooperation with respect to corruption.

[36] Inter-American Convention against Corruption, 29 March 1996, 35 I.L.M. 724, available at http://www.oas.org/juridico/english/Treaties/b-58.html, retrieved on 10 May 2011. Thirty-Three of the Thirty-Four OAS member States have signed and ratified the IACAC.

international cooperation in enforcement efforts. The IACAC contains several provisions aimed at achieving these policy objectives, which can be broadly categorized into substantive and procedural provisions. The substantive provisions set forth appropriate preventative measures, define crimes, and provide the scope of the IACAC's coverage. Because the IACAC's enforcement depends on domestic legislative implementation and international cooperative measures, the procedural provisions provide for the international obligations that must be undertaken to completely enforce the substantive provisions of the Convention.

In addition to these legal instruments, many international organizations are involving directly and indirectly in technical cooperation to assist countries in dealing with corruption. To take the case of the United Nations alone, the Centre for International Crime Prevention, through its Global Programme against Corruption, assists Member States build the requisite integrity, efficiency and effectiveness in their criminal justice systems in their fight against corruption. The Department of Economic and Social Affairs assists Member States to prevent corruption through sound public administration and governance institutions. It assists Member States through building the capacity of their public sector institutions, including for upholding the rule of law and promoting transparency and accountability. The United Nations Development Programme supports a number of global, regional and national anti-corruption programmes and projects. In these endeavours, the agencies of the United Nations foster a sharing of experiences and lessons learned.

International anticorruption agreements continue to play a key role in the growing international condemnation of corruption. By agreeing on mechanisms to fight corruption, the international community is opening the doors for increased multilateral and bilateral cooperation on important but traditionally local fronts. This, in turn, encourages the sharing of best practices, builds trust and relationships between cooperating countries, and ultimately increases the effectiveness of bilateral and multilateral efforts and development assistance programs.

International efforts have equally focused on tackling the "supply side" of corruption and most of the countries have either formulated their own anti-corruption laws or are signatories to Anti-Bribery Conventions. Therefore international pressure is building up on countries to formulate laws and take action against the private business in their countries who attempt to bribe foreign governments to obtain contracts.

Multilateral anticorruption agreements bring together internationally recognized principles to fight corruption and formalize government commitment to implement these principles. These principles, embodied most recently in the United Nations Convention against Corruption (UNCAC), go beyond simply exhorting governments to criminalize various corrupt actions. They recognize that the fight against corruption requires concerted action on a number of fronts.

If the Convention implemented successfully, it is likely to have a major impact on the prevention of and fight against corruption in the international arena, promoting national actions, creating a common framework and organizing cooperation among the States Parties. Furthermore, its approach and scope are ambitious; it has won the support of many countries in the drafting and signing phase (though only a small number of developed countries have actually ratified it so far); and it was negotiated on good terms, with intense United Nations involvement and in a short time. But it is only the first step in what should be a promising development. Its long-term success cannot be guaranteed, mainly because, at least for the time being, it lacks an effective mechanism to promote implementation and monitoring.

In addition to this, the Convention imposes no obligation on signatory countries to criminalize certain acts, such as passive bribery of a foreign public official, trading in influence, abuse of public functions or illicit enrichment. It contains a number of provisions that each State Party "shall adopt", others that each State Party "shall consider adopting" (or things they "shall endeavour to do"), and others that they "may adopt". Also, some articles contain safeguard clauses that limit the States Parties' obligation in the event of conflict with their constitution or the fundamental principles of their legal system. This means that one of the goals of the Convention, which is to create common standards in countries' legislation, may not be achieved.

Insofar as it is effective, it will have a significant impact on companies, on a national level and worldwide, changing the framework in which they operate, making it clearer and more homogenous. It may also help to create an anti-corruption culture, involving not only governments, government agencies and public officials but, above all, companies and civil society

The Convention has some undoubted plus points, such as its condemnation of corruption, active and passive, public and private; the combination of prevention and criminalization; the emphasis on international cooperation and technical assistance, so that all countries are able to implement the Convention consistently and rigorously; and a viable mechanism for the return of the proceeds of corruption to their legitimate owner, or at least to their country of origin.

1.12 Suggestive Conclusion

Evidence has shown the serious underlying consequences of corruption on economic growth, capital formation, poverty and inequality. The analysis of this investigation, examining the alleged costs of corruption on development from both normative and empirical dimensions has shown the impact on long term sustainability of development.

As the governments slowly begin to embrace UNCAC and devise a follow-up process for promoting implementation and facilitating technical assistance, existing international and regional commitments and mechanisms are important to keep

governments working together on corruption issues in a familiar setting and with familiar partners. It is possible to combat corruption and reduce its negative impact, and achieve the goals of international anticorruption laws only if there is a political will that exists, which is credible to attract a genuine support of all stakeholders in the government, the civil society, and the private sector to attack both passive and active corruption. By analysing existing literature on international law of prevention of corruption I would like to outline following suggestion for effective prevention of corruption at global level.

- Promote international parliamentary co-operation to share information for the establishment of an international code of conduct for business transactions.
- Develop an international watchdog agency to monitor compliance with an international code of conduct.
- Work with Transparency International (TI) to improve and make the corruption perception index fairer.
- Develop survey mechanisms that evaluate the corruption fighting commitment of developed countries.
- Draft a convention to require banks to disclose information on accounts held by persons being investigated for corrupt practices.
- Ensure regional uniformity and reciprocity in anti-corruption laws and regulations.
- Network with organizations such as TI to expose recipients of illegal money.
- To ensure transparency, make open to the public all committee meetings concerned with investigating corruption.
- Organize a national commission, with participation by religious groups, NGOs, business, MPs and the executive, to formulate a national definition of corruption.
- Establish a permanent, anti-corruption committee in Parliament.

EMERGING TRENDS OF THE RIGHT TO PRIVACY

Professor (Dr.) Nishtha Jaswal*
Lakhwinder Singh**

1.1 Introduction

In the contemporary world, we all are under 24/7 surveillance of Big Brother camera. At the same time, everyone has reasonable expectation of privacy, towards which the government, social institutions and any individual must show adequate respect.

Although the word "Right to Privacy" was firstly tossed up by Samuel D. Warren and Louis D. Brandeis in 1890 in the form of "right to be left alone" and finally got the constitutional status in *Griswold* v. *Connecticut*[1] but it is an inherent right.

On our planet, all living organisms take birth with the sense of self-protection. In fact, after an in-depth study, the anthropologists have deciphered the fact that both animals and human beings share some common mechanisms in protecting their private spheres of life.[2]

But human beings are blessed with the sixth sense, and hence, with the increase in the human reasoning and knowledge, 'man' has developed the concept of "privacy". In consequence to this, the shift took place from mere 'physical privacy' to 'psychological privacy' or 'mental privacy' and the 'modern state' is under the obligation to protect both of them. In every religious precinct, importance has been given to 'privacy' so that spiritual consciousness should be achieved. More or less every religion recognizes the value of privacy.

According to Alan F. Westin[3], the functions of privacy in democratic societies can be grouped under the following headings: (a) Personal autonomy (b) Emotional release (c) Self-evaluation and (d) Limited and Protected communication. Privacy is the claim of individuals, groups, or

* Professor and Chairperson Department of Laws, Panjab University Chandigarh.
** Research Scholar, Department of Laws, Panjab University Chandigarh.

1 381 U.S. 47 (1965).
2 Alan F. Westin, *Privacy and Freedom* (1970) at p. 8.
3 *Id.* at p. 32.

institutions to determine for themselves when, how, and to what extent information about them is communicated to others.[4]

The interests in privacy protected under common law are classified into four by Prosser.[5]

(1) Intrusion upon plaintiff's seclusions or solitude.

(2) Public disclosure of embarrassing facts.

(3) Publicity which places the plaintiff in false right.

(4) Appropriation for defendant's advantages, of plaintiff's name and likeness.

1.2 Privacy and Religion

Milton Konvitz has called attention to ways in which biblical passages can be interpreted as distinguishing a realm of privacy[6]:

> Almost the first page of the Bible introduces us to the feeling of shame as a violation of privacy. After Adam and Eve had eaten the fruit of the tree of knowledge, "the eyes of both were opened, and they knew that they were naked; and they sewed fig leaves together and made themselves aprons." Thus, mythically, we have been taught that our very knowledge of good and evil - our moral nature as men is somehow, by divine ordinance, linked with a sense and realm of privacy.

The frequent use of words like *Ekant, Rahasaya, Tiraskarinee, Avagunthanvatee Naree* and their synonyms in the Indian scriptures and classical literature, substantiates that privacy was alien to ancient Indian culture.[7] Even the importance of privacy and solitude is being attached to the process of meditation. Lord *Shiva*, while, in meditation, is said to have been disturbed by *Kamdeva*, the god of love and sex in the Indian mythology, who was burnt as punishment therof when Lord *Shiva* opened his third eye.[8]

Islam gives great importance to the fundamental human right to privacy. Islamic *Shariah* fully acknowledges the sanctity of the privacy of one's home and private life, and there is ample admonition against prying into the affairs of others. The principles of Islam elevate the religious conscience of every Muslim, and protection of the privacy of every Muslim lies at the core of Islamic principles.

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4 *Id.* at p. 70
5 Prosser, "Privacy" 38 *Col. L. Rev.* 383 (1960).
6 Cited in Judith Wagner DeCew, *In Pursuit of Privacy*, (1997), at p. 11.
7 G. Mishra, *Right to Privacy in India* (1994), at p. 47.
8 *Ibid.*

Islamic jurisprudence requires strict caution in such matters affecting people's lives, honour (sanctity) and right to property. Islam orders that one should not inquire into private matters of others, and strictly prohibits prying into these matters. If someone happens to come across private information, further disclosure of that information is not permitted. Managing the affairs of the private domain is the exclusive right of the individual.[9]

1.3 Evolution of the Right to Privacy

The modern version of the right to privacy was initially brought up by the Samuel D. Warren and Louis D. Brandeis in 1890 in the form of right to be let alone. In 1890, two Boston lawyers, Samuel D. Warren and Louis D. Brandeis, published a joint article, "The Right to Privacy" in the very young *Harvard Law Review*. This article became very influential and Roscoe Pound said that it did nothing less than add a chapter to the law.[10]

It was said to have been provoked by press publicity of which Warren and his family were the unhappy victims. It came at a time when, as the authors complained, a developing technology made it possible to intrude upon private lives and activities and to expose them to public gaze for reasons no better than mere titillation and vulgar curiosity.[11]

Basically this article was published against the wide spread of yellow journalism and unregulated use of mechanical bug devices. In this article the authors observed that in old times, the law gave a remedy only for the physical interference with life and property. Right to life was confined only to the protection from battery; and liberty meant freedom from actual restraint. Later, there came recognition of man's spiritual nature, of his feelings and his intellect.[12]

Thus, with the recognition of the legal value of human sensations, the law of assault, nuisance, defamation, etc. was developed.[13]

In their contemporary society, the authors observed that with the new scientific inventions and business methods, the individual privacy is in danger. Instantaneous photographs, newspaper enterprises and the mechanical bug devices had invaded the sacred precincts of private and

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9 Muhammad Aslam Hayat, "Privacy and Islam: From the Quran to Data Protection in Pakistan", *Information & Communications Technology Law, Vol. 16, No. 2, June 2007*, 137-148 at p. 137.

10 Zelman Cowen, *Individual Liberty and the Law* (1977), at p. 80.

11 *Ibid.*

12 Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", *Harvard Law Review*, Vol. 4, No. 5 (15 December 1890), 193-220 at p. 193.

13 *Id.*, at p. 194.

domestic life. Therefore, they were in the favour securing to the individual what Judge Cooley called the "right to be let alone".[14]

The second alarm was again ringed by Louis Brandeis as a Justice of the Supreme Court of United States. In *Olmstead* v. *United States*[15], he gave his dissenting opinion against the court's verdict. In this case, the Court held that phone-tapping does not amount to physical trespass into the home and hence not violative of the Fourth and Fifth Amendments.

Justice Holmes in a celebrated phrase characterized wiretapping as "dirty businesses". Brandeis went further; he anticipated the development of a technology which would give government the capacity to pry into the deepest recesses of the lives of individuals, and it was against this threat protection had to be provided.[16] Therefore, according to Justice Brandeis, any evidence which has been obtained through unauthorized phone-tapping is not admissible.

Justice Brandeis observed that the Framers of the Constitution conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men.[17]

In *Katz* v. *United States*,[18] the Court adopted Brandeis's view, overruling *Olmstead*. In its Fourth Amendment jurisprudence, as well as its substantive due process protection of the right to privacy, the Court frequently has invoked Brandeis's formulation of privacy as "the right to be let alone.[19]

The formulation of privacy as the right to be let alone merely describes an attribute of privacy. Warren and Brandeis's aim was not to provide a comprehensive conception of privacy but instead to explore the roots of a right to privacy in the common law and explain how such a right could develop. The article was certainly a profound beginning toward developing a conception of privacy.[20]

In the years following the publication of the article, law of privacy gradually developed by statute and by common law decision in state courts.[21] But it

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14 *Id.*, at p. 195.
15 277 US 438 (1927)
16 *Supra* note 10 at p. 87.
17 *Supra* note 15 at p. 478.
18 389 U.S. 347 (1967).
19 Daniel J. Solove, "Conceptualizing Privacy," *California law review*, vol. 90, No. 4 (Jul., 2002), 1087-1155 at p. 1101.
20 *Id.*, at p. 1102.
21 M. Glenn Abernathy, *Civil Liberties under the Constitution*, at p. 95 (1977).

was not until 1965 that the US Supreme Court squarely held that the Constitution contained at least a limited right to privacy.[22]

In *Griswold* v. *Connecticut* [23], the right to privacy got the constitutional status. The court invalidated the statute which made it a criminal offense for a married couple to use contraceptives because it is an invasion into their right to privacy. And the court further held that "the right to privacy" as a right older than the Bill of Rights.[24] The court held that the various guarantees contained in the Bill of Rights, such as First, Third, Fourth, Fifth and Ninth Amendments creates the "zone of Privacy".[25]

In *Roe* v. *Wade*[26], the court struck down a Texas statute which prohibited almost all abortions. The court held that right to privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[27]

1.4 Media and Privacy

The investigative journalism which received a boost after the Watergate disclosures in the U.S.A. has opened an interesting and attractive chapter in the history of the Press throwing denting challenges to the adventurous and the ambitious. It has made the press more powerful and awesome and when handled circumspectly, has helped furbish the image of the Press as an active watchdog of the interests of the society.[28]

The carrying out of a sting operation may be an expression of the right to free press but it carries with it an indomitable duty to respect the privacy of others. The individual who is the subject of a press or television 'item' has his or her personality, reputation or career dashed to the ground after the media exposure. He too has a fundamental right to live with dignity and respect and a right to privacy guaranteed to him under Article 21 of the Constitution.[29]

Today, it is being witnessed that the over-inquisitive media, which is a product of over-commercialization, is severely encroaching the individual's right to privacy by crossing the boundaries of its freedom.[30]

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22 *Ibid.*
23 14 L ed. 2d 510 (1965).
24 *Id.*, at p. 512.
25 *Id.*, at p. 515.
26 35 L Ed 2d 147 (1973).
27 *Id.*, at p. 177.
28 P.B. Sawant, *Mass Media in contemporary society* (1998), at p. 5.
29 Prabhsahay Kaur, "Freedom of Press vis-a-vis Responsible Journalism," *available* at http://www.legalserviceindia.com/articles/fre_pre_v.htm visited on 1 January 2011.
30 *Ibid.*

Of course, the law does not always give redress in defamation for a true statement. Privacy arises in different circumstances. It is concerned with the publication of private affairs, e.g., details of illness or disease affairs of a couple on honeymoons, or photograph of a film actress taking a sun-bath. The grievance here is not an injury to reputation. It is injury to feelings. In such an action truth would not be an appropriate defence because the right of privacy implies the right not merely to prevent the inaccurate portrayal of private life but the right to prevent its being depicted at all.[31]

Probably no event in recent history has had more to say about privacy and private lives than the death of Princess Diana. Although the direct cause of the car accident that killed her is yet unknown, it is clear in the public's mind that an indirect cause of her death was the incessant invasion of her private space by paparazzi and tabloid journalists.[32] More recently, the photograph of Barack Obama, in which it looks like that he casts sly glance at a teenage girl at the G-8 Summit, became very sensitive matter.

In the present era, the media has forgotten its social responsibility and has sold its ethics as well. Under the protective shield of investigative journalism, the media channels are showing the salacious and indecent things. Therefore, the infringement of public morality and decency is more or less amounts to the violation of the mental privacy of the people.

1.5 Advancement in Technology and Data Privacy

The capacity of new media to support the collection, use and storage of vast amounts of personal information by business and governments has under pinned debates on the need to build mechanisms which protect the privacy of individuals using the internet and other technologies. Use of technologies including cookies and web bugs to track behaviour across the web, and the increasing capacity to profile consumers using data gathered from purchases and page accesses, have encouraged the development of international agreements, including the Safe Harbor arrangement between the European Union and United States, to manage the use of and trade in personal information. The traditional notions of privacy have been curtailed by the development and application of new technologies to the collection and monitoring of personal information by both commercial interests and governments. The internet and interactive media permit business and government to track and monitor individual behaviour, in ways that would have been previously impossible for even the most authoritarian regime, through the establishment of databases, data-mining techniques, and the

[31] E.S. Venkatarmiah, *Freedom of Press, some recent trends* (1987), at p. 112.
[32] Robert Trager and Donna L. Dickesson, *Freedom of Expression in the 21st Century* (1999), at p. 194.

application of e-mail monitoring and interception technologies including the "Carnivore" system utilized by US security agencies.[33] Equally, governments and businesses have sought to adopt technological and procedural measures including web seals and encryption to protect information they have collected from unauthorized access and use.[34]

Personal information can be collected any time someone writes a cheque, uses a credit or debit card, engages in a financial transaction views world wide web pages, or does anything else that generates a data trail and it includes names, telephone numbers, marital status, education level, job history, credit history, medical records, and any other information that can be linked to specific persons or data subjects. Often, individuals have little choice but to reveal this information, which is collected without their consent or knowledge, or is a by product of a sale or service transaction. Furthermore, personal information can became the basis for decisions made about an individual by others, such as whether someone is offered a job, targeted for government surveillance or eligible for medical insurance.[35]

The social network sites are important aspect of the new media. In this virtual world, people express their feelings and happenings of the real world. All users voluntarily upload their family pictures, videos, etc on the sites like Youtube, Facebook, etc. and blog about their private matters on sites like Twitter. Majority of the users don't know the repercussions of such a usage. These social network sites collect and collate the individual data and sell it to other companies. Finally, such an individual data is being used for commercial purposes like Target-marketing, etc.

The information, posted to social media may be detrimental to users' privacy and reputation. Numerous media stories report the loss of jobs, college admissions, or relationships due to the posting of photos taken in different states of intoxication.[36]

Moreover, certain information posted on social networking sites is publicly available to users and non-users alike, and is even searchable by search engines such as Google.[37] But it does not mean that the users don't care

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[33] Terry Flew and Stephen McElhinney, "Globalization and the Structure of New Media Industries", in Leah A. Lievrouw and Sonia Livingstone (Ed.), *Handbook of New Media, Social Shaping and consequences of ICTs*, 304-319 (2002), at p. 314.

[34] *Id.*, at p. 315.

[35] Laura Stein and Nikhil Sinha, "New Global Media and, Communication. Polity: The Role of the State in the Twenty First Century", in Leah A. Lievrouw and Sonia Livingstone(Ed.), *Handbook of New Media, Social Shaping and consequences of ICTs*, 410-431 (2002), at p. 413.

[36] Omer Tene, "Privacy: The New Generations", *International Data Privacy Law*, 2011, vol. 1, No. 1, pp. 15-27 at p. 23.

[37] *Id.*, at p. 24.

The modern bio-medical technologies impinge privacy aspects of an individual in a variety of ways. One of them is genetic information which is a medical record and the doctor has a duty to maintain confidentiality of patient's health record. Genetic information is the heritable biological information. It can be used as the basis for insidious discrimination. Unfortunately, the employers and the insurance companies have been gaining access to genetic information for deciding employability and insurability respectively.[45]

1.6 Privacy in India

The concept of privacy was not alien to ancient India. Right to privacy was initially practiced as a custom. Among various customs, there was the norm of the seclusion of women from the male stranger's gaze. This custom of privacy had its foundation in the rules regulating the construction of houses. The earliest mention of such rules is found in the *Kautilya's Arthashastra* wherein the violation of such rules was made punishable.[46] By considering the importance of these customs, the Britishers initially recognized the right to privacy as a customary right and thereafter as a statutory right.

In the post-independent India, "right to privacy" was nowhere mentioned in the Constitution of India. It was the judiciary that invented the right to privacy in India and gave it the constitutional status. The Hon'ble Supreme Court of India was greatly influenced by the decisions of American Supreme Court and hence found the right to privacy in Article 21 by construing it liberally.

Initially the right to privacy was developed by spelling it out from the right to freedom of speech and expression in Art 19(1)(a) and the right to 'life' in Art. 21.[47] The initial two cases i.e. *Kharak Singh's case and Govind's case,* decided by the Supreme Court of India where the foundations for the right concerned with the intrusion into the home by the police under State regulations, by way of 'domiciliary visits'.[48]

In *People's Union for Civil Liberties* v. *Union of India*[49], the Supreme Court held that wiretaps were a "serious invasion of an individual's privacy." The court also set out guidelines for wiretapping by the government defining how phones may be tapped and under what circumstances. The right is only available to the State and not to private entities.

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45 *Supra* note 7 at p. 383.
46 *Supra* note 7 at p. 82.
47 *District Registrar & Collector, Hyderabad* v. *Canara Bank AIR 2005* SC 186 at p. 196
48 *Ibid.*
49 (1997) 1 SCC 301.

Recently in *Selvi* v. *State of Karnataka*[50],the Supreme Court held that compulsory administration of any of the techniques, like narcoanalysis, polygraph examination and brain Electrical Activation Profile (BEAP) test, is an unjustified intrusion into the mental privacy of an individual.[51] It was also recognized that forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences.[52]

The most significant development outside search and surveillance issues is the decision of the High Court of Delhi in *Naz Foundation* v. *Government of NCT of Delhi.* The broadest statement of the Delhi High court's approach, following its review of Indian case law on protection of privacy, is 'The right to privacy thus has been held to protect a "private space in which man may become and remain himself". The ability to do so is exercised in accordance with individual autonomy.'[53]

Therefore, the approach of the Supreme Court is now towards the protection of individual privacy. By giving more and more personal autonomy to the individual, the Supreme Court is also protecting his decisional privacy. In fact in *Khushboo's case*, the court recognized the Live-in relationships which is again a right of decisional privacy. The rigid attitude of the courts against honour-killings is the step towards the protection of one's right to choose his or life partner.

Nowadays another facet of privacy i.e. informational or data privacy has become the buzzword in India. Our country is planning to draft the Data Protection law but it is very embryonic stage. India is a fast growing economy and its data protection law is a great concern for the international outsourcing of processing of personal information .i.e. BPO's. India is planning to introduce a biometric-based ID system by 2011, to be issued to its 1.2 billion citizens. It is to be implemented by a newly-established Unique Identification Authority of India (UIDAI) established in Feb. 2009, the operation of which will change the significance of all other personal information processing in India, particularly if and when linked to the National Population register (NPR) and the National intelligence grid (NATGRID).[54]

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[50] 2010 (4) SCALE 690.

[51] *Id.*, at p. 783.

[52] *Id.*, at p. 778.

[53] Cited in Graham Greenleaf, "Promises and illusions of data protection in Indian law", *International Data Privacy Law,* 2011, Vol.1, No.1, 47-69 at p. 49.

[54] Graham Greenleaf, "Promises and illusions of data protection in Indian law", *International Data Privacy Law,*2011, Vol.1, No.1, 47-69 at p. 48.

