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TOWARDS A QUEST FOR AMELIORATING PROFESSIONAL LEGAL EDUCATION AND RESEARCH IN INDIA: MY ACADEMIC EXPERIMENTS AS THE FOUNDER VICE-CHANCELLOR OF A NATIONAL LAW UNIVERSITY

Gurjeet Singh*

1.1 Introduction

With the establishment of Rajiv Gandhi National University of Law (RGNUL), Punjab at Patiala in the year 2006, a new leaf was turned in the history of professional legal education and research in the state of Punjab. Notwithstanding the fact that two universities in the state, that is, Guru Nanak Dev University at Amritsar and Punjabi University at Patiala and a couple of private law colleges in the state as well as a number of universities in the immediate neighbouring states and union territory, that is, Kurukshetra University at Kurukshetra, Maharishi Dayanand University at Rohtak, University of Jammu at Jammu, Himachal Pradesh University at Simla and Panjab University at Chandigarh were also engaged in imparting legal education since long, a need was felt for establishing a national level institution for ameliorating the status of legal education and research in the state of Punjab. The need was fulfilled with the establishment of RGNUL at Patiala. Within a short span of nearly four and half years, RGNUL came on the national and international maps, thanks to the strenuous efforts put in by each one of the persons associated with the university, that is, the teachers, the non-teaching staff and, above all, by the students. During the time, I was associated with RGNUL, I thought of writing about a few of my academic endeavours, experiments and experiences on many an occasion, however, due to the extremely busy

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* Professor of Law, Guru Nanak Dev University, Amritsar and Founder Vice-Chancellor, Rajiv Gandhi National University of Law (RGNUL), Punjab (Patiala). My sincere appreciation is due for Professor (Dr.) Paramjit S. Jaswal, Professor of Law, Panjab University, Chandigarh and presently Vice-Chancellor, RGNUL, Punjab for his motivation that enabled me to share with the learned readers of this paper some of my academic experiences based on the various experiments that I made at RGNUL during my tenure as the vice-chancellor.

routine and administrative pre-occupations, I could hardly concentrate, except for writing about some of our activities and achievements in the Foreword to the University Prospectus released every year.

After relinquishing the charge of the office of the vice-chancellor in December 2010, I joined my duties back as Professor of Law at Guru Nanak Dev University, Amritsar. Only one month before demitting the office, I had to undergo a major surgery in emergency which was followed by another complicated surgery in the month of February 2011. Following these two consecutive surgeries, I was convalescing at home, when a sudden phone call woke me up and made me compulsorily sit at my study table. I was obligated to think, to pause and to reflect in writing, something that I always love to do, as I said earlier, but could not due to the enormous amount of workload that I was handling and a number of responsibilities that I was shouldering from the day one I had joined the newly established university. This pleasant phone call was from none other than my learned colleague Dr. Paramjit S. Jaswal, one of the distinguished academics and eminent scholars in the field of Constitutional Law in the country, who succeeded me as the Vice-Chancellor of RGNUL. I was asked by him to pen down some of the experiences that I had on the academic front as the founder Vice-Chancellor of RGNUL for the Inaugural Issue of the *RGNUL Law Review*, one of the prestigious ventures that was embarked upon during my tenure. The outer limit fixed for me to submit my contribution was just one week. All my pleadings for a little relaxation in time due to ill-health were firmly, but politely turned down by Professor Jaswal. On finding no escape from his kind directions, I had to recollect and write about some of the academic experiments that I made in the university alongwith with some of my dedicated colleagues and students in the direction of reforming and upgrading professional legal education which was indeed need of the hour.

It goes without saying that, as the founder vice-chancellor of a new university, I was indeed in an advantageous position to apply the exposure that I had in the field of legal education and research, to lay down strong academic foundations of a newly established institution.