The existing laws for the protection of individual data are not sufficient. In particular, the key data protection provisions of the 2008 amendments to the *Information Technology Act*, 2000 are not yet effective, and the consumer protections in the credit reporting legislation appear to be ignored by regulators and credit bureaux alike.[55]

Although the cases on Article 21 have not yet involved data protection issues, the Indian legal system is open to such judicial intervention, as illustrated by the Supreme Court's development of a right of access to public information prior to its national enactment in the *Right to Information Act*, 2005. If the legislature has failed to enact protections required by the Constitution, the Supreme Court can make binding rules which will operate until laws are made by the legislature and found by the court to be sufficient. The possibility of judicial developments must be kept in mind when considering the scope of Indian data protection law.[56]

1.7 Conclusions and Suggestions

It has been recognized at all levels of the society that right to privacy is an inherent right and is inviolable. With the growth of the industrialization, globalization and liberalization, the shift has come from joint privacy to individual privacy. With overreaching powers of media and increase in the privacy destroying techniques individual privacy is at stake. In this cyber age, the government has the potential to collect all personal details of every individual for any public purpose. But with the decrease in the cost of technology, private entities are also using very sophisticated privacy destroying technologies. Present law is insufficient to tackle these problems.

It is submitted that media should not forget its social responsibility. Investigative journalism is a potent tool of the freedom of press and media; it should be used for the public good. Media is also bound towards code of ethics. Whenever the personal data has been stored by the authorized entities, the concerned individual must know its purpose. Such personal data should be used for that purpose only, for which it has been stored and should be properly protected. In order to do so an effective Data Protection Law is required.

[55] *Id.*, at p. 68.
[56] *Id.*, at p. 49.

SURROGATE ADVERTISEMENT BRAND REINFORCEMENT OF LIQUOR AND TOBACCO PRODUCTS : MODE OF VIOLATING LEGISLATION

Dr. Rajinder Kaur*

1.1 Introduction

In today's world advertisements have become indispensable part of our lives whether we are watching match or a favorite daily soap on television or listening to radio or surfing the internet or even while opening mail on internet. The advertisement is gaining importance and popularity as it has become an important link between the producers and consumers. Advertisements can be comparative, competitive and informative. The American Marketing Association defines advertising as "any paid form of non-personal presentation and promotion of ideas, goods and services by an identified sponsor." Advertising is non-personal in nature as it is not directed towards single individual. Basically it is a technique which is used to bring products, services, opinions, or causes to public notice for the purpose of persuading the public to respond in a certain way[1].

Weekly newspapers in London were the first one to carry advertisements in the 17th century; by the 18th century such advertising was flourishing. Most advertising promotes goods for sale, but similar methods are used in public service messages to promote causes, charities, or political candidates. In many countries, advertising is the most important source of income for the media through which it is conducted.[2] The media of advertising can be print media i.e. newspaper, magazines, posters etc and electronic media i.e. television, radios, internet. The commercial advertisements are treated as a mode of expression and it is protected under the Article 19(1) (a) of Constitution of India.[3] But this freedom is not an absolute freedom and can

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* Assistant Professor of Law, Army Institute of Law, Mohali.

1 Encyclopedia Britannica<http://www.britannica.com/EBchecked/topic/6801/advertising> (last accessed on 20 June 2011)

The *Cigarettes & Other Tobacco Products (Prohibition of advertisement and regulation of trade and commerce, production, supply and distribution) Act*, 2003 s. 3(a) of the said act defines *'advertisement' as including: 'any visible representation by way of notice, circular, label, wrapper or other document and also includes any announcement made orally or by any means of producing or transmitting light, sound, smoke or gas'.*

2 *Ibid.*

3 *Tata Press Ltd v. Mahanagar Telephone Nigam Ltd.*, 1995 (5) SCC 139, The Supreme Court observed in its judgment : ...'commercial speech' cannot be denied the protection of Article 19 (1) (a) of the Constitution merely because the same is issued by businessmen

be curtailed[4] and State has a right to impose reasonable restrictions on the grounds mentioned under Article 19(2) of the Constitution of India, 1950. Therefore certain advertisements which promote liquor and tobacco products are banned in interest of public health. This has given birth to a new form of advertisement known as surrogate advertisement.

The literal meaning of **'Surrogate advertising'** is copying the brand image of one product to promote another product of the same brand. It can be defined as the strategy used by manufacturers and advertisers to promote a product surreptitiously, the advertisement of which is banned by the law of the land. Liquor and tobacco companies often advertise their products in this clandestine manner.[5] Many companies have worked around this rule by bringing out soda, glasses, fruit juice and playing cards by the same name to promote the brand. This is known as in advertising lingo, some say that genuine "Brand Extension" is different from surrogate advertising. But many people believe this to be a fraudulent approach garbed in politically correct terminology.[6]The main object of the producers is to keep their brand of liquor or tobacco alive in the mind of producers. Most of the producers successfully achieve their target as and when we hear the word bagpiper we fail to correlate it with soda water and relate it with whisky similarly Wills is not known for their chain stores but for tobacco products.

Surrogate advertising is a fairly innovative phenomenon in the advertising industry. In India also the tobacco and liquor advertisements are banned on television and radio. The government of India amended *Cable Television Act* to remove gaps and to make it more effective. But still the liquor companies promote their products either in the form of mineral water or fruit juices. The most popular advertisements are: Bagpiper Whisky is promoted through surrogate product of soda water, the Kingfisher beer advertisement also talks about its mineral water, 8 PM Whisky is also promoted in the disguise of apple juice, the Hayward 5000 product use dartboard as a surrogate product and recently a team in the IPL tournament.[7]

Some of the other premium liquor brands have associated themselves to another profession to advertise their brands. Johnny Walker Scotch whisky

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4 The *Constitution of India,1950*, Article 19 (2) provides that Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence

5 P. A Ram Chandra 'What is Surrogate advertisement', A writer @ large available at http://anilpen.blogspot.com/2008_08_01_archive.html (last accessed on 23 June 2011)

6 *Ibid.*

7 Deepak, 'Surrogate Advertising', *Advertising Express Magazine*, June 2004 at p. 35.

promotes a series of successful stories on the TV Channel. Teacher Scotch whisky on the platform of Teachers Achievement Awards. The Award Ceremony was hosted in Mumbai in 2003.[8] On the same lines the tobacco industry has also taken the support of surrogate advertisement to support their products. Red & White a Cigarette brand sponsors bravery awards; Wills running a chain of specialty stores and Manik Chand- a major gutka manufacturer is sponsoring Filmfare Awards. Surrogate advertisement plays a major role in reinforcing brand recall rather than inducing consumption.[9] Smirnoff, Imperial Blue is reinforcing their brand in the form of CDs.

Another the most recent and popular example of Surrogate was Royal Challengers, Bangalore, a team participating in Indian Premier League (IPL) cricket tournament for promoting liquor in the name of cricket. Krishan Aggrawal, the petitioner, filed a petition seeking to restrain Royal Challengers, Bangalore, team participating in Indian Premier League (IPL) cricket tournament from promoting liquor in the name of cricket. He further submitted before the court that Royal Challengers was promoting whisky brand Royal Challenge, manufactured and sold by United Breweries Group, a company owned by Vijay Malya, owner of the Royal Challengers, Bangalore, and this was illegal. The Supreme Court dismissed a petition seeking to restrain Royal Challengers, Bangalore, a team participating in Indian Premier League (IPL) cricket tournament from promoting liqour in the name of cricket. *The Supreme Court of India has since pointed out that the team was not named 'Royal Challenge', the liquor brand, but "Royal Challengers". 'Only those who drink can be attracted by these things,' the bench observed in a lighter vein, alluding to the fact that a name would not have any effect on non-drinkers.*[10]

The latest being Pernod Ricard's blended whisky brand Seagram's Imperial Blue which has launched a 90-minute film named after the brand's tagline 'Men Will Be Men'. Marketing experts say this is a logical extension for Imperial Blue which has earlier used music CDs as a way to promote the brand.[11] Though the film failed to make a mark in PVRs but still a new innovative mode has been invented to reinforce brand name.

1.2 International and National Measures

The WHO Framework Convention on Tobacco Control is the first treaty negotiated under the World Health Organization. It was adopted by the

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8 *Ibid.*

9 *Id., at p. 35.*

10 *Royal Challengers is obvious surrogate advertising for alcohol,* available at http://www.harshadoak.com/2008/04/ society/ royal-challengers -is-obvious-surrogate-advertising-for-alcohol.html (last accessed on 23 June 2011)

11 Pernod Ricard: The Big Screen Way, *Business Standard* 25 June 2011

World Health Assembly on 21 May 2003 and entered into force on 27 February 2005 and the first legal instrument designed to reduce tobacco-related deaths and disease around the world. It has since become one of the most widely embraced treaties in UN history and, as of today, has already 168 Parties.[12] India has signed this convention on 10 September 2003 and ratified on 5 February 2004.

In the light of WHO framework Convention on Tobacco Control it was considered expedient to enact a comprehensive law on tobacco in the public interest and to protect the public health. The *Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act*, 2003 was enacted with the object to ensure that effective protection is provided to non-smokers from involuntary exposure to tobacco smoke and to protect children and young people from being addicted to the use of tobacco.

Section 5 of the above referred Act prohibits the advertisement of cigarettes and other tobacco products. Sub clause (1) states: 'No person engaged in, or purported to be engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise and no person having control over a medium shall cause to be advertised cigarettes or any other tobacco products through that medium and no person shall take part in any advertisement which directly or indirectly[13] suggests or promotes the use or consumption of cigarettes or any other tobacco products.'

Section 5 (2) states: No person, for any direct or indirect pecuniary benefit, shall- (a) display, cause to display, or permit or authorise to display any advertisement of cigarettes or any other tobacco product; or (b) sell or cause to sell, or permit or authorise to sell a film or video tape containing advertisement of cigarettes or any other tobacco product; or (c) distribute, cause to distribute, or permit or authorise to distribute to the public any leaflet, hand-bill or document which is or which contains an advertisement of cigarettes or any other tobacco product; or (d) erect, exhibit, fix or retain upon or over any land, building, wall, hoarding, frame, post or structure or upon or in any vehicle or shall display in any manner whatsoever in any place any advertisement of cigarettes or any other tobacco product: Provided that this sub-section shall not apply in relation to- (a) an advertisement of cigarettes or any other tobacco product in or on a package containing cigarettes or any other tobacco product; (b) advertisement of cigarettes or any other tobacco product which is displayed at the entrance or inside a

[12] http://www.who.int/fctc/en/ (last accessed on 23 June 2011).

[13] *The Ministry of Health and Family Welfare made certain amendments to the above Act in 2005, added the word 'indirect advertisement' and had tried to fulfill the loopholes in the Act.*

warehouse or a shop where cigarettes and any other tobacco products are offered for distribution or sale.

Section 5 (3) states: No person, shall, under a contract or otherwise promote or agree to promote the use or consumption of—

(a) Cigarettes or any other tobacco product; or

(b) Any trade mark or brand name of cigarettes or any other tobacco product in exchange for a sponsorship, gift, prize or scholarship given or agreed to be given by another person.

Further Section 22 of the Act provides for the Punishment for advertisement of cigarettes and tobacco products[14] in case of first conviction the imprisonment extends for a term of two years and fine up to 1000 rupees and in case of subsequent conviction imprisonment extends for a term of five years and fine up to 5000 rupees. Section 23 of the above referred Act lays down provisions for forfeiture of advertisement and advertisement material.[15]

The WHO study[16] on the portrayal of tobacco in Indian cinema its impact on youth audience (2003) reported that movies/television programs with smoking and tobacco usage scenes exert the decisive influence on the adolescent age group which is most vulnerable to initiation of tobacco use. It was also found that 76% of the Indian movies that were analyzed portrayed tobacco consumption and the good characters account for approximately 50% of portrayal incidence. Taking due cognizance of this public health threat, the Ministry of Health and Family Welfare amended the rules of the *Tobacco Control Act*, 2003 to ban display of tobacco products or their use in movies or television through a gazette notification issued on 31st May 2005. In addition, sale of tobacco products through vending machines, sale of tobacco products by minors and visible stacking of tobacco products

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[14] The *Cigarettes & Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act*, 2003, Section 22 provides Punishment for advertisement of cigarettes and tobacco products.-Whoever contravenes the provision of section 5 shall, on conviction, be punishable- (a) in the case of first conviction, with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees or with both, and (b) in the case of second or subsequent conviction with imprisonment for a term which may extend to five years and with fine which may extend to five thousand rupees.

[15] *Id.*, S. 23 provides Forfeiture of advertisement and advertisement material.-Where any person has been convicted under this Act for the contravention of the provision of section 5, the advertisement and the advertisement material for cigarettes and other tobacco products may be forfeited to the Government and such advertisement and advertisement material shall be disposed of in such manner as may be prescribed by rules made under this Act.

[16] Bollywood: Victim or Ally, A WHO study on portal of tobacco in Indian Cinema, The study highlights the issue that use of tobacco in cinema and the influence of the same in youth.

at the point of sale was also banned to prevent easy access of tobacco products to minors. In this notification, indirect advertisement of tobacco products has also been clearly defined to prevent violations.[17]

In case of liquor also Section 7(2) (viii)[18] of the Cable television Network Rules, 1994 lays down that no advertisement shall be permitted which promotes directly or indirectly production, sale or consumption of (a) Cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants;

Recently in 2009 the Ministry of Information and Broadcasting amended the Advertising Code under Rule 7 of The Cable Television Network Rules, 1994 ("Rules").The amendment is to sub-rule (viii) Prohibits advertisements in cable services which promote, directly or indirectly the production, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants, and infant milk substitutes, feeding bottle or infant foods. The amendment permits advertisements of products which uses the brand name or the logo used for the prohibited products if the following conditions are satisfied:[19]

- The story and the visual of the advertisement must depict only the product being advertised and not the products which are prohibited in any form or manner
- The advertisements must not make any direct or indirect reference to the prohibited products
- The advertisement must not contain any nuances or phrases promoting prohibited products
- The advertisement must not use particular layouts, colours or representations associated with the prohibited products.
- The advertisement must not use situations typical for promotion of the prohibited products when advertising the other products

The amendment further requires certification from the Central Board of Film Certification (**CBFC**). The advertiser has to make an application to the Ministry along with the certificate from a chartered accountant that the product is distributed and made available in a substantial number of outlets where other products of the same category are available and that the proposed expenditure on advertising is not disproportionate to the actual

[17] "Tobacco Control Legislation" *www.whoindia.org/en/Section20/Section25_928.htm* (last accessed on 23 June 2011).

[18] Inserted by GSR 710(E), with effect from 8 September 2000.

[19] Inserted Notification No. GSR 138 (E) dated 27 February 2009.

sale turnover of the product. Advertisements found to be genuine by the Ministry shall be previewed and certified by the Central Board of Film Certification that it is suitable for unrestricted public exhibition and is in accordance with Rule 7 (2) (viii) before their telecast, transmission or retransmission.[20] Even after this recent amendment Hayward's 5000 has come up with a new surrogate product in the form of soda water with a new tag line and 'Men will be Men' the film released on the tag line of Seagram's Imperial Blue blended whisky. How far these rules are able to curb the problem of surrogate advertisement depend upon the strict implementation.

1.3 Self Regulation of Advertisements

In case of advertisement world the Advertising Standards Council of India[21] plays a crucial role of self regulation. It is a voluntary and not-for-profit company registered under section 25 of the *Indian Companies Act*, 1956 constituted in 1985. The principal members of the council are the Advertisers, Media, Advertisement Agencies and other Professional/Ancillary services connected with advertising practice. The purpose of the Code is to control the content of advertisements, not to hamper the sale of products which may be found offensive by some people.

In recent years the quantity of false, misleading and offensive advertising has resulted into disbelief in advertising, and resentment in the consumers. Misleading, false advertising also constitutes unfair competition. It could lead to market-place disaster or even litigation. If this kind of advertising continues, it won't be long before statutory regulations and procedures are imposed which make even fair, truthful, decent advertising cumbersome if not impossible. The Advertising Standards Council of India has adopted a Code for Self-Regulation in Advertising. It stands for the protection of the legitimate interests of consumers and all concerned with advertising - advertisers, media, advertising agencies and others who help in the creation or placement of advertisements.[22]

Chapter III of the code aims to safeguard against the indiscriminate use of Advertising in situations or of the Promotion of Products which are regarded as Hazardous or Harmful to society or to individuals, particularly minors, to a degree or of a type which is unacceptable to Society at Large and point six of this chapter specifically deals with the surrogate advertisement.

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[20] Infolex, *Legal and Regulatory Information* (March 2009) at p. 8.
[21] For details see http://www.ascionline.org/(last accessed on 23 June 2011).
[22] *Ibid.*

Advertisements for products whose advertising is prohibited or restricted by law or by this code must not circumvent such restrictions by purporting to be advertisements for other products the advertising of which is not prohibited or restricted by law or by this code. In judging whether or not any particular advertisement is an indirect advertisement for product whose advertising is restricted or prohibited, due attention shall be paid to the following:

(a) Visual content of the advertisement must depict only the product being advertised and not the prohibited or restricted product in any form or manner

(b) The advertisement must not make any direct or indirect reference to the prohibited or restricted products

(c) The advertisement must not create any nuances or phrases promoting prohibited products

(d) The advertisement must not use particular colours and layout or presentations associated with prohibited or restricted products

(e) The advertisement must not use situations typical for promotion of prohibited or restricted products when advertising the other products

The Board of Governors shall appoint Consumer Complaints Council (CCC), the number of members of which shall not be more than twenty one. The Consumer Complaints Council shall examine and investigate the complaints received from the consumers and the general public, including the members of the Company, regarding any breach of the Code of Conduct and/or advertising ethics and recommend the action to be taken in that regards. Generally the actions recommended by the Consumer Complaints Council are respected by the advertising agencies.

United Spirits Ltd (Antiquity) Strip Ad mentions -"Antiquity Music CDs advertisement was illegal under the laws of the land as advertisement of alcoholic drinks are banned. Under Chapter III rule 6 of the code of self regulation it was held that advertisement was a surrogate advertisement for a liquor product – Antiquity. Advertiser assured that Ad has been withdrawn. Another case is of Diageo India P. Ltd Smirnoff) published in India Today 12/2008 issue advertisement states - "Producing the Purest, Always", and "United against drink driving". Advertisement shows the brand name of a liquor product – Smrin off. Advertisement appears to be a surrogate as it mentions "Cassettes & CDs", without any visual depiction of the same. This bears no relation to the product/service being promoted. Under chapter III rule 6 of the code of self regulation it was held that advertisement was a surrogate advertisement for a liquor product – Smirnoff. Advertisement was

withdrawn.[23] Generally, whenever the complaints are filed in front of Consumer Complaints Council the decision is respected by the advertisers but till that decision comes the advertisers have achieved the desired object. The main reason for it is lack of public awareness.

1.4 Conclusion

International Initiative along with the national legislation is there to provide a healthy life to all our citizens. But the advertisement world is so creative to adopt new form of strategies for brand endorsement. Surrogate advertisement is one such form adopted by the liquor and tobacco companies for brand endorsement. Till the time tobacco and alcohol is viewed as an individual's problem and the soft approach is adopted towards introducing any regulatory measures it will become difficult to tackle the problem. Measures may also be considered to ensure that brand names or logos of tobacco products are not visible, even if such brands support international or national sports or any other event. The need is to make more transparent and stringent laws banning surrogate advertisements for different products and penalizing the companies involved in these practices.

The Advertising Standards Council of India works with the motto that *Regulate yourself, or someone else will* and to some extent they have proved successful but still a lot is required in this field. But it is difficult to monitor more than hundred channels and most of these channels are broadcasting non-stop twenty four hours a day. Above all, it is strongly believed that self regulation and legal regulation will work only if the consumers in India are more aware of their rights. The need is to create more consumer awareness to help people understand the negative impact of surrogate advertisements. In this era the advertisements are the tool in the hand of companies to promote the product or service but this tool should be used judiciously keeping in mind the interest of the consumers.

[23] Complaints upheld by the Consumer Complaints Council (CCC) **ASCI Decisions Compilation: April-November 2009.**

LEGAL EDUCATION - CHALLENGES, PEDAGOGICAL CONCERNS AND RESPONSE : AN INDIAN PERSPECTIVE

Renuka Salathia*
Vivek Salathia**

Law and lawyers are what the law schools make them[1]

1.1 Introduction

Education is a means by which knowledge is transmitted and skills developed. Beneath what appears to be a relatively simple statement, exists a complex matrix of pedagogic and cultural practices that inform, shape and give effect to what information is chosen and how it is understood, transmitted and received. Legal education has long been the subject of inquiry into its purpose and methods and the landscape of legal pedagogy reflects the diversity of interest it has generated.

Lawyers and legal profession has long been used to stinging, often accurate criticism of their work and profession. Criticisms of legal profession have spanned centuries, countries and classes. Although criticism of legal education has not spanned centuries, but the criticism has been as harsh and exhaustive as that endured by the profession. While the legal profession has had difficulty generating a silencing response to the critics, legal education has at least been prolific in its reply.

In India, legal education has been traditionally offered as a three years graduate degree. However the structure has been changed since 1987,on the suggestion by the Law Commission of India and also given the prevailing cry for reform, the Bar Council of India instituted upon an experiment in terms of establishing specialized law universities solely devoted to legal education and thus to raise the academic standards of legal profession in India. This decision was taken somewhere in 1985 and thereafter the first law University in India was set up in Bangalore which was named as the National Law School of India University (popularly 'NLS'). These law universities were meant to offer a multi-disciplinary and integrated approach to legal education. It was therefore for the first time that a law degree other than LL.B. or B.L. was granted in India.

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* Assistant Professor of Law Rajiv Gandhi National University of Law, Punjab, Patiala.
** Advocate, Punjab and Haryana High Court, Chandigarh.

[1] This famous quote is by Justice Felix Frankfurter who was an Associate Justice of the United States Supreme Court.

However, now India needs to look beyond mere establishment of National Law Schools and emphasize on the second generation of legal education reforms, weeding out mediocrity and inefficiency from the legal system. The need now is to look beyond the mere establishment of National Law schools. The need now is to weed out mediocrity and inefficiency from our legal education system through dramatic reform in terms of its scope and quality.

1.2 Challenges to Legal Education in India

India today faces multifarious challenges on account of the following reasons:

1. Allowing the three year LL.B. course to continue as before side by side with the five-year integrated programme;
2. Not following the distinction between professional and liberal legal education in categorizing the over 500 law teaching institutions for extending BCI jurisdiction;
3. Reducing the eligibility criteria for admission to the professional law course;
4. Inability to mobilize funds for supporting improvements in legal education, particularly among institutions located outside metropolitan cities;
5. Inability to revive the pre-enrolment apprenticeship scheme or any other viable alternative to ensure minimum professional competence on the part of fresh entrants to the profession;
6. Inability to deter full-time teachers from practicing law and thereby depriving students of the benefit of services of these teachers; and
7. Inability to provide any meaningful guidance for institutionalizing clinical teaching (of skills) and imparting education on professional ethics.
8. The Government of India also contributed to this decline by refusing to amend the relevant provisions of the *Advocates Act* even after repeated approaches by the Bar Council of India [2]

The reasons mentioned above are merely illustrative and not exhaustive. The legal education in India now faces challenges which need to be overcome in order to ensure quality legal education.

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[2] Professor. N.R Madhwa Menon, *Halting Progress of Legal Education*, http ://www.hinduonnet. com / 2001 /10 /23 /stories /13230643.htm

1.2.1 Challenges with Regards to Subject Matter

Concern with regards to subject matter has been a significant focus of the criticism of Legal education. The all important question of "what is to be taught". The question is on account of the awkward relationship between the theoretical and the practical. The curriculum designing, traditional thinking of law teachers and research are the major challenges faced by most of the law schools, law colleges and universities in India.

1.2.2 Challenges with Regards to Multiple Regulators

Legal education in India faces the problem of being controlled by multiple regulators. University Grant Commission (U.G.C), Bar Council of India (B.C.I), Universities in cases of Law colleges for affiliation purposes are the regulators controlling legal education in India. The University Grants Commission, which is in control of higher education generally, has conveniently avoided paying attention to legal education except perhaps for their one-time effort in curriculum development way back in the 1980s. Thus legal education is left with multiple controllers with little or no accountability. Even the accreditation mechanism put in place by the UGC is not particularly geared to evaluating performance of law teaching institutions. What is available to the public is an India Today annual survey of the top ten law schools in the country. This is an unsatisfactory state of affairs for the future of legal education in India which will soon be called upon to compete globally for quality, professionalism and responsiveness to changing demands. The Apex professional body, The Bar Council of India has infact lagged behind in meeting the demands of Legal education in India. The hon'ble Supreme Court of India has categorically ruled that as the apex professional body the Bar Council of India is concerned with the standards of the Legal education, legal professional and the equipment of those who seek entry into that profession.[3]

1.2.3 Challenges with Regards to Curriculum Designing

The biggest challenge is whether there should be a common curriculum in India. In 1996 a meeting was organized which comprised of Bar Council, Universities and UGC and it was recommended that a minimum of 30 subjects were to be taught across the country, however the Bar Council of India did not consider the recommendations in totality, as a result of which today every law school, college, University just have to follow the minimum

[3] *Bar Council of India* v. *Board of Mangement Dayanand College of Law and Ors.*, Civil Appeal No. 5301-5302 of 2001 decided by the Hon'ble Supreme Court of India on 28 November 2006.

criteria approved by the Bar Council of India, this has resulted in vast differences in Curriculum. Today no two institutions in India wherein legal education is being disseminated follow a common curriculum and hence this has greatly affected the quality of Legal professionals produced by the institutions. Though law schools in India have the Liberty and privilege of experimenting with the curriculum but the law colleges and universities still follow the traditional and old curriculum.

1.3 Pedagogical Concerns of Law Teaching

While many battles rage as to what should be taught, many are fought as to how it should be taught. The tedium of teaching methods, sterile classroom situation, the third year blahs all point to the problem of pedagogy.[4] The law school teaching pedagogy has been referred to as a "labyrinth"; that is a winding, confusing and circuitous path that is the study and later, the practice of law. The law school pedagogy is most noted for the intense reading by law students of countless judicial opinions; and then being subjected to the relentless Socratic scrutiny of their professors[5].

The Socratic Method and the case study method are the two major components of the law school pedagogy. The law school pedagogy has essentially remained unchanged since it was utilized by Harvard's Christopher Columbus Langdell in the late 1800's and as a result, has been criticized as outdated.[6] Law students and legal scholars have argued for its reform. In a typical Socratic dialogue, the professor requires the student to make assertions about a particular brief, and forces the student to articulate and understand the assumptions hidden within those assertions. But in India our teaching generally follows what Paulo terms as narration and depository method. In the words of Paulo "a careful analysis of the teacher-student relationship at any level inside or outside the school reveals its fundamentally *narrative* character. This relationship involves a narrating Subject (the teacher) and patient, listening objects (the students).

In many cases the Indian law teacher's conception of law is typically a static one as described above and he approaches legal education through a lecture method, emphasizing systematic presentation and verbal analysis of the

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[4] Andrew J. Pirie, "Objectives in Legal Education: The Case for Systematic Instructional Design", *Journal of Legal Education*, Vol. 37, pp. 576-97, December 1987.

[5] Jonathan R. Macey, *Towards a new Pedagogy*, Yale Law Journal, Vol. 93, NO. 6 (May 1984), pp. 1173-1185

[6] Langdell proposed that law students must be given some means of experimentation and research by which they might cut through the excessive verbiage of black-letter rules and discover the fundamental scientific axioms that ought to be used in studying, teaching and judging the law. Casebooks were to be the students laboratories.

existing structure of rule and doctrine. Little attention is paid either to the policies that underlie the rules or to the processes of growth and development through which the legal system adapts old rules or announces new ones. There is generally no dialogue; the quality of the discussion is not impressive. The students are typically poorly prepared and the teacher usually more interested in expounding than in exploring the subject. To use an adage, the situation in India, our pedagogy follows the maxim that you eat the fish, but I will get you fish where as a progressive pedagogy should focus on I will teach you fishing so that you can catch fish for a life time.

Further interdisciplinary approach is almost missing from the legal education scenario. There are very few universities in India which has taken the lead in having group teaching. For instance in a jurisprudence class philosophy teacher accompanies or in an administrative law class public administration faculty accompanies. These innovations can actually make teaching and learning a fulfilling experience for teachers as well as students.

National schools have started case methods and other mechanisms including Moots and seminars to improve the effectiveness of teaching and to make students equal partners in the pursuit of knowledge. But these mechanisms have not been percolated to the ground where the heart and soul of India's legal education lies.

1.4 Response to the Problems and Challenges

In order to meet the problems and challenges to Legal education in India, the National Knowledge Commission[7] came up with recommendations. The Recommendations of the National knowledge Commission are as under:

1.4.1 Regulatory Reform: A New Standing Committee for Legal Education

The National knowledge Commission recommend the setting up of a new regulatory mechanism under the Independent Regulatory Authority for Higher Education (IRAHE) which was vested with powers to deal with all aspects of legal education and whose decisions are binding on the institutions teaching law and on the union and state governments. The Role of Bar Council was to be limited to the extent of providing minimum standards.

[7] The National Knowledge Commission is a high-level advisory body to the Prime Minister of India which was constituted in 2005 by the Prime minister of India, Dr Manmohan Singh with the objective of transforming India into a knowledge society. In its endeavour to transform the knowledge landscape of the country, the National Knowledge Commission has submitted around 300 recommendations on 27 focus areas during its three and a half year term. While the term of the NKC has come to an end, the implementation of NKC's recommendations is currently underway at the Central and State levels.

1.4.2 Prioritize Quality and develop a Rating System

Development of an independent Rating System based on a set of agreed criteria to assess the standard of all institutions teaching law as a mechanism to ensure consistent academic quality throughout the country. The criteria for rating would be evolved by the Standing Committee for Legal Education while the rating would be done by independent agencies licensed by IRAHE for the purpose. Recognition could be either granted or withdrawn on the basis of such ratings. The rating results should be reviewed annually, regularly updated, monitored and made available in the public domain.

1.4.3 Curriculum Development

Development of contemporary curriculum, which is integrated with other disciplines and also ensures regular feedback from the stakeholders, was also recommended. Autonomy may be granted to universities, national law schools (NLSUs) and other law schools to decide the core and optional courses to be offered. This was a departure from current practice where the BCI largely determines curricula and syllabi. The curricula and syllabi must be based in a multidisciplinary body of social science and scientific knowledge. Curriculum development should include expanding the domain of optional courses, providing deeper understanding of professional ethics, modernizing clinic courses, mainstreaming legal aid programs and developing innovative pedagogic methods. Legal education must also be socially engaged and sensitize students to issues of social justice.

1.4.4 Examination System

It was recommended that the prevailing examination systems should be relooked and it was suggested that evaluation methods that test critical reasoning by encouraging essential analytical, writing and communication skills must be developed. The end-semester examination should be problem-oriented, combining theoretical and problem oriented approaches rather than merely test memory. Project papers, project and subject viva, along with an end-semester examination to be considered as pedagogic methods imperative for improving quality.

1.4.5 Measures to attract and retain talented faculty

To attract and retain talented faculty, National knowledge commission recommend better incentives, including improving remuneration and service conditions. Salary differentials could be considered as a means to retain quality talent and also promote a culture of excellence. To foster quality and create better incentives, there was also need to remove fetters on faculty that pertain to opportunities in legal practice (such as consultancy assignments and legal practice in courts). These reforms need to be introduced in a balanced,

reasonable and regulated manner to ensure adequate incentivization for faculty without compromising on the maintenance of consistent academic quality. Instituting awards to honour reputed teachers and researchers at national and institutional levels, flexibility to appoint law teachers without having an LL.M degree, if the individual has proven academic or professional credentials, faculty exchange programs with leading universities abroad and upgrading existing infrastructure, was also recommended.

1.4.6 Developing a Research Tradition in law schools and universities

It was felt that creating a tradition of research in law schools and universities was imperative if India has to transform itself from being only a consumer of available legal knowledge to being a leading producer in the world of new legal knowledge and ideas. The Commission recommend measures to develop a serious culture of research by emphasizing analytical writing skills and research methodology as integral aspects of the LL.B, LL.M and Ph.d program; creating excellent infrastructure (including research friendly library facilities, availability of computers and internet; digitization of case law; access to latest journals and legal databases available worldwide); rationalizing the teaching load to leave faculty members sufficient time for research; granting sabbatical leave to faculty to undertake research; creating incentives if research results in peer reviewed publications,; establishing prerequisites such as a mandatory dissertation in the LL.M program, a pre-registration presentation and a course in methodology for M.Phil and PhD programs respectively; and establishing four new centers for advanced legal research.

1.4.7 Centers for Advanced Legal Studies and Research (CALSAR)

Setting up four autonomous, well networked Centers for Advanced Legal Studies and Research (CALSAR), one in each region, to carry out cutting edge research on various aspects of law and also serve as a think-tank for advising the government in national and international for a, was also recommended.

1.4.8 Financing of Legal Education

It was suggested that is for law schools and universities to decide the level of fees but as a norm, fees should meet at least 20% of the total expenditure in universities. This was subject to two conditions: first, needy students should be provided with a fee waiver plus scholarships to meet their costs; second, universities should not be penalized by the UGC for the resources raised from higher fees through matching deductions from their grants-in aid. The central and state ministries may also be urged to endow chairs on specialized branches of law.

1.4.9. Dimensions of Internationalization

Suggested initiatives to promote such international perspectives include building collaborations and partnerships with noted foreign universities for award of joint/dual degrees; finding ways of evolving transnational curricula to be taught jointly by a global faculty through video conferencing and internet modes; as well as creating international faculty, international courses and international exchange opportunities among students was also recommended.[8]

1.5 Conclusion

Law is the cement of society and an essential medium of change. Knowledge of law increases the understanding of public affairs. Its study promotes accuracy of the expression and facilitates in accuracy of expressions. The quality of legal education acquired at the law schools is reflected through the standard of Bar and Bench and consequently affects the legal system. Effective reforms in Indian legal education will require energy, imagination, and devotion. But reform in legal education cannot succeed unless the Indian legal order as a whole moves in a complementary direction. One must hope that reforms and insights from an invigorated and reshaped legal education will help to stimulate movement in other areas of law until, in due time, the several efforts will multiply and become self-reinforcing. If challenge determines response, the enormous challenges to Indian legal education and to the Indian legal profession should produce a tremendous effort to improve legal education. Legal education is an investment, which if wisely made will produce most beneficial results for the society.

[8] Recommendations of the National Knowledge Commission, for further details visit *www.nationalknowledgecommission.gov.in*

SEXUAL HARASSMENT AT WORK-PLACES : EVIL OF THE MODERN SOCIETY

Bhavana Sharma*

1.1 Introduction

In our culture and civilization, the girl child represents beauty, auspiciousness and prosperity. She is worshipped as dawn, the bringer of hope. Women can be the harbingers of harmony in all spheres. Mohanjodaro, indicate a highly sophisticated culture. She is the mother of human-kind. But India is a great paradox. Nowhere is this more evident than with regard to the status of women in India. Our scriptures regard women as the goddesses, the incarnation of compassion, provider of food and destroyer of evil. But in practice, the gender discrimination is deep-rooted in social and political institutions. This begins in the form of "sex determination test" at a stage when the child is in mother's womb, the safest place in the history of human-beings, which ultimately lead to foeticide of girl child[1].

India has always been a male dominating society; women's have to go through many problems and pain like dowry death, eve-teasing, sexual harassment and rape. Here all these problems showcase the power of man to dominate, where the victim is the-'women'. Sexual harassment and rape are the two sides of the same coin. But many people extenuate sexual harassment to rape, just because the victims are not physically harmed, whereas in rape victim ravished like an animal for the fulfillment of desire and lust of another man. But is it true that harassment does not torture women physically or mentally much? No its not. Sexual harassment is a form of violence against women. It is a form of assault, which can manifest itself in terms of physical and psychological acts. Physically, the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against and forms of touching. Psychological harassment can occur through the proposal of physical intimacy by requesting dates and sexual favors, or by making loud and indecent remarks which embarrass the recipient. Both rape and sexual harassment have the same object- to undermine the integrity of the victim, physically as well as mentally[2].

Of all the forms that violence against women can assume, sexual harassment is the most ubiquitous and insidious; all the more so because it is deemed 'normal' behavior and not an assault on the female entity. It affects women in all settings

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* Research Fellow (JRF), Himachal Pradesh University Summer Hill, Shimla.

1 *Chronicle*, 2006.

2 Kouteelya, Sexual harassment and Supreme Court Guidelines, www.indiatogether.org, as browsed on 10th June, 2011.

whether public or private and has psychological, medical, social, political, legal and economic implications. Instances of sexual harassment should not be viewed as isolated incidents; rather they should be construed as a gendered aggression against the right and dignity of women. The fact that its pernicious effects are visible globally discounts any effort to view it with less gravity than it deserves[3].

1.2 Sexual Harassment: Meaning and Definition

India gained freedom in 1947, the Constitution was passed in 1951 in which a number of provisions for the protection and upliftment of women has been laid down but it was only in 1997 that for the first time absence of legislation in respect of sexual harassment at work places came into picture with the Vishakha's case, so there is no law in India which specifically defines the term "sexual harassment". Certain acts of sexual harassment constitute criminal offences, as under section 209 of the Indian Penal Code for performing an obscene act or utterance, and also under Sections 354 and 509 for outrage of modesty of women. But these provisions can not address the various insidious forms sexual harassment can take, and more important, the redressal is not the organisation's responsibility. J.S.Verma J. (as the former Chief Justice of India as then was), tied to define the term sexual harassment and suggested as:

For this purpose sexual harassment includes such unwelcome sexually determined behavior (whether directly or by implication) as:

(a) Physical contact and advances

(b) A demand and request for sexual favours.

(c) Sexually coloured remarks.

(d) Showing pornography.

(e) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature[4].

Thus the Vishakha's Guidelines categorically state that it is the duty of the employer or other responsible persons in the work place or institutions to:

- Prevent Sexual Harassment.
- Provide mechanism for the resolution of complaints.

Interestingly "sexual harassment" is not defined even in the Protection of Women against Sexual Harassment at Workplace Bill, 2010. Section 3 of this bill describes

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3 "Sexual Harassment", *Journal of Gender Studies*, 5 (1), Jan.-June, 1998, pp.115-125.

4 *Vishakha* v. *State of Rajasthan* , (1997) 6 SCC 241; cited in S.C. Tripathi, Law relating to women and children, p.23.

this to include unwelcome sexually determined behaviour, and the various items conceptualised in Vishakha, making it clear that is not limited to any assurance of preferential or threat of detrimental treatment, conduct which is humiliating or inducive to a hostile and unhealthy work environment.

Madhu Mehra, Director, Partners for Law in Development, a Delhi-based legal resource group that works on issues of social justice and women's rights says, "The Vishakha Judgment gave the invisible crime of Sexual Harassment a name and forced the State to acknowledge its widespread presence more than a decade back. Yet, people pretend as if it doesn't happen."

1.3 Vishakha's Judgment Heralded a New Era

There have been numerous campaigns[5] and legal interventions[6] against sexual harassment, most recommending reform of the law. The recent judgment on sexual harassment of working women pronounced by the Supreme Court in 1997 has been an important legal event, marking the emergence of judicial activism in the arena of gender justice. Supreme Court's judgment in Vishakha's case is a landmark for more than one reason. Not only was sexual harassment at the work-place recognized under the Indian jurisprudence as a crucial problem faced by women worker's, it also set out detailed guidelines for prevention and Redressal of his malaise. In doing so, the Supreme Court did not merely confine itself into interpreting the law but went into the legislative exercise of law-making. The court traveled beyond its traditional confines of being the interpretative organ of laws and went into the terrain of law making which it has historically shielded away from[7].

Supreme Court relied upon the Convention for Elimination of All Forms of Discrimination against Women (CEDAW) - an international document which India has both signed and ratified. This document deals in detail with 'sexual harassment' at the work-place. And this Convention needs to be given a legislative form and a Bill gas to be passed in Parliament for it to acquire the status of law, to give practical

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5 Delhi based groups initiated campaigns against sexual harassment of women on trains in 1998. Jawaharlal Nehru University students in Delhi have been waging a long drawn campaign against specific episodes of sexual harassment and been pushing for a policy on sexual harassment. Students of LNJP Medical College in Delhi in March 1996, came out very strongly against a head of a department for sexually harassing students. However, the college authorities punished them for daring to take up the case. Students and teachers in Delhi University have been pressing for a policy on sexual harassment for more than five years. In February 1999, a national level consultation took place at Hyderabad to evolve consensus on policies on sexual harassment in all Indian universities.

6 In August 1996, for example, K.P.S. Gill, former Director General of Police of Punjab was sentenced to three months of rigorous imprisonment, two months of simple imprisonment and fine for sexually harassing Rupan Deol Bajaj, an Indian Administrative Service officer of the Punjab cadre. She filed a complaint after Gill molested her at a party.

7 Mihir Desai, "Witness Protection: Starting the Battle", *Combat Law : The Human Rights Magazine*, Vol. 4, Issue 1.

shape to the International commitment, until this is not part of Indian Law. But Supreme Court broke these shackles and held that if Indian Government makes such commitment in international for a it shall be binding on the government with in the nation and it will be treated as part of the national law with in the country which is in direct conflict with such a law. Thus, if there was a conflicting Indian law on the issue of 'sexual harassment' at the work-place the International Convention could not be treated as part of the Indian law till such law was amended or replaced by the legislature. Supreme Court said that its doing was not creating any law but only declaring the law and fulfilling the gaps or better implements the already existing law[8].

1.4 Post-Vishakha Scenario: Miles to go

Vishakha's judgment was delivered in 1997 and for 6 years after that no efforts were made in the direction of enacting a law. So the guidelines continued to the law required to be followed more in their breach. Very few complaints committees were set-up, service rules were not amended and the judgment was widely disregarded both by public and private employers. But one of the fall-outs of the judgment was that many civil society organizations became aware of it and started to publicize it and pushed for its implementation. Around the same time many women who were being sexually harassed started breaking their silence and started demanding action from the employers. The media also started giving important space and time to this issue[9].

Then *Medha Kotwal's Case* came up in 2004 in the Supreme Court and the Solicitor-General made a statement that the sexual harassment bill is under construction. In between, some noteworthy complaints of sexual harassment came into the national limelight were filed by:

1. Rupan Deo Bajaj, an IAS officer in Chandigarh , against super cop K.P.S. Gill.
2. An activist from the All India Democratic Women Association, against the Environment Minister in Dehradun.
3. An airhostess against her colleague Mahesh Kumar Lala in Mumbai.
4. An IAS officer in Thiruvanathpuram against the State Minister.
5. Sushmita Sen, former Miss Universe against CEO of Coco-Cola.
6. Priyanka Pawar, an international athlete who has won two gold and over a dozen silver medals in international tournaments, including the Asian

[8] *Supra* note 6.
[9] *Ibid.*

Games, is an employee of the railways filed charges of sexual harassment against her team in-charge .

7. Anjali Gupta, IAF Flying Officer against three senior officers.

Ten years after putting the Vishaka Guidelines to test, the Protection of Women Against Sexual Harassment at Workplace Bill, 2007 (the "2007 Bill") was drafted to tackle the menace of sexual harassment of women at the workplace. The 2007 Bill has now been revised primarily to widen the applicability and enhance the consequences for non-compliance. And therefore on 5th November, 2010, that the Union Cabinet approved the introduction of the Protection of Women against Sexual Harassment at Workplace Bill, 2010 in the Parliament to ensure a safe environment for women at work places, both in public and private sectors whether organized or unorganized.

1.5 Highlights of the Bill:

- The Bill defines sexual harassment at the work place and creates a mechanism for redressal of complaints. It also provides safeguards against false or malicious charges.
- Every employer is required to constitute an Internal Complaints Committee at each office or branch with 10 or more employees. The District Officer is required to constitute a Local Complaints Committee at each district, and if required at the block level.
- The Complaints Committees have the powers of civil courts for gathering evidence.
- The Complaints Committees are required to provide for conciliation before initiating an inquiry, if requested by the complainant.
- Penalties have been prescribed for employers. Non-compliance with the provisions of the Act shall be punishable with a fine of up to Rs 50,000. Repeated violations may lead to higher penalties and cancellation of licence or registration to conduct business.

It was claimed that this measure will help in achieving gender empowerment and equality. This will contribute to the realization of their right to gender equality, life and liberty and equality in working conditions as enshrined in Articles 14, 15, 19(1) (g) and 21 of the Constitution of India, everywhere resulting in their economic empowerment and inclusive growth.

There is no doubt in it that the Constitution of India talks about gender equality and lays down the provisions for life with dignity under Articles 14, 15, 19 and 21, thus though the protection against sexual harassment at work places is not directly laid down in the Constitution of India but is essentially the spirit of the Constitution.

And therefore, the Supreme Court in Vishakha's case has declared that it was not making any law but only declaring the law which any way existed. For doing this the court came out with a legal principle which though not totally novel was definitely propounded with such force and clarity for the first time[10]. The idea was to evolve an alternative mechanism to fulfill the urgent social need to protect working women from sexual harassment. These guidelines were declared as the law of the land.

Caution was still the byword. So the court to clarify its stand that it was not encroaching upon the legislative function spelt out that the guidelines it was providing, though to be treated as the law of the land were to continue only still such time as the exercise of drafting a law concerning sexual harassment at the work place[11].

1.6 Conclusion

A survey by 'Sakshi' (a Delhi based NGO) throws up some worrying data. 80% of the respondents revealed that sexual harassment at work places exists, 49% had encountered sexual harassment. 41% had experienced sexual harassment at work places, 53% women and men did not have equal opportunities, 53% treated unfairly by supervisors, employers and co-workers, 58% had not heard of the Supreme Court's directive of 1997 and only 20% organizations had implemented the Vishakha guidelines.

The Supreme Court observed *in Madhu Krishana* **v.** *State of Bihar*[12], women form half of the Indian population. Women have always been discriminated against men and have suffered denial and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all kinds of inequities, indignities, incongruities and discrimination.

Though the Indian Constitution provides equality of status and of opportunity to women, discrimination is persisting in one form or the other. Discrimination against women continues to exist even today as if it is so deep-rooted in the traditions of Indian society. The root cause for the discrimination of women is that most women are ignorant of their rights and the position of equality assured to them under the Indian Constitution and legal system. Enlightened women should fight to bring awakening in other women regarding their rights by bringing awareness about their status in society as they constitute half of the Indian population[13].

It was *Bhanwari Devi's Case* which brought 'sexual harassment' into public glare in 1992 and *Vishakha's Guidelines* were laid down by the Supreme Court against sexual harassment at work places in 1997, a Bill on this issue was approved only in

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10 *Supra* note 6.
11 *Ibid.*
12 (1956) 5 SCC 148.
13 S.R. Myneni, *Women and Law*, Asia Law House, Hyderabad, 2nd Ed. (2008) p.14.

2010 by the Indian Parliament, now do we really think that Indian women has been empowered and the right of equality and gender justice enshrined in the Constitution of India has been enjoyed by her or the Vishakha's judgment has really broke the shackles and silence of the Indian Women? The answer to all these questions is that to give the practical shape to the provisions of the Constitution, the gap between the judicial response and legislative action has to be narrowed down and the women has to be make aware of their rights.