Having worked and interacted with a large number of distinguished academics and legal educationists on different occasions in and outside the country, I considered myself fortunate enough to contribute, in whatever small way I could, in the process of institution building in my state. Further, on being assigned this prestigious job at a relatively young age of forty six, I considered it my moral duty to lead the institution from the front and to take it to new academic heights. This feeling of belongingness to the institution propelled me to adopt an eighteen hour rigorous work routine and therein making a number of academic experiments, to some of which I shall refer to in the following paragraphs. Professor Jaswal, who took the reins of the university from me recently desired me to share with the readers of this article some of my reminiscences. The present piece is the outcome of what I was affectionately, though firmly, obligated to do by my learned successor.

As a matter of fact, the subject of 'Reforms in Professional Legal Education and Research in India' has indeed been a topic much dearer to my heart right from my student days. And for evoking and sustaining my interest in the said topic, I owe a debt of inexpressible gratitude particularly to the two of my distinguished and dedicated teachers, that is, Professor N.R. Madhava Menon[1] and Professor N.L. Mitra[2] respectively. There is no denying the fact that from the very early days of my joining the field of academics, I have deeply been influenced by a number of first, second and third generation law teachers, and later on even by some of my contemporaries, too[3]. Their persona as well as their

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1 Professor N.R. Madhava Menon was the founder Director of the National Law School of India University (NLSIU), Bangalore (Karnataka) and the founder Vice-Chancellor of the West Bengal National University of Juridical Sciences (NUJS), Calcutta (West Bengal) and one of the chief architects of reforms in professional legal education and research in India in the post-independence period.

2 Professor N.L. Mitra was the Director of the NLSIU, Bangalore and the founder Vice-Chancellor of the National Law University (NLU) Jodhpur (Rajasthan).

3 Prominent among these names (in the alphabetic order) were: Professor A.T. Markose (Cochin University, Cochin); Professor Anandjee (Banaras Hindu University, Banaras); Professor Avtar Singh (University of Lucknow, Lucknow); Professor B.B. Pande

writings, both in the shape of research articles[4] as well as books[5], and above all, my formal as well as informal interactions with some of these

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(University of Delhi, Delhi); Professor B.S. Chimni (Jawahar Lal Nehru University, Delhi); Professor B.S.N. Murthy (Andhra Pradesh University, Hyderabad); Professor Balram Gupta (Panjab University, Chandigarh); Professor D.C. Pande (Indian Law Institute, New Delhi); Professor D.N. Saraf (University of Jammu, Jammu); Professor Faizan Mustafa (Aligarh Muslim University, Aligarh); Professor G.S. Sharma (University of Rajasthan, Jaipur); Professor I.P. Messy (Himachal Pradesh University, Simla); Professor J.K. Mittal (Panjab University, Chandigarh); Professor Kirpal Singh Chhabra (Guru Nanak Dev University, Amritsar); Professor Lotika Sarkar (University of Delhi, Delhi); Professor M.K. Nawaz (Indian Society of International Law, New Delhi); Professor M.P. Jain (University of Delhi, Delhi); Professor M.P. Singh (University of Delhi, Delhi); Professor Mohammed Ghouse (Sri Venkateswara University, Tirupati); Professor N.L. Mitra (NLSIU, Bangalore); Professor N.R. Madhava Menon (University of Delhi, Delhi); Professor P.C. Bedwa (Guru Nanak Dev University, Amritsar); Professor P.K. Tripathy (University of Delhi, Delhi); Professor P.S. Jaswal (Panjab University, Chandigarh); Professor Paras Dewan (Panjab University, Chandigarh); Professor R.P. Anand (Jawaharlal Nehru University, Delhi); Professor Rahamatulla Khan (Jawaharlal Nehru University, Delhi); Professor Raj Kumari Agrawala (University of Poona, Pune); Professor Ranbir Singh (Maharishi Dayanand University, Rohtak); Professor S.N. Jain (Indian Law Institute, New Delhi); Professor S.P. Sathe (ILS Law College, Pune); Professor S.S. Singh (Indian Institute of Public Administration); Professor Saran Gurdev Singh (Guru Nanak Dev University Regional Campus, Jalandhar); Professor Tahir Mahmood (University of Delhi, Delhi); Professor Upendra Baxi (University of Delhi, Delhi); Professor V.D. Kulshreshtha (The Indian Law Institute, New Delhi); Professor Veer Singh (Panjab University, Chandigarh); and Professor V.Vijayakumar (NLSIU, Bangalore). Through these columns, I would like to pay respects and record my sincere appreciation for all these stalwarts for the enormous contribution that each one of them has made in their respective field and, above all, for inspiring generations of students like me to follow their foot-steps and embrace the noble profession of teaching by choice to spread the light of knowledge with missionary zeal and enthusiasm.