Though a legislation addressing sexual harassment in the workplace is long overdue and the Bill is comprehensive on the subject, the Protection of Women against Sexual Harassment at Workplace Bill, 2010 is facing severe criticism from NGOs and other associations who are requesting for gender neutral sexual harassment laws. It is also feared that the provision for monetary compensation to the victim will become a mechanism for legal extortion wherein harmless non-sexual interactions and consensual sexual interactions will be converted into sexual harassment cases.

ADMISSIBILITY OF CONFESSIONS *VIS-À-VIS* ANTI-TERRORISM LAWS IN INDIA

Dr. Sharanjit*

1.1 Introduction

The history of development of criminal law has witnessed recognition of various cardinal principles of criminal justice. These principles have developed deep roots in the psyche of all those who are concerned with the administration of criminal justice. Though the whole crime pattern and behavior has gone through a sea change yet there are strong reservations against deviation from the established norms of the system as such. In other words it calls for making out a strong case with valid reasons and arguments whenever there is a need to adopt new measures and methods by replacing the irrelevant or outdated norms.

Terrorist acts and activities are such crimes which are different from the traditional form of criminality both in terms of direct loss and impact on ordered society. Terrorism not only undermines every political system but also halts the economic progress. It undermines the faith in the democratic process. In these cases if the law would fail to reach to the criminals and bring them to book it would be failure of justice and will lead to further propagation of similar grave crimes. Therefore, recognizing the fact that terrorism being a very serious form of criminal behavior with audacious consequences, the legislatures all over the world have deviated from the ordinary rules of criminal procedure while dealing with terrorists and anti-national elements. One such significant deviation is with respect to the issue of admissibility of confessions before the police.

As an established norm all over the world, confessions made to police officers are not admissible in evidence as it is felt that the police use unfair means to extract confessions from the accused persons. In the Indian context the confessions made to police officers are not admissible in evidence in the case of ordinary offences. However the question of admissibility of confessions has remained under debate for the terrorism related offences at the different stages when different special laws remained in force. But unfortunately the issue has not been decisively settled and still agitating the minds of the policy makers. In this paper an effort has been made to analyze the Constitutional, legal and judicial developments in addition to the reports and recommendations of various commissions and committees on the related issue.

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* Assistant Professor of Law, Department of Law, Punjabi University Regional Centre, Bathinda

1.2 Legislative Position

The Constitution as well as other statutes have directly or indirectly dealt with the issue of confessional statements made in different circumstances and the limitations in its admissibility. The following discussion is on the legislative developments in the context of confessional statements vis-à-vis terrorism.

1.2.1 Constitutional Aspect

Article 20(3) of the Constitution of India provides that "no person accused of any offence shall be compelled to be a witness against himself." The 'right to silence' is a principle of common law and it means that normally Courts or tribunals should not conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to respond to questions put to him by the police or by the Court. The right to silence is based on the principle *'nemo debet prodere ipsum'*, the privilege against self- incrimination.

Article 20(3) of the Constitution embodies the right to silence of the accused by declaring that no person accused of an offence shall be compelled to be a witness against himself. This provision embodies the principle of protection against compulsion of self-incrimination which is one of the fundamental cannons of the British system of criminal jurisprudence and which has been adopted by the American system and incorporated in the Federal Constitution. The fifth Amendment of the American Constitution provides that no person shall be compelled in any case to be a witness against himself. The Constitution of India raises the rule against self-incrimination to the status of a Constitutional prohibition[1]. The right against self-incrimination primarily consists of the following three components[2]:

1. Firstly, it is a right pertaining to a person accused of an offence.
2. Secondly, it is a protection against compulsion to be a witness; and
3. Lastly, it is a protection against such compulsion resulting in his giving evidence against himself.

In the landmark case of *Nandini Sathpathy v. P.L. Dani*[3], the Apex Court held that "relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Article 20(3) if elicited by pressure from the mouth of the accused.

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1 V.N.Shukla, *Constitution of India*, 10th Edition, Eastern Book Company, Lucknow (2007), p. 160

2 *Delhi Judicial Service Assn v. State of Gujarat*, (1991) 4 SCC 406 (431)

3 (1978) 2 SCC 424: AIR 1978 SC 1025

The immunity under Article 20(3) of the Constitution of India does not extend to compulsory production of material objects or compulsion to give specimen writing, specimen signatures, finger impressions or the compulsory exhibition of the body or giving of blood specimen[4].

The right to silence as enshrined in Art. 20(3) of the Constitution of India is mainly concerned with recording of confessions. Keeping in mind the principles of presumption of innocence of the accused as well as the right to silence belonging to the accused person, the laws of evidence in India have made a confession to a police officer as inadmissible in evidence. It is felt that the police in India uses force and coercion to elicit confession from the accused. But under some special laws concerning terrorism and organized crime the confessions made to senior police officers is admissible in evidence thus departing from the ordinary rules of evidence.

1.2.2 Evidentiary Aspect

The substantive law with regard to confessions is contained in Sections 24 to 30 of the *Indian Evidence Act*, 1872 whereas the adjective or procedural law is contained in Sections 164, 281 and 463 of the Code of Criminal Procedure, 1973.

Sections 24-30 of the *Indian Evidence Act*, 1872 deals with confessions. The term 'confession' has not been defined under the *Indian Evidence Act*, 1872. It is considered to be a species of admission. Thus a confession is an admission made at any time by a person charged with crime stating or suggesting the inference that he committed the crime[5]. It is a statement made by an accused person admitting his guilt[6]. Conviction on 'confession' is based on the maxim *'habenus optimum testem, confiterten reum'* which means that confession of an accused is the best evidence against him. In order to decide whether a statement is a confession or not it must be read as a whole[7]. An admission of a gravely incriminating fact is not of itself a confession[8].

Under the *Indian Evidence Act*, 1872, confession before the police are not admissible as it is generally felt that the police use unfair means and torture to extract confession from the accused. The primary reason for not admitting

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4 *Dastagir v. State of Madras*, AIR 1960 SC 756: (1960) SCR 116:1960 Cri. L.J. 1159, *Ram Swaroop v. State of U.P.*, AIR 1958 All 119, 126:1958 Cri. L.J. 134, *Subbian v. Ramaswami*, AIR 1970 Mad. 85., *State through SPE and CBI, A.P. v. M. Krishna Mohan and Anr.* AIR 2008 SC 368

5 Stiphen, *A Digest of the Law of Evidence*, p. 29.

6 *Sahoo v. State of U.P.*, AIR 1966 SC 40

7 *Lokenan Shah v. State of W.B.*, 2001 Cri. L.J. 2196: AIR 2001 SC 1760

8 *Palvinder Kaur v. State of Punjab*, AIR 1952 SC 354

confession to the police officer is to avoid the danger of admitting a false confession[9].

Section 25 of the *Evidence Act* provides that no confession made to a police officer shall be proved as against a person accused of an offence. Section 25 rests upon the principle that it is dangerous to depend upon a confession made to a police officer which cannot extricate itself from the suspicion that it might have been produced by the use of coercion. The legislative policy and practical reality emphasize that a statement obtained, while the accused is in police custody, truly be not the product of his free choice.

Further Section 26 provides that no confession made by any person while he is in custody of a police officer unless it be made in the immediate presence of a Magistrate shall be proved as against such person. The underlying object of Section 26 is to prevent the abuse of the powers by the police officers. The custody of a police officer provides an opportunity for extracting confession through torture and undue influence.

The fascicule of Sections 24 to 30 aim to zealously protect the accused against becoming the victim of his own delusion or the mechanization of others to self incriminate in crime. The confession, therefore, is not received with an assurance, if its source be not *omni suspicious mojes*, above and free from the remotest taint of suspicion. The mind of the accused before he makes a confession must be in a state of perfect equanimity and must not have been operated upon by fear or hope or inducement. Hence threat or promise or inducement held out to an accused makes the confession irrelevant and excludes it from consideration.

In England, even though the confessions to the police can be received in evidence the voluntariness of the confessions are tested by adopting stringent standards[10]. In England, there is today, a trial within a trial. Under English law, confessions have been made admissible under the *Police and Criminal Evidence Act*, 1984 and under Section 76(1) the confession is made relevant unless it is liable to be excluded under the Section. Section 76(2) says that if "it is represented to the Court that the confession was or may have been obtained: (a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time of render unalienable any confession which might be made by him in consequence thereof, the Court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the Court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid." The word

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9 *Queen Empress v. Babu lal,* (1884, 6 All 509, 532 ,*F.B Paulose v. State of Kerala,* 1990 Cri. L.J. 108 (Ker) Sec generally *Union of India v. Altaf Ussain,* 1988 Cri LJ 2782 (All) *Narakn v. State,* 1998 Cri. L.J. 3183 (AP).

10 the *Police and Criminal Evidence Act,* 1984, S. 76 deals with confessions in England

'oppression' has been widely construed by the Court as including torture, inhuman or degrading treatment, use of violence. The 1984 *Act of U.K.* lays down detailed provisions for the treatment of suspects by the police, including their arrest, detention and questioning.

Similarly, in the United States, according to the decision of the Supreme Court viz., *Miranda v. Arizona*[11]; *Escobedo v. Linnaeus*[12] the prosecution cannot make use of the statements stemming from custodial interrogation unless it demonstrates the use of procedural safeguards to secure the right against self-incrimination and these safeguards include a right to counsel during such interrogation and warnings to the suspect of his right to counsel and to remain silent.

1.2.3 Procedural Aspect

The Code of Criminal Procedure, 1973 (Hereinafter referred as Code) is the principal procedural law of India. It embodies many principles of criminal administration which are recognized all around the world. The main object of this law is to ensure that the accused person gets a fair trial.

The Code contains several provisions to ensure the voluntary nature of the confessions. Sub-Section (2) of Section 161[13] of the Code grants a right to silence during interrogation by police.

The Code under Section 162 imposes a general bar against the use of statement made before the police. Section 163 further provides that no police officer or other person in authority shall offer or make or cause to be offered or made any inducement, threat or promise as is mentioned in Section 24 of the *Indian Evidence Act*, 1872.

Section 164 contains elaborate provision with regard to recording of confession and statements. This Section empowers any Metropolitan Magistrate or Judicial Magistrate to record any confession or statement of a person made in the course of investigation by the police or at any time afterwards but before commencement of inquiry or trial. But the Magistrate is bound to observe the following condition before recording the confession –

1. It should be recorded and signed in the manner provided in Section 281 and shall be signed by the person making confession.

2. The Magistrate should give a warning that the accused is not bound to make a confession.

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[11] 384 US 436

[12] 378 US 478

[13] The *Code of Criminal Procedure, 1973*, S. 161 (2) : Such person shall be bond to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have tendency to expose him into a criminal charge or to a penalty or forfeiture.

1. The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him.

2. The person from whom a confession has been recorded under Section 15(1) of the Act, should be produced before the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession written or recorded on mechanical device without unreasonable delay.

3. The Chief Metropolitan or the Chief Judicial Magistrate should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of a Assistant Civil Surgeon;

4. Notwithstanding anything contained in the Code, no Police Officer below the rank of an Assistant Commissioner of Police in the Metropolitan cities and elsewhere of a Deputy Superintendent of Police or a Police Officer of equivalent rank, should investigate any offence punishable under this Act of 1987. This is necessary in view of the drastic provision of this Act, more so when the *Prevention of Corruption Act*, 1988 under section 17 and the *Immoral Traffic Prevention Act*, 1956 under Section 13, authorize only a police officer of a specified rank to investigate the offence under those specified Act.

Further by a majority decision in *State v. Nalini and others*[16], popularly known as the Rajiv Gandhi's Assassination case, the Court observed that Section 15 of the TADA is an important departure from the ordinary law and must receive that interpretation which would achieve the object of that provision and not frustrate it and that the correct legal position is that a confession recorded under Section 15 of the TADA is a substantive piece of evidence and can be used against a co-accused also".

If a confessional statement as recorded under Section 15 of TADA is challenged, it shall be shown before a conviction is based upon it that it is truthful and it was made voluntarily. In the case of *Ranjit Singh Alas Jita and others v. State of Punjab*[17], the Court held that in case the recording officer of confessional statement on administering the statutory warning to the accused forms the belief that the accused should be granted some time to think over the matter, it becomes obligatory on him to grant reasonable time for the purpose to the accused. What time should be granted would depend upon the facts and circumstances of each case.

[16] (1999) 5 SCC 253
[17] 2002 (8) SCC 73

1.2.6 The Prevention of Terrorism Act, 2002

After the lapse of TADA in 1995 till 2002 India did not have any strong anti-terror law but the 9/11 US strikes and the attack on the Indian Parliament on 13th December 2001 lead to the enactment of POTA. Like the *TADA*, the *POTA Act* also made confessions before the police officers as admissible in evidence[18]. To ensure its voluntarism certain safeguards were provided under Section 32 thereof-

(a) The confession was to be made to a police officer not lower in rank than a Superintendent of Police.

(b) It should be recorded by such police officer in writing or any mechanical or electronic device.

(c) Police Officer was bound to inform such person in writing that he is not bound to make the confession and if he does so, it may be used against him.

(d) The confession was to be recorded in a free atmosphere without any inducement or threat.

(e) It shall be recoded in the same language in which the person makes it.

As with TADA, the Supreme Court upheld the provision under POTA authorizing confession to police officers against Constitutional challenge[19].

It is important to note that the provision with regard to admissibility of confessions before the police in the TADA and the POTA were widely criticized. It was alleged that TADA did not merely overlook the torturous methods police use in securing confession but rather it invited their use. The human rights activists had alleged that this provision gave arbitrary power to the police and was frequently misused by them. Moreover, it was against Article 20(3) of the Constitution and Sections 25 and 26 of the *Indian Evidence Act.*

1.2.7 The Unlawful Activities (Prevention) Act, 1967

The *Unlawful Activities (Prevention) Act*, 1967, (herein after referred as UAPA) was originally enacted in 1967 to deal with the unlawful activities of associations but in 2004 at the time of repeal of POTA certain amendments were made in the UAPA to deal with terrorism. Keeping in mind the fact that the provision with regard to admissibility of confessions was the most controversial under the lapsed POTA, the UAPA amendments did not provide for the admissibility of confessions before the police and relied on the provisions as contained in the *Indian Evidence Act* in the matter of recording of confessions.

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[18] the *Prevention of Terrorism Act*, 2002, S. 32.

[19] *People's Union for Civil Liberties v. UOI*, AIR 2004 SC 479

1.2.8 The Unlawful Activities (Amendment) Act, 2008

After the Mumbai carnage in November 2008, UAPA was further amended to deal with the growing threat of terrorism in India. But this time also the confessions before the police are not admissible. Interestingly, the *National Investigation Agency Act*, 2008, is also silent on the issue of admissibility of confessions made to the police. But Arun Jaitley, the former law minister of India is of the opinion that the confessions under police custody should be made admissible under the UAPA, as was the case of TADA. He said that no conviction would have been possible in the Rajiv Gandhi assassination case and the Parliament attack case had confession in police custody not been made admissible evidence under TADA. He said such provisions presently exist in *Maharashtra Control of Organized Crimes Act*, and the organized crime laws of Andhra Pradesh and Karnataka. In the absence of this provision, the confession made by Ajmal Kasab, the lone surviving member of the gang of terrorists who had attacked Mumbai in November 2008, could not be admitted as evidence in a Court of law.

1.3 The Commissions and Committees

1.3.1 The Law Commission of India

The Law Commission of India has examined the issue of admissibility of confessions several times. Here it is pertinent to refer to the first report of the Indian Law Commission given over 150 years ago. The report said that the evidence of the Parliamentary Committee on Indian Affairs showed gross abuse of powers by the police officers in India leading to oppression or extortions. They also said:

> "A police officer, on receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence, often endeavors to secure himself against any charge of supine ness or neglect by getting up a case against parties whose circumstances or characters are such as are likely to obtain credit for an accusation of the kind against them. This is not infrequently done by extorting or fabricating false confession; and, when this step is once taken, there is of course impunity for real offenders, and a great encouragement to crime... We are persuaded that any provision to correct the exercise of this power by the police will be futile; and we accordingly propose to remedy the evil..."

Further, in the 69th Report of the Law Commission (paras 11.17 and 11.18) of India it was suggested that under a new Section 26A all confessions made to senior police officers should be made admissible subject to certain conditions. The safeguards suggested in the 69th Report are as follows (in regard to confession to Superintendents of Police or higher officers):

a) the said police officer must be concerned one;

b) investigation of the offence;

c) he must inform the accused of his rights to consult a legal practitioner of his choice, and he must give the accused an opportunity to consult such legal practitioner before the confession is recorded;

d) at the time of making and recording of the confession, the counsel for the accused, if he has a counsel, must be allowed to remain present. If the accused has no counsel or if his counsel does not with to remain present, this requirement will not apply;

e) the police officer must follow all the safeguards as are now provided for by Section 164 of the Code of Criminal Procedure in relation to confessions recorded by Magistrates. These must be followed whether or not a counsel is present;

the police officer must record that he has followed the safeguards at (b), (c) and (d) above.

But the Law Commission of India in its 185th Report on review of the *Indian Evidence Act* had expressed strong views disfavoring the admission of confessions made to police officers but accepted that in terrorism related offences such confessions made even to police officers can be admitted in evidence. The Law Commission of India cited that in the case of such grave offences like terrorism it is normal experience that, no witness will be forthcoming to give evidence against hard core criminals. Further these offenders belong to a class in themselves requiring special treatment and are different from the usual type of accused. But the exception made in cases of terrorism should not be made applicable to all accused or all type of offences. Exception cannot become the rule.

1.3.1 The National Human Rights Commission

The National Human Rights Commission's opinion on the Prevention of Terrorism Bill, 2000 commenting on the provision of Section 32 said that this would increase the possibility of coercion and torture in securing confessions and thus be inconsistent with Article 14(3)(g) of the International Covenant for Civil and Political Rights which requires that everyone shall be entitled to the guarantee of not being compelled to testify against himself or to confess guilt. This provision is inconsistent with Article 20(3) of the Constitution of India. It would also imperil respect for Article 7 of the International Covenant for Civil and Political Rights which categorical asserts that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

with "terrorists" he clarified that the procedure must still meet the test of Article 21 of the Constitution. The Judge noted that even the Superintendent of Police had an inherent interest in solving a crime and was liable to use all kinds of harsh measures. The majority of the Judges in this case, even while upholding the Constitutionality of Section 15, recognized the danger inherent in this Section of TADA. The Court observed: "Whatever may be said for or against the submission with regard to the admissibility of a confession before a police officer, we cannot avoid but saying that we have frequently dealt with cases of atrocity and brutality practiced by some over zealous police officers resorting to inhuman, parabolic, archaic and drastic methods of treating the suspects in their anxiety to collect evidence by hook or crook and wrenching a decision in their favor".....

In *S.N. Dube v. N.B. Bhoir and Others*[26], the Supreme Court referred to the judgment of the Constitution Bench in Kartar Singh's case and observed that Section 15 of the *TADA Act* is an important departure from the ordinary law and must receive that interpretation which would achieve the object of that provision rather than frustrate it.

In *Jayant Dattatray Suryarao v. State of Maharashtra*[27], the Supreme Court reiterated the rule that if conditions embodied in Section 15 of the Act and Rule 15 of the Rules for recording confession of a person by a police officer are complied with, then such statement is admissible in evidence not only against the maker but also against co-accused, abettor or conspirator. The Court then observed that "irregularities here and there would not make such confessional statements inadmissible in evidence. If the legislature in its wisdom has provided after considering the situation prevailing in the society that such confessional statements can be used in evidence, it would not be just, reasonable and prudent to water down the scheme of the Act on the assumption that the said statement was recorded under duress or was not recorded truly by the officer concerned in whom faith is reposed".

In *Devender Pal Singh v. State of N.C.T of Delhi*[28], the Apex Court held that whenever an accused challenges the voluntary character of his confession recorded under Section 15(1) of the Act, the initial burden is on the prosecution to prove that all the conditions specified in that Section read with the Rules have been complied with and once that is done, it is for the accused to show and satisfy the Court that the confession was not made voluntary. The Court further held that the confession of an accused can be relied upon for the purpose of conviction and no further corroboration is necessary if it relates to the accused himself. However, as a matter of prudence the Court may look for some corroboration if the confession is to be

[26] 2000 (2) SCC 254
[27] 2001 (10) SCC 109
[28] 2002 (5) SCC 234

used against a co-accused though that will be again within the sphere of appraisal of evidence.

Recently, the Supreme Court has in *Mohmed Amin @ Amin Choteli Rahim Miyan Shaikh & Anr. v. C.B.I. through its Director*[29], a confession recorded under Section 15 of the *TADA Act*, and made before a competent officer is admissible in the trial of the maker as also the co-accused, abettor or conspirator not only for an offence under the Act but also for the offence(s) under other enactments- provided that the co-accused, abettor or conspirator is charged and tried in the same case along with the accused- subject to the Court's satisfaction about compliance of the requirements of the Act and Rules.

In the landmark judgment in the case of *D.K.Basu v. State of West Bengal*[30], the Supreme Court stated that a just balance has to be struck between the right to interrogate and the right against self-incrimination. Using any form of torture for extracting any kind of information would neither be right nor just nor fair and, therefore, would be impermissible, being offensive to Article 21.

1.5 Conclusion

The present position is the result of a competition between many sets of conflicting values. On the one hand, for the proper investigation of offences, subjection of the accused person to questioning is regarded as inevitable. It is believed, that law enforcement is unduly hampered by artificial rules restricting the admissibility of material obtained during the investigation. On the other hand, the society apprehends that the zeal and power of the law enforcement officers may outrun their self restraint and wisdom. The philosophy behind Sections 25 and 26 of the *Evidence Act* is that these safeguards are indispensable to provide against the possibility of extorted confessions.

As discussed above, terrorism related offences cannot be dealt under the ordinary rules of evidence and new methods need to be devised to deal with the grave situation. As the direct evidence, and witnesses are difficult to procure in these serious offences therefore confessions made to police officers should be admissible. But the guidelines provided in various judicial pronouncements should be followed in true letter and spirit. The police force in India must be sensitized to Constitutional values. A just balance has to be struck between the right to interrogate and the right against self-incrimination. Using any form of torture for extracting any form of information would neither be right nor just nor fair, and, therefore, would be impermissible, being offensive to Article 21 of the Constitution.

[29] 2009 (1) Crimes 39 (SC) para 19 and 27.
[30] 1997 (1) SCC 416

In the light of the forgoing discussion there is a need to adopt some measures in relation to conduct of investigation in general and confessional statements in particular as under-

(1) Such a crime-suspect must be interrogated – indeed subject to sustained and scientific interrogation – determined in accordance with the provisions of law. In serious offences, we should strengthen the Investigation process and scientific techniques should be extensively used to obtain evidence. He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc so the need of the hour is to strengthen the investigation process for terrorism related cases

(2) To ensure that the investigating officers do not indulge in any custodial violence or torture the anti-terror law should contain provisions for video recording of the entire investigation and interrogation process. Recording custodial interrogations would not only strengthen the case but also promote guilty pleas in cases where the suspect is in fact guilty, prevent frivolous allegations of misconduct, coercion and torture by the investigating officers and even protect the police from false allegations of brutality and custodial torture. In addition, it will allow the judges to see for themselves what actually transpired, thus helping them in arriving at a just decision. It will help the judges to see and hear for themselves what actually went on during and before recording of the confessions including the tactics employed by the interrogator, the body language and conduct of the accused etc. Moreover electronic recording of the entire interrogation process would also make available a clear record of all custodial events.

The advanced technology prevalent in western countries can also be adopted in India. Moreover as the technology will evolve the process of electronic recording will become more reliable and trustworthy. Automatic time and date stamping is already a standard feature in many recording devices and technology that prevents recording devices from being turned on and off will soon be available. Thus by resorting to new and advanced technologies we can lend more authenticity to the recording process.

(3) We should also be conscious of the fact that the police in India have to perform a difficult and a delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers who have organized

gangs, have taken strong roots in the society. And to deal with such a situation, a balanced approach is needed to meet the ends of justice. The policy of distrust of the police requires change. Early recorded statements would help the administration of justice if essential steps are taken to ensure its voluntariness, accuracy and integrity. The 'best evidence' policy would also demand changes in procedure which increase the utilization of early statements In evidence by the prosecution as well as the defence.

In nutshell the following recommendations are made with respect to admissibility of confessions before the police in terrorism related offences-

(a) The confessions made only before the senior police officers should be video-recorded and the tapes should be produced before the Courts.

(b) The accused should be entitled to the presence of his lawyer or a family member while making a confessional statement.

(c) The accused should be medically examined before and after making of the confessional statement.

(d) The accused should be produced before a magistrate immediately thereafter, who shall confirm by examining the accused whether the confession was obtained voluntarily or under duress.

(e) Emphasis should be laid on collecting evidence through scientific and forensic tools and eschewing coercive methods.

(f) Any police officer using coercive methods to extract false confessions from the accused should face stringent action.

Thus every effort should be made to ensure that the principles of procedural fairness as incorporated in our Constitution and various international instruments like Universal Declaration of Human Rights, 1948 and the International Covenant for Civil and Political Rights, 1966 are scrupulously followed and upheld in the matter of recording of confessions before the police in terrorism related offences. Moreover, the anti-terror laws usually provide for stringent punishments. Thus the need for the observance of procedural safeguards is even greater. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed.

WITNESS PROTECTION IN INDIA : A PRESSING NEED

Purnima Khanna*

> Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.[1]

1.1 Overview

A witness plays a pivotal role in the determination of a criminal case. It is he who gives testimony before the Court and thereby assists the Court in arriving at a decision. By giving statement before a Court, he performs his civil duty. Therefore, it is the responsibility of the State to protect him. In *Zahira Habibullah v. State of Gujrat*[2] the Supreme Court discussed the Eighth Chapter (Stanja14 and 18) of *Manu Samhita* dealing with the role of witnesses. The stanzas read as follows:

Stanza 14: "Jatro Dharmo Hyadharmena
Satyam Jatranrutenacha
Hanyate Prekshyamananam
Hatastrata Sabhasadah"

It means that where in the presence of judges 'dharma' is overcome by 'adharma' and 'truth' by 'unfounded' falsehood', at that place they (judges) are destroyed by sin.

Stanza 18: "Padodharmasya Kartaram
Padah Sakshino Mruchhati
Padah Sabhas Udah Sarban
Pado Rajan Mruchhati"

It says that in the 'adharma' flowing from 'wrong decision' in a court of law, one fourth each is attributed to the person committing the 'adharma', witnesses, the judges and the rule.

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* Research Fellow (JRF), Department of Laws, Guru Nanak Dev University, Amritsar.

1 *National Human Rights Commission* v. *State of Gujrat*, Writ Petition (Crl.) No. 109 of 2003 in the Supreme Court of India, Judgment delivered on 1 May 2009, available at http://judis.nic.in/supremecourt/helddis.aspx (last accessed on 11 May 2010).

2 2006 (5) SCJ 536

In *Swaran Singh v. State of Punjab*[3] the Supreme Court observed that a criminal case is built on the edifice of evidence, evidence that is admissible in law. For that witnesses are required whether it is direct evidence or circumstantial evidence. But in India, the plight of a witness is pathetic. He is threatened, bribed, intimidated and even killed for the purpose of preventing him from appearing as a witness before the Court. If a witness fails to appear before the court or retracts from his earlier statement, it may result into the acquittal of the accused. Such acquittals can seriously undermine the credibility of criminal justice system of India. The present paper is a humble attempt to highlight the inevitable need for enactment of a comprehensive Witness Protection Programme in India. The paper briefly discusses the recommendations made by the Law Commission of India and Malimath Committee Report 2003. The study includes the observations made by the Apex Court on the issue of Witness Protection. It also focuses on 'Witness Protection Programmes', which are in force in countries like United Kingdom, United States of America, Canada, and Australia.

1.2. Need for a Witness Protection Programme

In recent times, it has become very common for witnesses, in criminal cases, to turn hostile on account of danger to their life or property or that of their relations consequent upon threats or intimidation by the accused.[4]Especially in criminal cases, a witness turning hostile has become a routine matter. A number of high profile cases such as the *Best Bakery Case, Jessica Lall Murder Case, Nitish Katara Murder Case, BMW Hit and Run Case* etc. are glaring example of the dangerous trend of material witnesses turning hostile. More than 80% of the acquittals in the trials relating to heinous crimes are a result of witnesses turning hostile. Recently in a rape case against actor Shiney Ahuja the complainant (rape victim) reiterated from her statement. Witnesses turning hostile results into low conviction rate, loss of faith in judiciary and depredation of rule of law. It is submitted that the issue of witness protection has assumed great urgency which can no longer be ignored by the government. An effective Witness Protection Programme will enable the witnesses to tell the truth and the accused will be prevented from intimidating or threatening the witnesses.

Witness Protection Programme means a State Programme designed to protect prosecution witnesses in serious criminal cases especially from bodily injury or tampering.[5] The Law Commission in its 198th Report has recommended that a comprehensive Witness Protection Programme must include provisions for 'identity protection' and 'physical protection' of a witness and his family in

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3 AIR 2000 SC 2017

4 Law Commission of India, 'Consultation Paper on Witness Identity Protection and Witness Protection Programme', August, 2004. p. 1.

5 P. Ramanatha Aiyer, *Advanced Law Lexicon*, Wadhwa and Company, Nagpur (2005), p. 4974.

criminal cases of grave nature where there is a danger to the life or property of the witness or his family.

Witness protection is indeed very much required in criminal cases of grave nature. However, it is not possible to provide protection to all the witnesses in criminal trials. The Supreme Court has made clear that it is not physically possible for the Police to grant protection to the thousands coming to Courts on a daily basis.[6] A bench comprising Chief Justice K.G. Balakrishnan and Justice D.K. Jain said that there can be no blanket protection to all witnesses in criminal cases, agreeing with the view that there is a need for protection to witnesses.[7] The Bench was expressing its view after senior lawyer, Mr. Vivek Tankha, appearing for an NGO, Country First, which had filed the petition for enacting legislation on witness protection, said that Country cannot be allowed to suffer the menace of hostile witnesses. When he said that if the witnesses have a duty to speak truth, the State also has duty to protect them, Additional Solicitor General, Mr. Gopal Subramaniam responded by saying, "Even the best of the protected witnesses do not wink before turning hostile."[8] However, it is desirable that witnesses, who are giving statement in a case of serious nature, should be provided adequate protection by the State.

1.3 Recommendations of Law Commission of India on Witness Protection

The Law Commission has time and again made recommendations to the government on the issue of witness protection. The Law Commission in its 14th Report (1958) referred to inadequate arrangements for witnesses in the Courthouse, the scales of traveling allowance and daily *bhatta* paid to witnesses for attending the Court in response to summons from the Court.[9] The 154th Report of Law Commission (1996) emphasised that necessary confidence has to be created into minds of the witnesses that they would be protected from the wrath of the accused in any eventuality.[10] Further, the 172nd Report of the Law Commission (2000) suggested use of videotaped interview of victims in cases of child abuse.[11] The 178th Report (2001), the Law Commission recommended the insertion of Section 164A in the *Criminal Procedure Code* to provide for recording of the statement of material witnesses in the presence of magistrate

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6 Available at http://news.oneindia.in/2007/01/22/protection-cannot-provided-witnesses-sc.html (last accessed on 23 February 2010).

7 Available at http://www.navhindtimes.com/articles.php?story-ID-012321 (last accessed on 23 February, 2010).

8 *Ibid.*

9 *Supra* note 4, p.32.

10 *Id.*, at p.34.

11 Law Commission of India, *One Hundred and Seventy Two Report on 'Review of Rape Laws'* (2000).

where the offences are punishable with imprisonment of 10 years or more.[12] The 198th Report (2006) of the Law Commission is on the subject of the 'Witness Protection Programme' itself. The Report has suggested comprehensive 'Witness Identity Protection and Witness Protection Programmes' to prevent witnesses from turning hostile under threat from the accused and to ensure that criminal trials do not end in acquittals.[13] The Report says that it is accepted today that 'Witness Identity Protection and Witness Protection' is necessary in the case of all serious offences wherein there is danger to witnesses and it is not confined to cases of terrorism or sexual offences.[14] The Malimath Committee in its Report of 2003 has observed that there is no law to protect the witnesses. The treatment given to the witnesses is very shabby. Even the basic amenities like shelter, seating, drinking water, toilets etc. are not provided. The Committee recommended that the time has come to enact a law on Witness Protection in India.[15]

1.4 Judicial Response

Of the trinity of Legislature, Executive and Judiciary, justicing under our constitutional set up belongs to the judges. As such, the role to be played by the judges in the administration of justice is pivotal.[16]In the absence of a general statute covering witness protection, the Supreme Court has discussed the issue in many important cases. The Supreme Court in judgments namely *Human Rights Commission* v. *State of Gujrat*[17], *People's Union for Civil Liberties (PUCL)* v. *Union of India*[18], *Zahira Habibulla Sheikh and Another* v. *State of Gujrat*[19], *Zahira Habibulla Shekh and* v. *State of Gujrat*[20] and *Sakshi* v. *Union of India*[21], has dealt with the subject of witness protection and emphasised the need for a comprehensive law on it. The Hon'ble Supreme Court has time and again stated that the Parliament must consider making a law on the subject of witness protection.

In *Mrs. Neelam Katara* v. *Union of India*[22], the Delhi High Court has suggested guidelines for witness protection, as applicable to cases where an accused is

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12 Law Commission of India, *One Hundred and Seventy Eight Report* on 'Recommendations for Amending Various Enactments, Both Civil & Criminal' (2001), p. 122.

13 *The Hindu*, 1 September 2006, p. 14.

14 *Ibid.*

15 *Report of the Committee on Reforms of Criminal Justice System*, Ministry of Home Affairs, Government of India chaired by Dr. Justice V. S., Malimath, 2003, p.20.

16 C.J.F. Prasanna Kumar, "Administration of Criminal Justice - Role of Judge - A Brief Note", *Supreme Court Journal*, 2006 (3), p.24.

17 2003 (9) SCALE 329

18 2003 (10) SCALE 967

19 2004 (4) SCALE 375

20 2006 (5) SCJ 536

21 2004 (6) SCALE 15

22 Crl.W.No.247 of 2002 cited in *Supra* note 4, p.50, 51.

punishable with death or life imprisonment. The Court suggested that while determining whether or not a witness should be provided police protection, factors such as the nature of the risk to the security of the witness which may emanate from the accused or his associates, the nature of the investigation in the criminal case, the importance of the witness in the matter and the value of the information or evidence given or agreed to be given by the witness and the cost of providing police protection to the witness should be considered.

In *Zahira Habibullah Sheikh and Another* v. *State of Gujrat*, on the question of witness protection, the Supreme Court observed:[23]

> "The Witness Protection Programmes are imperative as well as imminent in the context of alarming rate of summersaults by witnesses with ulterior motive and purely for personal gain or fear for security. It would be welcome step if something in those lines is done in our Country. That would be a step in the right direction for a fail trial."

Similarly in *Zahira Habibullah Sheikh* v. *State of Gujrat*[24] the Court observed that Legislative measures to emphasise prohibition against tampering with witnesses, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with.

Recently the Hon'ble Supreme Court reiterated the necessity of witness protection in India. The Supreme Court observed: [25]

> "Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle the truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the

[23] 2004 (4) SCALE 373
[24] 2006 (5) SCJ 536
[25] *Supra* note 1

> edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery."

The above mentioned cases make it clear that the Hon'ble Supreme Court has stated in various cases that the Parliament must consider making a law on the subject of witness protection.

1.5 Witness Protection Regimes in the World

Many developed countries like United Kingdom, United States of America, Canada, Australia, South Africa etc. have enacted legislation in connection with Witness Protection Programme. In England, threatening a witness amounts to contempt of Court.[26] In the United States, the *Organised Crime Control Act, 1970* and later the *Comprehensive Crime Act, 1984* authorised the Witness Security Programme.[27] There are other provisions in the United States Code, Title 18 - Crimes and Criminal Procedure, in Part II Criminal Procedure. Chapter 224 thereof deals with protection of witnesses or potential witnesses for Federal Government or for a State Government in any official proceeding in connection with organised criminal activity or other serious offences.[28] Similarly, Effective Witness Protection Laws and Schemes are available in *Australian Witness Protection Act, 1994* and *Witness Protection Act, 1996*, Australian Crime Commission Bill, 2003.[29] Canada gives witness protection cover under the *Witness Protection Act, 1996*. The purpose of the Act is to promote law enforcement by facilitating the protection of persons who are introduced directly or indirectly in providing assistance in law enforcement matters.[30] In South Africa, witness protection is provided under the *Witness Protection Act, 1998*. The *Witness Protection Act, 1998* of South Africa provides for the establishment of an office called the office for witness protection within the Department of Justice. The Director of the office is responsible for the protection of witnesses and related persons and exercises control over Witness Protection Officers and Security Officers.[31]

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[26] 2006 (5) SCJ 536

[27] *Supra* note 4, p.68.

[28] *Id.*, at p.186.

[29] *Id.*, at p.163-169.

[30] Justice Madan B. Lolur, "Access to Justice: Witness Protection and Judicial Administration", available at http://www/humanrightsinitiative.org/jc/papers/jc-2004/supplementary-papers.lokur.pdf (last accessed on 23 February 2010).

[31] *Ibid.*

1.6 Concluding Remarks and Suggestions

From the analysis of foregoing study it is concluded that a Witness Protection Programme should be established to protect the safety, welfare and the interests of the witnesses. A comprehensive Witness Protection Programme is simply need of the hour. The Law Commission of India has given its 198th Report on the issue of Witness Protection Programme. The Hon'ble Supreme Court has observed in various landmark cases that legislative measures should be taken for the protection of witnesses. Now, the Government should take the initiative and frame a Comprehensive Witness Protection Programme through an Act of Parliament and finance it from the consolidated funds of India. In order to make and implement an effective Witness Protection Programme some suggestions are put forward for consideration:

1. A witness should be included in the Witness Protection Programme on the grounds of seriousness of the offence, the nature and importance of the statement or evidence of the witness, the nature of the perceived danger to the witness.[32]

2. A Witness Protection Programme should provide physical as well as identity protection to the witnesses, his family, near relatives and his property in cases of serious threat.[33]

3. The Programme should also contain provisions for relocating and rehabilitating the witness and his family. Reasonable financial assistance and job assistance should also be provided to the witness.

4. To prevent misuse and abuse of such a Programme, the Government should appoint and select men of integrity and honesty from various professional backgrounds to implement and monitor it.

5. It is proposed that where a witness who is admitted to the Witness Protection Programme fails or refuses to testify without any just cause, he should be prosecuted for contempt of court and the protection order be cancelled.

6. It is recommended that the prosecution should be an autonomous agency away from the control of Government. In many cases, the prosecution and the accused are hand in glove. In *BMW Hit and Run Case*, N.D.T.V. Channel exposed the public prosecutor trying to intimidate the key witness in the case. The State later dropped the public prosecutor Mr.

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[32] *Supra* note 22

[33] For details, see, Law Commission of India, *One Hundred and Ninety Eighth Report* on 'Witness Identity Protection and Witness Protection Programme' (2006).

J.U. Khan. But the scandal highlights that the time has come for the prosecution to be made an independent and autonomous agency.

7. It is recommended that the statement of a witness in sensitive cases should be recorded through video-conferencing. By using this method, a witness may avoid direct confrontation with the accused while giving his testimony. Recording of evidence by way of video-conferencing has been held to be permissible in a decision of the Supreme Court in *State of Maharashtra* v. *Dr. Praful B. Desai.*[34]

8. It is suggested that in certain circumstances, the venue of the trial may be shifted if the witnesses are not in a position to depose freely. The Apex Court in 'Best Bakery Case' ordered a shift in the venue of the trial from Gujrat to Maharashtra. The *Code of Criminal Procedure, 1973* also contains provisions in respect of the transfer of cases.[35]

9. It is suggested that the state should provide sufficient compensation to witnesses who suffer physical injury or any other loss due to their giving testimony in a criminal case.

10. Witnesses should be provided with adequate facilities in the court premises. They should be protected from any harassment at the hands of accused.

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[34] 2003 (4) SCC 601

[35] the *Code of Criminal Procedure*, 1973, Ss. 406-407.

ELECTORAL OPINION AND EXIT POLLS : RESTRICTIONS ON FREEDOM OF EXPRESSION

Dr. Shruti Bedi*

> If a politician murders his mother, the first response of the press or of his opponents will likely be not that it was a terrible thing to do, but rather that in a statement made six years before he had gone on record as being opposed to matricide.
>
> - Meg Greenfield

The media provides the audience for India's political theatre and polls give a voice to the people in a democracy. Polls provide the public with an independent voice that can act as an antidote to elitist interests and frames of issues and policy. It is therefore stated that while humans need only one heart to pump life-sustaining oxygenated blood to the body, a democracy requires more than one source to circulate the life's blood of representative government—information—to its citizens. It is generally argued that the wider the variety of sources informing the electorate about politics, the better.

The Indian Constitution under Article 19 guarantees the freedom of expression to its people, which is the true test of a democracy.[1] The right to freedom of expression also carries with it a corresponding right of the public to receive information and ideas. Nevertheless, there are circumstances in which the two rights may come into conflict and international law recognises that certain restrictions on freedom of expression in order to ensure that the political debate prior to an election, is not distorted, may be legitimate. Most countries have imposed some restrictions of this sort.

One such area in which restrictions on freedom of expression have been imposed to protect the integrity and fairness of the electoral process is in relation to the publication of pre-election opinion and exit polls.[2] Media coverage of such information can, at times, be controversial. This is particularly true of polls and projections commissioned or conducted by a

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* Assistant Professor of Law, University Institute of Legal Studies, Panjab University, Chandigarh.

1 the *Indian Constitution of India*, Article 19 (1) (a) guarantees freedom of speech and expression to the citizens of India.

2 Pre-election polls are public surveys which assess the views of the electorate on various election-related matters while exit polls take place immediately after people have voted and assess the level of support for the various parties and candidates.

source that is not impartial. The unethical practices lead to publication of wrong information thereby affecting the nature of the election result. Furthermore, polls may be subject to manipulation at many levels: in the choice of questions, the choice of sample, the time that the questions are asked etc. It has often been perceived, therefore, that polls and projections have a distorting effect on the vote, rather than simply reflecting public sentiments. This paper analyses the ethical practices followed by various countries and concludes with a suggestion to minimise the unethical practices during such polls.

1.1 Status of Opinion and Exit Polls

In this regard it is submitted that with respect to India the Election Commission of India has been of the view that there should be some restriction or regulation on the publishing / dissemination of the results of opinion polls and exit polls. The Commission had issued some guidelines in this regard in 1998. This was challenged in petitions before Courts and subsequently on the observation of the Hon'ble Supreme Court that the Commission did not have the power to enforce the guidelines. Accordingly the same were withdrawn by the Commission. Various national political parties had sent a proposal to the government for the ban on such polls. The government referred the matter to the Attorney General of India, who opined that prohibiting the publication of Opinion Polls and Exit Polls would be a breach of Article 19 (1) of the Constitution of India. He suggested that certain guidelines could be laid down to provide that while disseminating results of poll surveys, the agency concerned should provide the public with sufficient information regarding the name of political party / organization which commissioned the survey, the identity of the organization conducting the survey and the methodology employed, the sample chosen and the margin of error, etc., and that it is open to the Commission in exercise of its plenary powers under Article 324 to issue directions requiring the media to comply with the guidelines.[3]

Many governments of the world have adopted laws or regulations that restrict the reporting of electoral opinion polls by the media. Such laws and regulations constitute a *de facto* restriction on the freedom of expression as they interfere with both the principle of editorial independence and the public's right to receive information.

In general, there are two ways in which any risk of distortion from pre-election polls can be minimised and both means have been employed in countries around the world. First, many countries prohibit the publication of

[3] Detailed information available at http://eci.nic.in/eci_main/PROPOSED_ELECTORAL_REFORMS.pdf (last accessed 9 February 2011).

such polls in the period immediately preceding the vote. A controversial issue here is the timeframe over which such a prohibition applies and whether this can be justified as a restriction on freedom of expression. In practice, the length of such prohibitions range from Singapore, a country not known for respecting freedom of expression, where polls are prohibited for the entire election period, to countries such as Australia, South Africa and the United States, which do not impose such restrictions.

In some countries, such as Canada and France, constitutional decisions have helped to clarify the legitimacy of such prohibitions and, in particular, the timeframe over which a prohibition may be legitimate. In both these cases, the prohibitions were shortened, respectively, to polling day and to 24 hours before the vote, following challenges to longer prohibitions based on the guarantee of freedom of expression.[4]

Second, some countries require the publication or broadcasting of polls, both pre-election and exit, to be accompanied by certain information, such as: the source of the poll, the margin of error, the date on which the poll was conducted and so on. This can help serve as a sort of 'health warning' about the validity of the poll and help avoid situations where electors place undue reliance on the poll.[5]

1.2 Reports of Various Countries

The practices followed by various countries with regard to the publication and airing of opinion and exit polls are as follows:

1.2.1 Albania

Article 130 of the *Electoral Code of the Republic of Albania, 2000*, which governs the election of National Assembly members and the conduct of local government referendums, prohibits the publication of opinion poll results during the last five days of the election campaign. Exit polls are not specifically addressed. Poll results published before the proscribed period commences must include the names of both the pollster and survey sponsor, the sample size, the margin of error, and the time period during which the poll was taken. The penalty for violating these provisions is a fine of 100,000 - 500,000 lakh (approx. US$760 - $3,800) for members of the media, and between 1,000 - 2,500 lakh for everyone else.[6]

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4 Global Campaign for Free Expression, "Comparative Study of Laws and Regulations Restricting the Publication of Electoral Opinion Polls", London January 2003. Available online at: http://www.article19.org/pdfs/publications/opinion-polls-paper.pdf (last accessed 8 February 2011).

5 *Ibid.*

6 The full text of the legislation is available at: http://www2.essex.ac.uk/elect/legi_index.htm (last accessed 13 July 2011).

1.2.2 Australia

Australia has no legal restrictions on the publication of either pre-election opinion polls or – with the exception of the state of Victoria – exit polls. Reportedly, the Australian media rarely used exit polls due to negative past experiences with erroneous results and the increased speed at which official election results are delivered.[7]

1.2.3 Bulgaria

Bulgarian law prohibits the publication of new electoral survey results at any point during the last 14 days of the election campaign, and also on election day. The penalty for violation is a fine of 50 - 5,000 leva (approximately US$28 - $2,750).[8]

1.2.4 Canada

The reporting of poll results during federal elections is regulated by the *Canada Elections Act, 2000*. The Act prohibits the transmission of new election survey results to the public on polling day, before the close of all the polling stations in the electoral district. Exit polls may not be shown until the close of polls and transmission of election results from a district one time zone to those in another are not permitted before the close of polls in the district where the polls close later, to take account of the numerous time zones in Canada.[9]

The Act also stipulates that the first person to transmit the results of an election survey to the public, or any person who transmits the results within 24 hours after they are first transmitted, must provide the following additional information:

- the name of the sponsor of the survey;
- the name of the person or organization that conducted the survey;
- the date on which or the period during which the survey was conducted;
- the population from which the sample of respondents was drawn;
- the number of people who were contacted to participate in the survey; and

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7 T. Bale, "Restricting the Broadcast and Publication of Pre-Election and Exit Polls: Some Selected Examples", in *Representation*, Vol. 39, No.1, 2002, p. 16.

8 the *Election of Members of the National Assembly, Municipal Councillors and Mayors Act, 1991*, Article 60. Full text of the legislation is available at: http://www2.essex.ac.uk/elect/legi_index.htm (last accessed 10 July 2011).

9 the *Canada Elections Act*, Ss. 328 and 329.

- if applicable, the margin of error in respect of the data obtained.[10]

These rules are new, and result from a Supreme Court decision holding that a 72-hour ban on the publication of opinion survey results prior to elections violated freedom of expression as protected by the *Canadian Charter of Rights and Freedoms*, and could not be justified as necessary to protect the integrity of the electoral process.[11] The Court applied a necessity test very similar to the three-part test contained in the ICCPR.

The Canadian government argued that the three-day ban was required to protect against the threat to freedom of choice by inaccurate polls and to protect some voters from being excessively influenced by polls. The Supreme Court stated that the government "cannot take the most uninformed and naïve voter as the standard by which constitutionality is assessed."[12] Rather, the ban sends the message to voters that the media can be constrained by government not to publish factual information. The Supreme Court was of the view that the tangible harms to freedom of expression caused by the ban were not outweighed by the intangible benefits, and that less restrictive measures are available to protect the population from inaccurate polls, including requiring that the media publish information on the survey's methodology.

Notably, the Supreme Court alluded to circumstances, for example, in the context of unfettered paid political advertising, in which the nature of the interests of the speakers could make the expression "inimical to the exercise of free and informed choice by others." However, the court concluded that no such systemic or structural dangers currently exist in Canada. This might, however, be the case, for example in a country where major media outlets were controlled by vested political interests.

1.2.5 Czech Republic

The publication of opinion polls is prohibited in the Czech Republic for the entire week preceding the day of elections, up until the close of voting. Additionally, no exit polls may be undertaken on election day in the building in which a polling station has been located.[13] Presumably exit polls may be conducted elsewhere.

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[10] Full text of the legislation is available at: http://laws.justice.gc.ca/en/E-2.01/13937.html#rid-14037 (last accessed 9 March 2011).

[11] *Thomson Newspapers Co.* v. *Canada (Attorney General)*, [1998] 1 S.C.R. 877 ("*Thomson*"). Available at: http://www.lexum.umontreal.ca/cscscc/en/pub/1998/vol1/html/1998scr1_0877.html (last accessed 15 February 2011).

[12] *Thomson Newspapers Co.* v. *The Attorney General of Canada* (1998) 1 SCR 877, para 128.

[13] The Law on *Elections to the Parliament of the Czech Republic, and on Amendments of Certain Other Acts, 1995*. Full text of the legislation, Article 16 is available at: http://www2.essex.ac.uk/elect/legi_index.htm (last accessed 12 July 2011).

1.2.6 France

Under Article 11 of the *Loi 77-808 du 19 Juillet 1977*, the publication and broadcasting of opinion polls was banned for the seven days preceding each of the two rounds of voting in the country's national elections. Exit polls were banned until the close of voting. In 1997, however, several newspapers either published opinion poll results within the blackout period or indicated to readers where such results could be found on the Internet, in violation of the 1977 law. The newspapers were prosecuted by the *Commission des Sondages* – the regulatory body charged with overseeing the law – and the case went to the country's highest judicial court, the *Cour de cassation*. In a landmark decision, the French court held that the 1977 law violated Article 10 of the *European Convention on Human Rights*,[14] protecting freedom of expression, and specifically the electorate's right to receive and communicate information.[15]

Following the Court's decision the French Senate conducted its own study of the law and concluded that the week-long ban violated freedom of information (in addition to the media's right to expression) because it permitted the media to rely on poll results to inform their reporting, but to keep the basis of that reporting – the poll results – secret from the public. The Senate also concluded that modern communication technologies undermine the viability of media blackouts, as information may be published in other countries, accessible to audiences via satellite or the Internet.

A new law, adopted in February 2002, replaces the week-long prohibition with a 24-hour publication ban. With the exception of Internet sites, no person may publish or otherwise transmit the results of any opinion poll – whenever carried out – on the day before the vote. When opinion poll results are published, the law

[14] The European Convention on Human Rights (ECHR) (formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*) is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention.

[15] Article 10 – Freedom of Expression - 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

imposes an obligation on the media to provide details of the poll's methodology (this is unchanged from the 1977 law), and exit polls remain prohibited.[16]

1.2.7 India

In 1998, the Election Commission of India issued its *Guidelines for the Publication and Dissemination of Results of Opinion Polls/Exit Polls*, prohibiting the publication of opinion poll results beginning 48 hours before the start of voting, and continuing until the polls closed. Organisations or agencies that conducted and published the results of an opinion poll before the blackout were required by the Guidelines to indicate the survey's sample size, the geographic spread of the survey, the margin of error, details regarding the methodology, and information about the organization.

During the 1999 election, numerous media institutions ignored the ban and were subsequently prosecuted by the Election Commission. After a number of lower court decisions, the Supreme Court of India ruled that the Commission Guidelines "exceeded the power of 'superintendence, direction and control' granted to it by Article 324 of the [Indian] Constitution."[17] The Court also questioned the practicality of such a ban, given the presence of international and online media in the country. The Commission Guidelines have since been withdrawn, and no new legislation has been enacted. Renewed calls for some form of ban on the publication of opinion and exit poll results were heard last February after numerous exit polls were wrong, prompting accusations of media bias.[18]

1.2.8 Italy

Under *Law No. 28/2000*, a prohibition on the publication of electoral polls begins 15 days before election day and continues until the close of voting. Results that are published prior to the blackout period must be accompanied by information about the polling methodology, sample size, date, and response rate. The same data must also be submitted to the Department of Information and Press, which will post the information on a dedicated website. Although Italy's regime is one of the most restrictive in Europe, previous legislation imposed an even longer prohibition period.[19]

1.2.9 Montenegro

The *Law on Election of Municipal Councilmen and National Assembly Representatives, 1998*, prohibits the publicly owned media from publicizing

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[16] For a discussion of the new law and its full text, in French, see: www.senat.fr/leg/pp100-057.html (last accessed 10 July 2011).

[17] T. Bale, *Supra* note 7 at pp. 18-19.

[18] *The Tribune* (India), 17 February 2002. Online: http://www.tribuneindia.com/2002/20020217/punjab1.htm (last accessed 14 July 2011).

[19] T. Bale, *Supra* note 7 at p. 19.

electoral survey results the entire week prior to election day. The publicly owned media are also prohibited from carrying exit polls.[20]

1.2.10 Peru

Article 191 of the *Lei Organica de Elecciones, 1997,* (Electoral Law) imposes a 15-day blackout period on the publication of electoral survey results prior to election day. The sanction for violation is a fine, the amount of which is determined by the National Legal Election Oversight Commission.

1.2.11 Russia

Article 47 of the *Law on Elections for the Russian President, 2002*, prohibits the publication of any electoral survey results for five days prior to election day and on election day itself. The law further requires that when opinion polls are published, the following information must be provided: the name of the organization publishing the survey results, the name of the organization that conducted the survey, the name of the organization that commissioned the survey, the time frame in which the survey was conducted, the sample size, the geographic region in which the survey was conducted, the exact wording of the question, the method of collecting the information, and the margin of error.[21]

1.2.12 Singapore

The *Parliamentary Elections Act, 2001,* severely restricts the publication of electoral opinion poll results and imposes an outright prohibition on the publication of exit polls. The blackout period for the publication of opinion poll results begins with the issuance of the "writ of election", at the very beginning of the election campaign, and ends with the close of all polling stations on polling day. Thus the publication of poll results are effectively prohibited for the duration of the entire election period.

The sanction for violation of the provisions is a fine not exceeding $1,000 (approximately US$580) and/or imprisonment for a maximum of 12 months.[22]

1.2.13 South Africa

There is no prohibition on the publication of electoral survey results prior to an election. Exit polls, however, are banned by the 1998 *Electoral Act*, which states at

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[20] See Article 63. Full text of the legislation is available at: http://www2.essex.ac.uk/elect/legi_index.htm (last accessed 13 July 2011).

[21] This information is based on an English translation of a nearly final draft of the Russian law, provided to ARTICLE 19 by the OSCE. The 1999 *Federal Law on the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation* has been recently amended, but ARTICLE 19 was unable to locate an English translation.

[22] Full text of the legislation is available at: http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl? actno=REVED-218 (last accessed 12 July 2011).

section 109: "During the prescribed hours for an election, no person may print, publish or distribute the result of any exit poll taken in that election."[23]

Compliance with the *Electoral Act* is monitored and enforced by the independent Electoral Commission, which has the power to bring proceedings for non-compliance before a specially-created Electoral Court.

1.2.14 Sweden

In Sweden, as with the other Scandinavian countries, there are no formal legal restrictions against the publication of electoral survey results during an election campaign. In practice, however, no media organisation publishes poll results later than a day before the election, and exit poll results are not published until all polling stations have closed.[24]

1.2.15 United Kingdom

There are currently no restrictions on the publication of pre-election surveys, although the publication of exit polls taken before voting closes is prohibited by the *Representation of the People Act, 2000*. The sanction for contravention of the exit poll publication ban is the same as for other summary conviction offences: a fine or imprisonment of no more than six months.

The absence of legislative prohibition has been explained by the British media's commitment to self-regulation and impartiality.[25] The British Broadcasting Corporation (BBC), for example, has internal guidelines on reporting opinion polls that have reportedly been effective for a number of years, following a fiasco during the 1992 elections in which almost all the reported polls were proven wrong.[26] A sample of the BBC's self-imposed reporting guidelines include:

- not leading a programme or bulletin with the results of a pre-election poll;
- not including the results of an election survey in a headline;
- not relying on the interpretation given to a poll's result by the publication or organization which commissioned it;
- always reporting the expected margin of error, and where the gap between the two leading contenders is within the combined margin of error, saying so; and

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[23] Full text of the South African legislation is available at: http://www.info.gov.za/view/DownloadFileAction? id=70732 (last accessed 10 July 2011).

[24] T. Bale, *Supra* note 7 at p. 19

[25] *Id.*, at p. 20.

[26] See: http://www.aceproject.org/main/english/me/mec03c.htm (last accessed 10 July 2011).

- always reporting the dates of the poll, and who commissioned and carried out the poll.[27]

1.2.16 United States

In spite of messy Presidential elections in 2000, which included sharp public and official criticism of the media for the widespread reporting of an inaccurate exit poll, there are currently no legal restrictions on either the publication of pre-election opinion polls or exit polls. It may be assumed that a ban of this nature would be unlikely to withstand a constitutional challenge in the United States.

1.2.17 Council of Europe

In September 1999, the Committee of Ministers of the Council of Europe adopted *Recommendation No. R (99) 15 On Measures Concerning Media Coverage of Election Campaigns.*[28] While stressing the importance and fundamental nature of the principle of the editorial independence of the media, the Ministers noted that, "particular attention should be paid to specific features of the coverage of election campaigns, such as the dissemination of opinion polls, paid political advertising, the right of reply, days of reflection and provision for pre-electoral time." The Ministers recommended that member State governments examine ways of ensuring respect for the principles of fairness, balance and impartiality in the coverage of election campaigns by the media.

In that regard, the Recommendation makes the following statement regarding opinion polls:

Regulatory or self-regulatory frameworks should ensure that the media, when disseminating results of opinion polls, provide the public with sufficient information to make a judgment on the value of the polls. Such information could, in particular:

- name the political party or other organisation or person which commissioned and paid for the poll;
- identify the organisation conducting the poll and the methodology employed;

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[27] The BBC Guidelines are available online at: http://www.bbc.co.uk/bbctrust/assets/files/pdf/review_ report_research/impartiality_21century/f_editorial_guidelines_extracts.txt (last accessed 14 July 2011).

[28] Recommendation No. R (99) 15 of the Committee of Ministers to Member States on Measures Concerning Coverage of Election Campaigns. Adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Ministers' Deputies.

- indicate the sample and margin of error of the poll;
- indicate the date and/or period when the poll was conducted.[29]

All other matters concerning the way in which the media present the results of opinion polls should be decided by the media themselves. Any restriction on member States forbidding the publication/broadcasting of opinion polls (on voting intentions) on voting day or a number of days before the election should comply with Article 10 of the European Convention on Human Rights [freedom of expression],[30] as interpreted by the European Court of Human Rights.[31]

Similarly, in respect of exit polls, member States may consider prohibiting reporting by the media on results of such polls until all polling stations in the country have closed.

1.3 Conclusion

The most identifiable trait of speech is that the right is primary and the exception ought to be construed purposefully. This fact epitomises the spirit that pervades the Indian Constitution, a document rich in moderation. The principle of free speech is as Voltaire succinctly states, "I disapprove of what you say but I will defend to death your right to say it".[32] Hence whilst the continued legal protection of opinion polls remains unassailable owing to its principled basis, to extend this exalted status to a practice which is unregulated remains unjustified on principle, unsubstantiated by any policy considerations.

An examination of the regulatory approaches adopted by the various democratic governments as to the publication of pre-election opinion and exit polls reveals no set pattern. Of the 16 jurisdictions surveyed, the following picture emerges: 6 countries – Australia, India, South Africa, Sweden, the United Kingdom and the United States – impose no restrictions; 2 countries – Canada and France – impose restrictions of 24 hours or less; 2 countries – Albania and Russia – impose restrictions of between 3 and 5 days; and 6 countries – Bulgaria, Czech Republic, Italy, Montenegro, Peru and Singapore – impose restrictions of 7 days or more.

It is pertinent to note here that from among the established democracies surveyed, only Italy imposes a ban of more than 24 hours and that there is a clear

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29 Recommendation No. R (99) 15 of the Committee of Ministers to Member States on Measures Concerning Coverage of Election Campaigns. III Measures concerning both the print and broadcast media. Available online at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=419411 &Site=CM (last accessed 14 July 2011).

30 *Supra* note 15.

31 *Supra* note 4.

32 S. Aarthi Anand and Celia Joanne Jenkins, "Exit Polls: Debating Freedom or Fairness" in *Economic and Political Weekly*, Vol. 39, No. 46/47 (Nov. 20-26, 2004), 4971 at p. 4973.

trend towards shorter bans. Courts in these countries have questioned the assumption implicit in bans that voters are uninformed and naïve, as well as the implications of bans of this nature – which prevent the media from disseminating true, factual material – for freedom of expression. These courts have also noted that in the modern world, where access to the Internet and satellite television is becoming commonplace, bans of this sort may no longer be viable.

It is stated that where important parts of the national media, including the public media, are controlled by political figures, any risk of bias from opinions polls increases. The requirement of a control on the publication of the opinion and exit polls as suggested above should be made mandatory to check the unethical practices of the media. In particular a health warning is effective in combating the distorting influence of polls. Professional standards must ensure that competent, reliable, accredited organizations work in this area. Reporting, due to the power of influence of such polls, of the results of these polls is of particular concern.[33]

The government in consultation with the media enterprises can make guidelines for carrying out opinion polls, so that it does not become a tool of spreading "prejudicial effect" on the voters. There must be a balance between the mandate of "free and fair election" given to the Election Commission and the citizen's right to know the public opinion on an important issue.

Mr. Soli Sorabjee former Advocate General of India suggests that certain conditions could be imposed on the publication of the opinion or exit polls and cites the Council of Europe's recommendations in this regard. He recommends that each poll should carry the following information: (a) name of the political party or other organisation or persons who commissioned and paid for the poll; (b) identify the organisation conducting the poll and the methodology employed; (c) indicate the sample and margin of error of the poll; and (d) indicate the date and/or period when the poll was conducted.[34]

In Mr. Sorabjee's opinion, these conditions would ensure that "the opinion or exit polls are not manipulated and also provides the voter with the relevant

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[33] Media and Elections. Project Central and Eastern European Countries. Available online at: http://docs.google.com/viewer?a=v&q=cache:9Jpp3FAe_TQJ:aceproject.org/ero-en/topics/media-and-elections/Media%2520and%2520elections%2520report.doc+In+September+1999,+the+Committee+of+Ministers+of+the+Council+of+Europe+adopted+Recommendation+No.+R+%2899%29+15+On+Measures+Concerning+Media+Coverage+of+Election+Campaigns.&hl=en&gl=in&pid=bl&srcid=ADGEESgkppLaYrY1scauq-D_XdOCU3xbScPOP3gQOdlZgPrkckOI3KzeIrPZdvDoXMCV8TcyGPah9-fpgEd5ii1R09U-Yp-Sd50JGeHpoc6Vhdj_twODqEoyw00e0UdtTOPK4BCT5S5Y&sig=AHIEtbQf5Zs_UvwqN7_vyI4cE33e3lCoJg (last accessed 10 February 2011).

[34] "Ban on opinion, exit polls, unconstitutional", The Hindu, Saturday, 10 April 2004. Available online at: http://www.hindu.com/2004/04/10/stories/2004041005910100.htm (last accessed 5 September 2011).

information in order to enable him or her to judge the credibility or reliability of the opinion and exit polls and thereby to make an informed choice."[35] Further the Election Commission has the option to invoke its plenary powers under Article 324 of the Indian Constitution "to issue directions requiring the media to comply with the aforesaid recommendation." Such a recommendation would be "regulatory in nature and not restrictive of the fundamental right of free speech and expression under Article 19(1)(a)."

To conclude it is clear that bans of longer than 24 hours will rarely, outside of special circumstances, such as the first multi-party election in a country, be justified. However a word of caution is necessary as stated by Malcolm: "The media's the most powerful entity on earth. They have the power to make the innocent guilty and to make the guilty innocent, and that's power. Because they control the mind of the masses."[36]

[35] *Ibid.*

[36] Quoted by Malcom X. Available online at: http://www.goodreads.com/author/quotes/17435.Malcolm_X (last accessed 5 September 2011).

DEVELOPMENT OF PRINCIPLE OF INDIVIDUAL RESPONSIBILITY *VIS-À-VIS* STATE RESPONSIBILITY UNDER THE INTERNATIONAL CRIMINAL LAW

Dr. Jasmeet Kaur*

> Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.
>
> - Nuremberg Judgment

1.1 Introduction

Sir Frederic Smith observed that 'states and states alone enjoy a *locus standi* in the law of nations and that they are the only wearers of international personality'[1]. This is the old, orthodox and classic view of the positivists, who believed that only states are the subjects of international law. Individuals were not considered the subjects of international law; but they were considered as objects of international law. States were primarily considered the subjects of international law because ordinarily, international law deals with the rights and duties of the states; it is the states that enter into treaties with each other[2]. Therefore only states are bound by such treaties under international law. Even the International Court of Justice, as per its statute, empowers only states to take action in international disputes[3]. And individuals have no right to bring a case against any State or an individual in the International Court of Justice. While defining international law in 1905, Oppenheim considered international law as the body of customary and conventional rules, which are considered legally binding by states in their intercourse with each other. It is important to note that he only mentions states in his definition and excludes the mention of individuals as forming a part of international law.

This view cannot be held to be correct in the present times because treaties do not bind only the states. There are several treaties that protect the basic rights of the individuals. These treaties deal with the rights and duties of the individuals' vis-à-vis the State and with each other. It is pertinent to mention here about various treaties and declarations that declare and recognize the rights of individuals. For instance, Universal Declaration of Human Rights 1948,

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* Assistant Professor of Law, University Institute of Legal Studies (UILS), Panjab University, Chandigarh.

1 M.P. Tandon, *Public International Law*, Allahabad Law Agency (2000).

2 Dr. S.K. Kapoor, *International Law and Human Rights* (15th Edition) Central Law Agency (2004).

3 Article 34 of the ICJ Statute expressly provides that only states may be parties in the cases before the Court.

International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966, United Nations Convention on Rights of the Child 1989, Geneva Convention on Protection of Prisoners of War 1949, Rome Statute of the International Criminal Court 1998, so on and so forth. Not only under various treaties and conventions the individuals have found their place, but the importance of individuals has been also recognized under the customary international law. The twenty-first century marks the steady rise of the individual[4] as a subject of international law, more particularly in the province of human rights and dilution of procedural incapacities before international tribunals. The high watermark of the present century is global commitment towards ending impunity, fixing accountability and criminal responsibility of individuals who commit serious international crimes[5].

Several international conventions adopted during the period 1884 to 1936, fairly established the norm of individual criminal responsibility. State practice has also recognized individual as a subject of international law[6].

The Nuremberg and Tokyo tribunals have, after the Second World War, raised the benchmark of personal responsibility of individuals - irrespective of their position and the offices they held - for commission of 'crimes against peace', 'war crimes' and 'crimes against humanity'. The General Assembly in 1946 and the International Law Commission of the UN in 1950 formulated the Principles propounded by the Nuremberg and Tokyo tribunals, into a Draft Code of principles affirming the Tribunal's judgment. In these principles, reference is made to persons as guilty of crimes against peace and security of the mankind[7]. The Nuremberg Principle has affirmed the individual responsibility doctrine in the following words-

> Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment[8].

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4 J.G. Starke, *Introduction to International Law*, p. 70. He writes, "that under modern practice, the number of exceptional instances of individuals or non-state entities enjoying rights or c\becoming subject to duties directly under international law, has grown'. States are no longer exclusive subjects of international law. In the human rights regime, the individual has readily found access to international bodies.

5 N. Sanajaoba, *ICC and the Individual Criminal Responsibility in 21st century*, International Conference on International Law in the New Millennium: Problems and Challenges Ahead (4-7 October 2001), Souvenir and Conference Papers, Vol. II, Indian Society of International Law, p. 652.

6 *Ibid.*

7 *Supra* note 4.

8 General Assembly Resolution, 1950. Principle I.

The defendants in the Nuremberg and Tokyo trials argued that they were soldiers of sovereign countries, they followed orders of their political supremo and the offences they were charged with were not crimes at the time of commission of offence[9]. But the tribunal held them responsible and observed that superior order is no defence. Even the military commanders and the Head of the State were not exempt from responsibility. Principle III of the G.A. Resolution 1950 provides, "the fact that a person who committed an act which constituted a crime under international law acted as a Head of State or responsible Government official does not relieve him from responsibility under international law".

One point, which has been clarified in the light of these principles, is that international law can reach over and beyond traditional technicalities, and prosecute guilty individuals sheltering behind the abstract concept of the state[10]. The Nuremberg and Tokyo Tribunals held the individuals responsible for their acts, which were considered crimes under international law.

The concept of individual responsibility under international criminal law has also been recognized under the 1998 Rome Statute establishing the International Criminal Court[11]. To enforce *jus in bello,* the principle of individual responsibility cannot be ignored. The individual responsibility vis-à-vis the international criminal law will be better understood, firstly if the importance of individuals under international law is highlighted. Thereafter, the analysis of individual criminal responsibility under international law can be made.

1.2 Importance of Individuals as subjects of International Law

The traditional view that only states are the subjects of international law was supported by Lassa Oppenheim. He defined International Law or the Law of Nations as the name for the body of customary and conventional rules, which are considered legally binding by civilized states in their intercourse with each other[12]. To conclude from the definition as given by Oppenheim, international law is the body of rules that governs the relations between states only. According to this traditional view, individuals were not considered the subject of international law. It was in the time of Westlake and Oppenheim that international law was considered to regulate the relations between states and interests of individuals were at best, marginal[13].

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9 *Supra* note 5 at pp. 653-4.

10 J.G. Starke, *Introduction to International Law,* Butterworths Publication (Tenth Edition).

11 Article 25 of the Rome Statute provides for individual criminal responsibility.

12 L. Oppenheim, *International Law,* Vol. I, Eighth Edition (1970 reprint), p. 6 in Dr. S.K. Kapoor International Law and Human Rights (15th Edition) Central Law Agency (2004).

13 John O' Brien, *International Law,* Cavendish Publishing Ltd. (2001).

Kelsen strongly supported the view that individuals are subjects of international law. According to him, 'the subjects of international law are - like the subjects of national law - individual human beings'. Kelsen believed in the view that individuals alone are the subjects of international law. In this respect, according to him, there is no real distinction between state law and international law. Both systems bind individuals, but Kelsen's view is another extreme. Westlake supporting a similar view observed, 'the duties and rights of states are only the duties and rights of the men who compose them.[14] In fact the central figure in international law is man; and his rights and responsibilities are inalienable and indefeasible[15]. However, it cannot be said that individuals alone are the subjects of international law. We can say that individuals occupy the same position as states under international law.

The international legal personality of individuals has been derived from various international conventions relating to rights and duties of individuals. The Human Rights conventions that solely deal with the protection of basic rights of the individuals are discussed as follows-

(i) ***Universal Declaration of Human Rights, 1948*** - The most important declaration that has recognized the worth and rights of the human beings is the Universal Declaration of Human Rights (UDHR)[16] adopted by General Assembly Resolution on December 10, 1948. The Declaration states all kinds of basic human rights from right to life, liberty and security of person to economic, social and cultural rights. The Declaration sets a new international standard[17]. The rights in UDHR have been set forth in following two covenants-

- International Covenant on Civil and Political Rights (ICCPR), 1966
- International Covenant on Economic Social and Cultural Rights (ICESCR), 1966

The two covenants ensure equal rights of men and women for the enjoyment of all civil and political rights and also economic, social and cultural rights as well.

ICCPR, 1966 - protects the right to life (Article 6), prohibits torture or cruel, inhuman and degrading treatment or punishment (Article 7), prohibits slavery, slave trade, protects right to freedom of opinion and expression, provides for equality before courts and guarantees in civil

14 *Supra* note 10.
15 M.P. Tandon, *Public International Law*, Allahabad Law Agency (Fifteenth Edition) (2003).
16 G.A. Res. 217 A, UN GAOR, 3d Sess., Res. 71, UN Doc. A/ 810 (1948).
17 *Supra* note 15.

and criminal procedures and the like. However, along with enumeration of rights, limitations have also been specified to protect national security, public order, public health and morals and the rights and freedoms of others.

ICESCR, 1966 - Under this covenant, state parties recognize the right to work freely, right to the enjoyment of just and favorable conditions of work (Article 7), right to form and join trade unions, right to social security, right of free consent to marriage and the like. Article 14 of the covenant provides for making available compulsory primary education free of charge.

(ii) ***The Slavery Convention, 1926*** - The convention came into force in 1927 and was amended by the Protocol of 1953. The state parties to the convention have undertaken to abolish slavery in their territory.

(iii) ***Atlantic Charter, 1941*** - It gave expression to four basic principles of human freedom- freedom from fear, freedom from want, freedom of speech and freedom of worship.

After this charter, it became internationally established that 'the state is an instrument to serve the people and not an end for man to serve'.[18]

(iv) ***Charter of the United Nations, 1945*** - The UN Charter has laid emphasis on the respect and protection of human rights and fundamental freedoms for all under Article 56 and its Preamble. The UN, the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF), the UN International Children's Emergency Fund (UNICEF), etc are all designed to secure economic, social and cultural advancement of mankind.

(v) ***Genocide Convention, 1948*** - The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the U.N. General Assembly on December 9, 1948 attaches direct responsibility towards individuals by making provision for punishing persons committing genocide, whether they are constitutionally responsible rulers, public officials or private individuals (Article IV).

(vi) ***Convention on Political Rights of Women, 1952*** - It was adopted by General Assembly in 1952. The Convention recognizes the political rights of women and provides that there shall be no discrimination in regard to right to vote and eligibility for holding public office.

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[18] *Supra* note 15.

(vii) ***International Convention on the Elimination of All forms of Racial Discrimination, 1965*** - Under the convention[19], States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the civil rights, political rights and economic, social and cultural rights.

(viii) ***Convention on Suppression and Punishment of Apartheid, 1973*** - The convention was adopted by General Assembly in 1973. It outlaws apartheid and considers it a crime against humanity. Apartheid has been recognized as a crime against humanity in other international instruments also. For example, even the Rome Statute mentions apartheid as crimes against humanity.

(ix) ***Convention on Elimination of All Forms of Discrimination against Women, 1979*** - The General Assembly adopted this convention in 1979. The purpose of the convention is to end the discrimination that denies or limits women's equality in political, social, cultural and civil fields.

(x) ***Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*** - The Convention was adopted by General Assembly on December 10, 1984. It declares that any kind of torture or cruel, inhuman or degrading treatment or punishment is an offence to human dignity and violates human rights.

All these conventions deal with the rights and duties of the individuals, which have been recognized under international law. There are other regional conventions that deal with rights and duties of individuals. These are discussed as follows -

(xi) ***European Convention for Protection of Human Rights, 1950*** - This was a step in the direction of realization of the ideas enshrined in UDHR on regional basis. Other endeavors by the European Union in this direction are setting up of European Commission of Human Rights and European Court of Human Rights.

(xii) ***American Convention on Human Rights, 1969*** - It was signed in 1969 and entered into force in 1978. The convention is modeled closely on European Convention on Protection of Human Rights.

(xiii) ***Banjul (African) Charter on Human and People's Rights, 1981*** - The Charter was adopted by the member states of the Organization of

[19] Adopted by General Assembly Resolution 2106 (XX) of 21 December 1965.

African Unity (OAU) and recognizes the basic rights, duties and freedoms of the human persons for right to equality, education, to property, respect for life and integrity of a person.

Apart from the recognition of rights of the individuals under the various conventions as discussed above, the importance of individuals is also reflected with the recognition of rights of aliens' under the concept of extradition and asylum. Needless to mention here, are the Pirates that are covered under international law. Further, the stateless persons are subjects of no particular state but they are the subjects of international law. It is important also to mention here the rights of refugees as recognized under the International Convention on Refugees, 1961.

The rights and duties of individuals under international law are not only recognized under various conventions but customary international law also recognizes the importance of individuals. In the famous *Danzig Railway Officials case*[20], PCIJ observed, "It cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts". Though generally treaties don't create rights and obligations for private individuals but if the states intend to do so, that intention can be given effect to by a treaty or an agreement. In the said case, in accordance with the agreement between Danzig and Poland which regulated conditions of employment of officials taken by Polish railway service, the Danzig railway officials had a right of action to be brought against Polish railway administration for recovery of claims under the said agreement. Therefore, even the private individuals were given importance under a treaty, which was given effect to by the PCIJ in 1928.

The importance of individuals can also be traced back to the end of 2nd World War, when Nuremberg and Tokyo Tribunals were established i.e. in 1946. Certain defendants were prosecuted and held guilty for having committed crimes against humanity and war crimes. The said judgments affirmed the principle of individual responsibility under international criminal law. The establishment of the two military tribunals is of historic significance. The principles of international law recognized in the agreement for setting up of tribunals of 1945, were subsequently formulated by ILC of the UN as a Draft Code of Principles recognized in the tribunal's judgment. In these principles as formulated by the ILC, the reference is made to persons as guilty of crimes against peace and security of mankind[21].

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[20] Permanent Court of International Justice, Ser. B, no. 15 (1928), in Ian Brownlie, *Principles of Public International Law* (Third Edition) Oxford University Press.

[21] J.G. Starke, *Introduction to International Law*, Butterworths Publications (Tenth Edition).

According to the Nuremberg Tribunal[22], "Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced".

It cannot be ignored that in the ICJ, it is only the states that can bring an action and that too only against another state. But the fact that individuals have such procedural incapacities before the international court of justice is not inconsistent with their status as subjects of international law. Though it has become necessary that access by individuals and international corporations should be allowed to the international court of justice, and in this direction suggestions have also been proposed. In certain cases, the access by individuals or corporations to the international tribunals is necessary and should be allowed, and it may be expected that in the future, changes in this direction will come about[23].

1.3 International Criminal Court (ICC)

The Rome Statute establishing the International Criminal Court, in its *Article 25* provides for individual criminal responsibility. The provision reads, 'the court shall have jurisdiction over natural persons'[24]. The individuals have been made criminally responsible for committing the crimes specified under the statute. These crimes are international in character for which an international court has been given jurisdiction to prosecute such persons. The Article further provides that a person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for the punishment in accordance with the statute. The official capacity of a person who commits such crimes as specified under the statute is also irrelevant[25]. His official capacity even if he is a Head of State or Govt. shall not exempt him from criminal liability. Article 28 further provides for command responsibility, i.e. a military commander shall be criminally responsible for crimes within the jurisdiction of the court, committed by forces under his/ her effective command and control provided the commander knew that the crime is being committed and he failed to take all necessary and reasonable measures to prevent or repress the commission of such crime. Similar responsibility is also of the superior who shall be made responsible under the provisions of the statute, for the crimes committed by his

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22 See Official record, Vol. I, Official Documents at p 223. The tribunals also pointed out that it has long been recognized that 'international law imposes duties and liabilities upon individuals as well as upon states', in J.G. Starke, *Introduction to International Law*, Butterworths Publications (Tenth Edition).

23 Globalized Economy has brought about interaction between states and transnational corporations. Governments of developing states are increasingly relying on MNCs/ TNCs for executing infrastructure projects. Thus, any dispute between the two entities might be better resolved under the aegis of ICJ, rather than municipal courts.

24 Rome Statute, Article 25 (1).

25 See Rome Statute, Article 28.

subordinates. The statute of the ICC extends individual responsibility to commanders and superiors for the acts of their subordinates. Thus, the importance of individuals under international criminal law has been further enhanced with the coming into force of the ICC.

1.4 Principle of Individual Responsibility in the International Criminal Law

The principle of individual criminal responsibility is based on the notion that individuals behaving contrary to the most fundamental legal standards may be held criminally responsible regardless of whether they have acted in an official capacity, that is, both when they were state organs and when they acted as private individuals[26]. Prosecution and punishment are conducted in the interest of the world community. The primary goal of this class of responsibility is to punish the culprit[27].

The principle of individual criminal responsibility is a general principle of law, whether it is applied in national criminal law or in international criminal law. As has been discussed in earlier paragraphs, there has been a shift under international law from holding states responsible for international crimes to individual criminal responsibility. The coming into force of the Rome Statute of International Criminal Court (ICC) is itself an achievement in development of the principle of individual responsibility in international criminal law. Earlier, the principle was adopted by International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) that prosecuted individuals for committing crimes against humanity and war crimes.

It is relevant to mention here the case of *Prosecutor v. Stanislar Galic*, decided by the trial chamber- I of the ICTY which gave its judgment on 5 Dec 2003. The case involves discussion of two war crime charges - i.e. attack on civilians and terror against civilians - and of the individual criminal responsibility of the defendant. Galic was charged with both direct and command responsibility under Article 7(1) & Article 7(3) of the ICTY Statute. The chamber found Galic guilty on 5 counts of terror, murder and inhuman acts; he was punished with 20 years imprisonment. The case highlights the principle of individual criminal responsibility that was recognized by the ICTY.

Although all criminal justice systems in the world recognizes the concept of individual criminal responsibility, for the violation of the norm, which entails penal consequences[28]. Within the national framework of the particular system it

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[26] Antonio Cassesse, *International Law*, Oxford University Press Inc., New York (2001).

[27] *Ibid.*

[28] M. Cherif Bassiouni, *The Sources and Content of ICC: A Theoretical Framework*, International Criminal Law (Second Edition), Vol.- I (Crimes), Trans-national Publishers Inc. New York (1999).

is understood as a principle of national criminal law. But enforcing this principle under international criminal law has only recently been recognized by the international community.

Another issue regarding the establishment of the principle of individual criminal responsibility under international criminal law was whether international criminal law can inflict direct criminal responsibility upon individuals without going through the mediation of the states since states also proscribe for the same responsibility under its national criminal legislation. To explain this further, the point to consider is whether the international criminal law through its sources, i.e. conventions, customs, *jus cogens* or general principles, provides for imposing direct criminal responsibility on individuals. And if we do peruse the conventional rules, we may conclude that the Rome Statute does provide for such criminal responsibility. For that matter even the customary international law and also the general principles recognized by the states provide that individual criminal responsibility can be enforced as it were by the Nuremberg Tribunal and Tokyo Tribunal.

The principle of individual criminal responsibility not only makes an individual responsible for acts that are prohibited by the Rome Statute or customary international law, but the principle also covers the individual who orders, solicits or induces the crime and also the person who aids, abets or otherwise assists. Though the Rome Statute does not indicate whether there is some quantitative degree of aiding and abetting required to constitute material acts involved in complicity[29].

In the case of *Prosecutor v. Ferdinand Nahimana et al*, the trial chamber of ICTR sought to define the offence of direct and public incitement to commit genocide. The defendant was held responsible for the charge of public incitement to commit genocide. The case was also called the Media Trial.

The developing system of international criminal law in the light of establishment of various international criminal tribunals has proven the acceptance of the principle of individual criminal responsibility under international criminal law. The system of international criminal law imposes certain duties on individuals, which can be examined from various international conventions. The provisions of international criminal conventions govern various categories of international crimes which can be or are violated by the acts of individuals. Not only the duties have been imposed by the various international conventions; these conventions also protect the rights of the individuals. If we examine the Rome Statute, there are provisions that protect the rights of persons during an investigation (Article 55), rights of the

[29] William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press (2001).

accused (Article 67), protection of the victims' and witnesses (Article 68), reparations to victims (Article 75), and etcetera. These provisions under the conventions protect the rights of the individuals. The individual is considered to be the sole subject of international human rights law and constituting an integral part of international criminal law. In fact, most punishments under international criminal law are solely applicable to physical and not legal persons. The increasing development of regional and international conventions relating to extradition, jurisdiction, prosecution and punishment of perpetrators of international crimes implies the concept of international criminal responsibility of individuals[30].

1.5 Issues Regarding Enforcement of Individual Criminal Responsibility under the International Criminal Law

From the above discussion it is clear that the principle of individual criminal responsibility embodies responsibility of individuals for the most serious crimes committed under international law. Such individuals can be prosecuted in the international criminal court if they commit acts that are prohibited under the Rome Statute or are crimes under the customary international law. These prohibited acts are covered under the category of so-called international crimes, for which there is also universal jurisdiction, i.e. crimes against humanity, war crimes, genocide and act of aggression. The term aggression not only embodies the responsibility of the state for the act of aggression as per the General Assembly Resolution on the Definition of Aggression 1974[31], but it would also entail the responsibility towards an individual committing aggression as under the Rome Statute, after its review in June 2010 in Kampala[32]. It is important to note that in the present era the individuals have been given equal importance as states under international law and the principle of individual criminal responsibility under international criminal law has been fully developed and recognized. Thus it cannot be ignored today that an individual can also be a major participant in commission of an act of aggression. The best example is provided by the attack on Twin Towers (World Trade Center in the US) on 9/11 in 2001. This attack was allegedly committed by Osama Bin Laden, who could be made criminally liable for his acts, since it was serious violation of the territorial integrity of a state. It can be categorized as an act of aggression. He, as a leader, allegedly organized, planned and ordered the commission of an act of aggression. Under

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30 *Supra* note 30.

31 According to Article 1, Aggression is the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state or in any other manner inconsistent with the charter of the United Nations, as set out in this definition.

32 Article 8 has been adopted under the Rome Statute in its Review Conference in Kampala that defines the individual crime of aggression as the planning, preparation, initiation or execution by a person in a leadership position of an act of aggression.

international law, such act imposes individual criminal responsibility. The act of aggression can also be committed by a State and therefore State in that case will be responsible for the act of aggression for which the forum is International Court of Justice. In such cases of act of aggression, the issue arises as to who will be responsible under international law- whether the individual or the state? Is it possible to prosecute both under international law but under different forum?

The second issue regarding the enforcement of the principle of individual responsibility under international law is that once a state imposes responsibility on an individual liable for having committed international crimes, i.e. the crimes within the jurisdiction of the court, it becomes difficult to actually enforce this principle specially when the other states are not cooperating to hand over the fugitive, for example by not extraditing such an individual. Further, in case there is no extradition treaty between the states, the extradition of such criminals becomes very difficult. So the question remains as to how do the states or the ICC should actually enforce the principle of individual criminal responsibility? In the present context, the major problem that arises is how to get extradition of such individuals from a state which is giving them shelter. Therefore, the need is to have a regional extradition convention with respect to the crimes mentioned under the Rome Statute, if not a universal convention. The need to have a universal extradition convention cannot be ignored because that would only make it work against the non-member states. It is important to note that under Article 1(3) of the UN charter, one of the purposes of the United Nations is to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. One of the important principles of the United Nations, is that the organization shall ensure that states which are not members of the United Nations, act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.

Therefore, there is an obligation on the UN to maintain international peace and security, and in furtherance of that, to take all necessary measures including ensuring assistance from members as well as non-member states of the UN. This would automatically apply to cases of extradition/ surrender of the person where there is a prima facie case against a person who has committed crimes against international peace and security or any act, which can be categorized under the crimes that are within the jurisdiction of the Court.

The third issue is pertaining to the grant of amnesty by states that are exercising jurisdiction over individuals who commit most serious crimes under international law. Here, the situation being highlighted is when a state

exercising jurisdiction under the principle of complementarity[33] over the crimes within the jurisdiction of the ICC, grants amnesty after prosecuting the individuals for having committed those crimes. In such a situation, can we conclude that the principle of individual criminal responsibility was legally applied? And since the states have universal jurisdiction over such crimes, the alleged criminal may not even be the national of the state holding the trial. Though the appeal is for international cooperation but it is the sole discretion of the state, which is also a sovereign act of the state wherein it grants amnesty to a criminal. In fact the non-state parties are under no obligation to cooperate with the ICC. But, in that case, the Security Council has been empowered to take action under chapter VII by asking states to cooperate, if non-cooperation amounts to threat to international peace and security. The Security Council may ask the non-state parties, by adopting resolution under chapter VII, to surrender the persons to the Court so that individual responsibility may be enforced effectively.

[33] See the Preamble of Rome Statute, Articles 1 and 17 (1) (a).

INTERNATIONAL POLITICS AND CLIMATE CHANGE : THE KYOTO PROTOCOL AND THE COPENHAGEN ACCORD

Arneet Kaur*

1.1 Introduction

Climate change caused by anthropogenic greenhouse gases has emerged as one of the most important issues facing the international community. Greenhouse Gases (GHG)-particularly fossil fuels-based carbon dioxide emissions-are accumulating in the atmosphere as a result of human activities and the ongoing increase in greenhouse gas concentrations is expected to raise the global average temperature and cause other changes to the climate.

Climate change is a daunting challenge. This is due to several factors. The most prominent factor is that the effects of climate change seem to be unequally distributed. While northern regions could actually benefit from global warming by the expansion of arable lands and a decreased need for heating, tropical zones will suffer most from droughts, loss of water resources and the expansion of epidemics. Hence, different countries and segments of society can expect to confront a variety of changes and the need to adapt to them. Additionally to make matters worse, greenhouse gases are no local environmental pollutants and thus there is no domestic incentive to reduce their emissions. They arise in all sectors of an economy, which means that an efficient climate policy has to be cross sectoral. Due to global mixing of greenhouse gases, an efficient climate policy must be done on a global scale.[1]

Due to these challenges, the international community has embarked on the development of climate policy. International concern about climate change has led to the Kyoto Protocol in 1997 which contains legally binding emission targets for industrialized countries to be achieved during 2008-2012 (the so-called Kyoto commitment period).[2] But protocol did not achieve full international support. US (the world's largest emitter of GHG's) has refused to ratify it. China which has overtaken USA in 2009 in total GHG's (through it lags in per capita emissions) has taken shelter behind the developing countries. With two of the world's largest GHG's emitters having no obligation to reduce their emissions under Kyoto Protocol, how can it be a success? The first commitment period of Kyoto Protocol

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* Research Fellow (JRF), Department of Law, Guru Nanak Dev University, Amritsar

1 Stellina Jolly and Varun Bajaj, "Clean Development Mechanism: International Legal Systems Response to Global Warming", *Conference Papers*, Thirty Sixth Annual Conference on Contemporary Challenges to International Law and Environment Law: International and National Perspectives, The Indian Society of International Law, 24-25 March 2007, pp. 223-244, at p. 224.

2 Christoph Bohringer, "The Kyoto Protocol: A Review and Perspectives", available on *http://www.econstar.eu/bistream/10419/23995/1/dp0361.pdf*, last visited on 2 August 2010.

will expire in 2012. International negotiations are underway to draw up a UN agreement to govern global action on climate change after 2012. It was hoped that a legally binding treaty could be concluded at Copenhagen. But such hopes could not materialize with each country protecting its own interest. So with all the countries engaging in geopolitics, international negotiations were doomed to fail. This research paper will discuss in detail the international negotiation on climate change and the development of climate change regime in midst of international politics.

1.2 Challenges Posed by Climate Change

While cooling and heating shifts in the earth's climate occur with somewhat predicable frequency on geological time scales, it is now accepted that we are in the midst of a dramatic and rapid warming of the planet, consequent to the combustion of fossil fuels.[3] This warming, which began with the advent of industrialization in the late nineteenth and early twentieth century, has accelerated over the last few decades and bodes ill for the earth's ecosystems and for human health.[4] Already, much of the world is feeling the stress-past decade has seen the hottest summers, the fiercest cyclones and typhoons, the worst droughts and downpours, alarming rise in sea levels and the collapse of agriculture in many countries. Nearer home, the drought that India faced last summer, the floods this summer, Mumbai's crippling downpours, and cyclone Nargis that lashed Myanmar are seen more as disasters triggered by climate change.

In its Fourth Assessment Report (AR4) published in 2007, the Intergovernmental Panel on Climate Change (IPCC) projects that, without further action to reduce greenhouse gas emissions, the global average surface temperature is likely to rise by a further 1.8-4.0°C this century.[5] R.K. Pachauri, the Chairman of the Inter-Governmental Panel on Climate Change projects that based on scientific studies, if nations continue to emit Greenhouse Gases (GHGs) at current levels, the average global temperature would exceed the tipping point and cause irreversible climate changes.[6]

A rise in earth's temperature can in turn root to other alternations in the ecology. It may boost the occurrence and concentration of severe climate events such as floods, famines, heat waves, tornados and twisters. Other consequences may

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3 M.T. Donohoe, Causes and Health Consequences of Environmental Degradation and Social Injustice, *Social Science and Medicine*, 2003, Vol. 56, No.3, as cited in Martin Donohoe, "Global Warming: A Public Health Crisis Demanding Immediate Action", *World Affairs*, Summer, 2007, Vol. II, No.2, pp. 44-58, at p. 44.

4 Martin Donohoe, "Global Warming: A Public Health Crisis Demanding Immediate Action", *World Affairs*, Summer, 2007, Vol. II, No.2, pp. 44-58, at p. 45.

5 "Climate Change", available on *http://ec.europa.eu/environment/climate/home_en.htm*, last visited on 15 July 2010.

6 Raj Chengappa, "Enemies of the Earth", *India Today*, 21 December 2009, pp. 30-36, at p. 31.

comprise of higher or lower agricultural outputs, glacier melting, lesser summer stream flows, genus extinctions and rise in the ranges of disease vectors. The effect of global warming and climate change will definitely be seen on some species in the water. It is expected that many species will die off or become extinct due to the increase in the temperatures of the water, whereas various other species, which prefer warmer waters will increase tremendously.

Climate change and global warming pose a great threat to developing countries like India. With close economic ties to natural resources and climate-sensitive sectors such as agriculture, water and forestry, India may face a major threat, and requires serious adaptive capacity to combat climate change. Set to be the most populous nation in the world by 2045, the economic, social and ecological price of climate change will be massive. Thus, global warming is expected to cause irreversible changes in the ecosystem. The threat is not just biophysical but social too with the number of failed states likely to go up, leading to the export of terror and drugs.

1.3 International Negotiations on Climate Change

Climate change became a major political issue during 1980s. Growing scientific evidence in the 1980s linking global climate change with greenhouse gas emissions from human activities prompted several governments to collectively address the emerging concern about the impacts of global warming.

The UN General Assembly responded to this growing scientific evidence by launching negotiations to formulate an international treaty on global climate protection which resulted in completion of the United Nations Framework Convention on Climate Change (UNFCCC) in May 1922. The Convention was opened for signature at the Earth Summit in Rio De Janerio in June 1992, where it was signed by 154 states and European community. The Convention entered into force on 21 March 1994. India signed UNFCCC on 10 June 1992 and ratified that in 1993.[7] The Convention established the Conference of Parties (COP) as its supreme body.

1.3.1 The Kyoto Protocol

In December 1997, World Climate Conference was held at Kyoto (Japan) where a historic accord was signed by the participating countries for mandatory cuts in emission of greenhouse gases.[8]

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[7] India signed the UNFCCC on 10 June 1992 and ratified it on 1 November 1993. Under the UNFCCC, developing countries such as India do not have binding GHG mitigation commitments in recognition of their small contribution to the greenhouse problem as well as low financial and technical capacities. The Ministry of Environment and Forests is the nodal agency for climate change issues in India.

[8] P.S. Jaswal, *Environmental Law*, Allahabad Law Agency, Faridabad (2007), at p. 11.

During COP 3 meeting in Kyoto, Japan, the parties agreed to a legally binding set of obligations for 38 industrialized countries and 11 countries in Central and Eastern Europe, to return their emission of GHGs to an average of approximately 5.2% below their 1990 levels over the commitment period 2008-2012. This is called the Kyoto Protocol to the Convention. But the Protocol entered into force 16 February 2005 when Russia ratified it as the agreement was not to enter into force until two conditions were fulfilled. These were: Firstly, at least 55 Parties to the convention must ratify the treaty by their national Parliaments. Secondly, industrialized countries among ratifying parties must account for at least 55% of the total 1990 CO_2 emissions from this group.[9] The Protocol targets six main greenhouse gases: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCS), perfluorocarbons (PFCs) and sulphur hexafluoride (SF6).[10]

The starting point of the Protocol is the necessity to provide for some kind of flexibility in order to provide incentive to developed countries in meeting their mitigation commitments.[11] Therefore there are four flexibility mechanisms under the Kyoto Protocol that can be utilized: "Bubble Mechanism (Article 4), Emissions Trading (Article 17), Joint Implementation (Article 6) and Clean Development Mechanism (Article 12). Bubble Mechanism refers to the European Union member countries that agreed to have a collective target of 8 percent reduction, regardless of the actual individual countries' reductions. Emissions Trading (ET) refers to exchanging assigned amount of emissions between Annex I countries expectedly between rich Annex I counties.[12] As currently defined, the emissions trading regime will allow for national pollution reductions where one can 'buy' the 'unused' emissions of country two. Joint Implementation (JI) involves investment by an Annex I country in another Annex I country, with emissions reductions that are credited to the investing country. In Clean Development Mechanism (CDM), Annex I countries make investments in developing countries or countries not included in Annex I countries to both reduce emissions and promote sustainable development and in return earn credits for emissions reductions. Deemed as the 'Kyoto Surprise' CDM is the only link between the developed and developing countries under the

9 *Supra* note 2.

10 Annex A of Kyoto Protocol to the United Nations Framework Convention on Climate Change available at *http://unfccc.int/resource/docs/convkp/rpeng.html*, last visited 18 November 2009.

11 Gianluca Rubagotti, "The Clean Development Mechanism: Establishing a Regulatory Framework to favour Climate-Friendly Investments in Developing Countries", *Indian Journal of International Law*, Vol. 46 (2006), pp. 212-239, at p. 213.

12 Annex I countries include the industrialized countries that were members of the OECD (Organisation for Economic Cooperation and Development) in 1992, plus countries with economics in transition including the Russian Federation, the Baltic States and several Central and Eastern European states. Non-Annex I countries are mostly developing countries.

Kyoto Protocol.[13] The CDM could result in massive flow of climate-friendly investments from developed to developing countries.

1.3.1.1 Weaknesses of the Kyoto Protocol

No doubt, the Kyoto Protocol has established a broad international mechanism for widening and deepening climate protection activities in the future, still it suffers from a number of defects. These are:

(1) It was provided that in joint implementation projects, savings should be 'additional to any that would otherwise occur and credits should be 'supplemental to domestic actions'. However, the body and means of deciding what is or is not 'supplemental' or 'additional' was not defined in the Kyoto Protocol.

(2) Again in CDM, the reduction of greenhouse gases should be in addition to what would have been possible in the absence of such a project. Whether emission reduction is additional or not requires determining the baseline. Both the parties have all the incentives to show a higher baseline so that they can claim larger credit for reduction over the inflated baseline. There is likelihood that many industrialized countries would claim large reductions in GHG emissions resulting from CDM projects, relative to fictitious baseline. The industrialized countries will thus meet their Kyoto commitments without reducing any emission. This would be fraud on mankind.

(3) Another area of concern is 'Emission Trading' or 'Issue of Hot Air'. Emission Trading may be defined as 'low-pain option' for those industrialized counties unable or unwilling to commit to carbon reductions at home in the short term. The developing countries are worried that countries such as Russia and Ukraine who have experienced an economic decline since 1990 will have a huge surplus of credits to trade. This surplus or 'hot air' would then flood the market and create an inexpensive means for countries such as the US to avoid domestic action. Therefore, in the period upto 2012, 'hot-air' trading could actually lead to an increase in global emissions.

(4) Kyoto Protocol entered into force in 2005. By selecting a timescale that is almost immediate (2008-2012), the Kyoto mandated economically inefficient measures to achieve its targets. The economic lifetime of a power plant is expected to be around 30 years and the average automobile is on the road for 11 or 12 years. If you have to change to

[13] *Supra* note 1, at p. 227.

renewable sources of energy, to reduce the emissions of GHGs than you have to retire the equipment that is still economically productive.

(5) Another area is concern in the Kyoto Protocol is the geographical distribution of CDM projects. Almost 65% of the total number of projects have gone to 5 big developing states, Brazil, India, China, Mexico and China and only 2.7% of the total have gone to least developed countries like Bhutan, Bangladesh and Nepal.[14]

Despite all these weaknesses, the protocol is a breakthrough in international climate policy. It is the only legally binding treaty that has specified emission targets for various developed countries.

1.3.2 The Copenhagen Accord

The Bali Road Map set out a two year process towards a binding agreement in 2009 in Copenhagen. It was expected industrialized countries that form the so-called Annex I nations under the Kyoto Protocol were to commit to higher and legally binding cuts in their GHGs emissions in the Copenhagen Summit for the second committed period. Copenhagen was to be the culmination of negotiations spanning two years that should have come out with a blueprint to save the earth. But now it is defined as 'start of the process and not the end'. It was hammered out by a small group of countries- including the world's two biggest- greenhouse gas polluters, China and US. The plenary of 192 UN member countries did not 'endorse' the backroom deal but just decided to take note of it.

The main points of the Copenhagen Accord are:

(1) The Accord reflects a goal of reducing worldwide greenhouse emissions sufficient to limit the increase in global temperature to below 2°C and all countries committed to achieve the peaking of global and national emissions as soon as possible.

(2) Industrial counties must list their individual, emission reduction targets and less industrialized countries must list the actions they will take to cut emissions by 31 January 2010.[15]

(3) In addition, developing countries such as China, India and Brazil agreed to Nationally Appropriate Mitigation Actions (NAMAs), including some specific actions/ targets to be set forth in an attachment to the

[14] *Supra* note 11, p .239.

[15] Richard Heinberg, "The Meaning of Copenhagen", available on *http://www.energybulletin.net/node/511120*, last visited on 2 August 2010.

Accord, and to a set of basic commitments aimed at making such NAMAs 'Measurable, Reportable and Verifiable'.[16]

(4) Industrialized countries have set a goal of making available some $100 billion a year in funding for developing countries to use for climate change related actions by the year 2020, and $30 billion over the next three years and to establish a Copenhagen Green Climate Fund.

(5) The Accord creates a Technology Mechanism to accelerate development of low-carbon technology.

(6) Programmes to provide developing countries with financial incentives to preserve forests- REDD and REDD plus to be established immediately.

1.3.2.1 Weaknesses of Copenhagen Accord

The Copenhagen witnessed a historic conference with more than 100 Heads of States in attendance. But the Accord did not even come close to the fair, ambitious and binding deal that millions globally had been calling for. The main defects of Copenhagen Accord are:

(1) The Accord is largely inconsistent with the provisions under the Convention. It has altered the balance of 'common but differentiated responsibilities' under the Convention, to the disadvantage of developing country parties.

(2) The Accord specifies no emission targets to keep global warming within 2°C.

(3) There is no target date for peaking of emissions mentioned in the Accord, just a vague suggestion that emissions should "peak as soon as possible".

(4) The Accord makes general statements about need for adaptation and an end to deforestation, but there is no concrete deal on reducing emissions from deforestation and forest degradation.

(5) The Accord offers no cap for CO_2 concentrations.

(6) The Accord is vague as to how its goals, such as $100 billion of funds for developing countries will be achieved.

Thus Copenhagen Summit has ended with a watered down political agreement that would read like a statement of intent rather than any enforceable action. The

[16] 'The Copenhagen Climate Change Agreement: Failure or Success?, available on *http://chinatextile.360 fashion.net/2010/03/the Copenhagen-climate-change.php*. last visited on 5 August 2010.

accord is not a legally binding deal. The Accord calls on countries to state what they will do to curb GHG emissions, but these will not be legally binding commitments.

1.4 International Politics and Climate Change

The birth of the world's first atomic bomb can be seen as one of the key factors influencing world politics since 1945. But, the impact of global climate change on world politics could prove more significant than the invention and proliferation of nuclear arms. Global warming will continue, while the complicated politics of climate change will become an issue affecting all individual lives.

The United Nations Framework Convention on Climate Change (UNFCCC) was signed and ratified by the world's majority of countries in the early-mid 1990s. However, before and since that, negotiations and meetings have been marred by special interest groups trying to prevent effective action to combat climate change. In addition, there has been a lack of political will to take effective steps and measures. That's why, during the period since the UNFCCC was signed in 1992 at the Earth Summit in Rio, the world's GHG emission levels have risen as much as 30 percent.[17] The problem seems to be that world leaders are sharply divided over critical issues. The climate change negotiations can be described as 'clash of civilizations'. For instance,

- The various island nations are already seeing a rise in sea levels. The Alliance of Small Island States (AOSIS) as well as the European Union (EU) therefore have pushed for ecological effectiveness.
- OPEC and various industrialized countries are concerned about their economic ramifications and are pushing forth more research into creating carbon "sinks" to soak up carbon dioxide emissions. Such groups are therefore seeking economic effectiveness.
- Developing countries are primarily concerned about their right to develop, to use their resources and not to be penalized for climate change problems that are largely caused by the industrialized countries. They are therefore seeking social justice and equity.[18]

But as seen in the majority of international negotiations on climate change, economic effectiveness has been focused to the detriment of the other two

[17] *Supra* note 6, p. 33.

[18] "Reactions to Climate Change Negotiations and Action", retrieved from *"http://www.globalissues.orgarticle/179/reactions-to-climate-change.negotiationsand-action"*, last visited on 21 August 2010.

concerns. Business interest have historically played an important part and had a large influence in the climate negotiations.

The politics of global warming have involved corporate lobbying, funding of special interest groups and public relations campaigns by the oil and coal industries which have affected policy decisions and legislation worldwide.[19] For instance, the coal and oil industries in US are ready to spend $300 million a year to ensure that the status quo remains. That's why US although a signatory to the Kyoto Protocol has refused to ratify it. Citing "serious harm" to its economy as well as the exemption of developing nations from the treaty, the US contends that the Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns. The USA calls Kyoto Protocol a political document. It is a big irony since all the changes and concessions which have been made to the original text of Kyoto Protocol were made so that US ratifies it. The ratification by US is important because the effect of Kyoto Protocol without US participation on climate change will be virtually non-existent since US the world's largest economy is home to just four percent of world population but emits one quarter of world GHG's.

Whereas in case of the Copenhagen summit, it was doomed from the start. The failure of Copenhagen was not a failure of the multilateral process. The Copenhagen failed because the open, transparent and intergovernmental process of negotiations under the United Nations system was discarded and set aside deliberately by the developed countries which worked to undermine this process all throughout the two years before Copenhagen.[20] There were media leaks, backdoor meetings, broken promises, accusations and counter-accusations, turned the summit into the costliest lost opportunity in history. It resulted in watered down political agreement with no legal binding.

The Accord has altered the balance of common but differentiated responsibilities under the Kyoto Protocol and the Convention. Industrialized countries set out on the path of development much earlier than developing counties and have been emitting GHGs in the atmosphere for years without any restrictions. Since GHG emissions accumulate in the atmosphere for decades and centuries, the industrialized countries emissions are still present in the earth's atmosphere. Therefore, these countries have historical responsibilities to take on for having pumped tones of GHGs into the atmosphere in the past two centuries. These countries, therefore, not only had to cut their emissions but also pay to help

[19] John Vidal, "US Oil Company donated millions to climate septic groups, says Greenpace", *The Guardian*, available on *http://www.guardian.co.uk/environment/2010/mar/30/US-oil-donated-millions-climate-sceptics*, last visited on 15 May 2010.

[20] "What happened in Copenhagen and the Way Forward", available on *http://www.dawnnet.org/uploads/ documents/COP15%20 and %20 the %20Copenhagen%20 Accord-2.pdf*, last visited on 15 July 2010.

developing countries take on mitigation and adaptation measures. But the Accord has put the concept of 'common but differentiated responsibility' down. That's why Copenhagen Accord is described as nothing short of climate change skepticism in action. Some even have gone to the extent of calling Copenhagen Accord 'a breakdown of the international negotiation process.'[21] But Copenhagen summit was among the most complex as alliances shifted, powerful new negotiating blocks took shape and the diplomatic dynamics of a new world order began to emerge. However, its failure was not due to the UN process, but due to the lack of political will among leaders to make real progress.

The countries do not reach any consensus also because immediate profits are worth more to companies then similar profits ten years hence, similarly the immediate cost of averting climate change looms large compared to the estimated cost of dealing with its consequences decades from now. Perhaps the single largest blow to climate change negotiations was the economic meltdown and the recession. Job security has become the number one priority. With developed nations trying to bring down the unemployment rates, there was no way they were willing to make the big changes in lifestyle or restructuring of the economy that climate change measures demanded. So they have conspired to stall and defeat the Kyoto Protocol through Copenhagen Accord. Forming an umbrella group of rich nations, Australia, which has the dubious distinction of being the highest per capita emitter of GHGs has for years refused to join the protocol. It ratified the protocol in 2007 but since then has been working to destroy the tenets of the protocol.

The US recalcitrance has spread like a virus to Europe which has also toned down the massive pledges that they had originally made. At one time Europe was talking about cutting their GHG levels by as much as 50 percent by 2050. This is now toned down to a more modest 20 percent by 2030 if the US in on board. The main reason is that Europe does not want to lose its competitive edge to its arch rival, the US, by introducing cuts that are certain to result in an increase in the cost of production. That is because renewable energy alternative cost lot more per KW in the short term as compared to fossil fuels that make it unviable.[22]

The UNFCCC had estimated that to meet the mitigation and adaptation needs for developing countries, the advanced countries should shell out $400 billion a year. But the only promise that came out was $30 billion in the next three years and it could be increased to $100 billion uptill 2020 and that too directed only towards the least developed countries. The industrialized countries were to

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[21] Arkisaeo, "Copenhagen Accord may already be a failure", retrieved from *http://www.greenfudge.org/ 2010/02/17/Copenhagen-accord may-already-be-a-failure/abamba*, last visited on 2 August 2010.

[22] *Supra* note 6, p. 36.

impart clean technology that would have helped developing countries reduce their emission levels. However, these countries have raised issues about Intellectual Property Rights and now talk of only information sharing rather than knowhow.

To stall China and India, who had gained the largest amount from projects under the Clean Development Mechanism, industrialized countries also said that offsets would now be more for the preservation of forests. So a fund for Reducing Emissions from Deforestation and Forest Degradation (REDD) was floated that would help compensate countries like Brazil and Indonesia for preserving their forests instead of felling them.[23] The only concrete measure specified in the Accord is a halt to deforestation. As protecting tropical forest is the cheapest way for polluters to buy the right to keep on burning fossil fuels and to keep on destroying forests via warming. Oil producing countries like Saudi Arabia are also against shifting to renewable sources of energy.

In case of developing countries, China is an anomaly as it has now overtaken the US as the largest emitter of GHGs and given its frenetic economic growth is fast moving out of the developing country orbit. Yet China knows that it would need at least a decade or so before it can stabilize its energy intensity or come up with green technology that could substantially reduce its emission levels without impacting growth. That's why it talks of only cutting its carbon emission intensity[24] which in real terms will not see a drop in China's emission levels just a slowing down.

India whose per capita emissions are eighteen times lower than USA has been brought on board along with developed counties like USA in the Copenhagen Accord. It has also to make cuts now. While the developing countries worked to ensure that the principles and obligations under the Convention and its Kyoto Protocol were preserved in any outcome of Copenhagen, most developed countries sought to promote a new legal agreement, "post-2012", that would reject the principle of common but differentiated responsibilities and deny their own responsibilities for historical emissions which caused the problem of climate change. The result was a watered down political agreement that has no legal binding.

Therefore, different countries adopt different policies, strategies and approaches to deal with the problem of climate change. No consensus could be reached on this burning issue as each wants to protect its own interest. That's why, an universally binding treaty could not be concluded on climate change. With all the countries of the world engaging in geopolitics, climate change negotiations were doomed to fail.

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[23] *Ibid.*

[24] Carbon intensity is linked to energy used to produce every dollar of the GDP.

1.5 Conclusion and Suggestions

Climate change represents one of the greatest environmental, social and economic threats facing the planet. It is threat to the survival of mankind and carries serious consequences for our environment and health. Planetary warming is much more than an environmental issue: it is a huge social, economic, human and ecological threat, which objectively requires an ecosocialist alternative. The heart of the matter-capitalism as a system has exceeded its limits. Its capacity for social and ecological destruction clearly exceeds its potential for progress.[25] As climate degradation is outcome of an unsustainable mode of production and consumption, therefore, these patterns need to be changed. As discussed above, the countries are more interested in protecting their financed empires and not the planet without which their empires are nothing. Therefore, the need for today is 'Change the politics, not the climate'.

Global co-operation through international treaties is critical for decreasing global warming as we have seen that Montréal Protocol has been fairly successful in phasing out chlorofluorocarbon use. As climate change affects all countries of the world, therefore, solutions must be global and in accordance with internationally agreed principles and obligations as laid down in Kyoto Protocol and the Convention. All countries should unite together and reach a legally binding treaty. The principle of 'common but differentiated responsibility' should be followed as developed nations indiscriminate GHG emissions for the past two centuries are still present in the atmosphere and developing countries have a right to develop. But amongst the developing countries also, all should not be treated alike. China is developing fast and moving out of the developing country orbit and whose GHG emissions have exceeded that of USA has more responsibility for reduction of GHG emission than others, followed by India. Thus principles of social justice and equity should be followed in future international negotiations. In future negotiations for a legally binding treaty the amount of financial aid to developing and least developed countries should be increased as UNFCCC has estimated a requirement of $400 billion annually. Meanwhile, the amount promised under the present accord should be made available to developing and least developed countries to combat climate change.

For a successful, equitable outcome that would engage global cooperation in Mexico, the open and transparent multilateral process under the two legal instruments, the Convention and its Kyoto Protocol, must continue and reach a binding outcome, for the benefit of all. The success of future negotiations at Mexico depend a lot on the attitude of the US as without its participation, in the global treaty, the effect on the climate change will be virtually non-existent because other developed countries like UK also cut their emission targets if USA

[25] Daniel Tanuro, "Copenhagen: Collapse at the summit", available on *http://www.internationalviewpoint.org/spip.php?article1778*, last visited on 10 August 2010.

backs up from any commitment as seen in Kyoto Protocol. So USA should leave its economic and political concerns and give reference to social, equitable and ecological concerns and save this planet. It should not try to break the international unity as it tried by creating Asia Pacific Partnership on Clean Development (APPCDC) which was an effort by US to entice the emergent emitters to support this approach in preference to Kyoto as it does not prescribe any target for emission reductions.[26]

More than ten years of climate policy negotiations have produced the Kyoto Protocol, the first legally binding international agreement on climate protection. Given the large uncertainties in the science of climate change and the fundamental incentive problems of sovereign states, it is clear that it will be very difficult to achieve a good and sound climate policy All the countries of the world will have to leave their different and varied concerns, interests and attitudes and adopt global concerns. Nobody can be satisfied with the Copenhagen Accord as it stands. Its usefulness comes if it helps to build a bridge that closes the gap between the current state of things and a new climate treaty that is robust enough to prevent dangerous climate chaos. On the other side, organized civil society and political environmental organizations should concentrate efforts to ensure progress on domestic grounds. Each country should device and follow measures at national level until global treaty is entered into.

There are moments in history where the world can choose to go down different paths. This is one such defining moment, we can choose to go down the road towards green prosperity and a more sustainable future or we can choose a pathway to stalemate and do nothing about climate change leaving an enormous bill for our children and grandchildren to pay. We should choose the former path and save our planet form global warming which is a threat to mankind. Therefore, all the nations of the world should unite, cooperate and act now to ameliorate and reverse climate change.

[26] Peter Christoff, "Post Kyoto? Post Bush? Towards An Effective Climate Coalition of the Willing", *International Affairs*, 2006, Vol. 5, No.82, at p. 848.

THE BOOK REVIEW

Marie-Claire Foblets and Alison Dundes Renteln (eds.) *Multicultural Jurisprudence: Comparative Perspective on the Cultural Defense*, First Indian Reprint 2010, Mohan Law House, New Delhi under special arrangements by Heart Publishing Ltd., U.K., Price Rs. 695/-.

Renuka Salathia*

Cultural Defense primarily aims to examine the nature of the debate surrounding the admissibility of cultural evidence in a court of law. It often varies from state to state. As individuals travel across borders, societies have became more and more pluralistic. The result of increased migration is the interaction among cultural communities and inevitably clashes between state law and customary law. These cultural conflicts have given rise to a new multicultural jurisprudence.

The volume is based on papers given at the Onati International Institute of the Sociology of Law in June 2005. The colloquium 'Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense' was convened in order to shift the discussion of the cultural defence from the United States to other countries which have also witnessed the rise of cultural defences.

The book is a compilation of analytical essays demonstrating the widespread use of the cultural defence in many countries around the world. The book has been edited by Marie Claire Foblets and Alison Dundes Renteln. The book is divided into five major parts. The first part consists of set of essays that examines definitional questions, as well as theoretical issues that arise in debates that centre on questions concerning use of cultural defence. The second part

* Assistant Professor of Law, Rajiv Gandhi National University of Law, Punjab

comprises country studies that discusses various contexts in which cultural defences are raised in various jurisdictions. The third part offers analysis of specific issues and groups. The fourth part confines to essays that address the role of legal actors in interpreting cultural issues. The last part contains an elaborate bibliography.

The book was edited primarily to provide comparative analysis of cultural defence on a deep inside into the content of the compilation. It is highlighted that the considerations of culture must be kept into mind in the legal process and in the court of laws. The highlight of the book is the sincere effort to compile various views from diverse cultural backgrounds with regards to availability of cultural defence in various legal systems. However the book remains a compilation of essays and is found lacking on various aspects. The editors of the book have not made an effort to provide conclusion which could highlight the comparative study. The essays in the collection do not have a common conceptual framework. Infact most of the contributions have given divergent views and different ideas with regards to cultural defence. The book levels research and cannot be used effectively for understanding a comparative perspective of cultural defence.

Overall the book is good for academicians and researchers however on account of usage of difficult English vocabulary and on a account of lack of firm base the book might not be of much use to the students.

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