4 These, *inter alia*, include (year-wise): A.T. Markose, "A Brief History of the Steps Taken in India for Reform of Legal Education", *Journal of the All India Law Teachers Association*, Vol. 68, 1968, pp. 75-82; P.K. Tripathi, "In the Quest for Better Legal Education", *Journal of the Indian Law Institute*, Vol. 10, No. 3 (July-September 1968), pp 469-91; K.D. Gaur, "Legal Education in a Changed Context", *Journal of the Bar Council of India*, Vol. 7, 1978 pp. 90-97; N.R. Madhava Menon, "Reforming Legal Education Issues, Priorities and Proposals", *Indian Socio-Legal Journal*, Vol. 5, 1979, pp. 22-35. Upendra Baxi, "Notes Toward Socially Relevant Legal Education: A Working Paper for the UGC Regional Workshop in Law", *The Journal of the Indian Law Institute*, Vol. 51, Nos. 1-3, pp. 23-55; Upendra Baxi, "Socio-Legal Research in India: A Programmescrift", *Journal of the Indian Law Institute*, Vol. 24, Nos. 2-4 (April-December) 1982, pp. 416-19; and S.P. Sathe, "Access to Legal Education and the Legal Profession in India", Rajiv Dhavan et.al. (eds.), *Access to Legal Education and Legal Profession*, Cavendish Publishing Co., London, 1989, pp. 160-175.

5 These, *inter alia*, (books cited year-wise) include: M.P. Jain and S.N. Jain, *Principles of Administrative Law*, N.M. Tripathi, 1979; S.K. Agrawala (ed.), *Legal Education in India:*

stalwarts on different occasions and at different platforms have always inspired me and have certainly been instrumental in shaping my teaching orientations from the very beginning and continue doing so till date. However, it was primarily because of the intense motivation, paternalistic attitude and constant patronage shown by the above named two educationists, legal reformers and the institution builders, that I developed keen interest in this subject which was later reflected in some of the modest presentations that I have been able to make at various

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Problems and Perspectives, N.M. Tripathi, Bombay, 1973; N.R. Madhava Menon (ed.), *Legal Aid and Legal Education: A Challenge and an Opportunity*, Students Legal Aid Service Clinic, University of Delhi, Delhi, 1974; Upendra Baxi, *Indian Supreme Court and Politics*, Eastern Book Co., Lucknow, 1980; S.K. Agrawala and Mohammed Ghouse, (eds.), *Status of Teaching in the Discipline of Law*, University Grants Commission, New Delhi, 1981; Upendra Baxi, *Alternatives in Development Law: Crisis of the Indian Legal System*, Vikas Publishing House, New Delhi, 1982; Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in Eighties*, N.M. Tripathi, Bombay, 1985; Upendra Baxi, *Inconvenient Forums and Convenient Catastrophe: The Bhopal Case*, Indian Law Institute, New Delhi, 1986; *Towards Sociology of Indian Law*, Sriram Publishers, New Delhi, 1986; Upendra Baxi and Amita Dhanda, *Valient Victims and Lethal Legislation: The Bhopal Case*, N.M. Tripathi, Bombay, 1990; Upendra Baxi, *Dimensions of Law*, N.M. Tripathi, Bombay, 1992; S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Oxford University Press, New Delhi, 2002; Upendra Baxi, *Future of Human Rights*, Oxford University Press, 2003; Upendra Baxi, Human Rights in a Posthuman World: Critical Essays, Oxford University Press, New Delhi, 2007; G. Mohan Gopal (ed.), *N.R. Madhava Menon - Reflections on Legal and Judicial Education*, Universal Law Publishing Co., Delhi, 2009; and S. Surya Prakash, *The Story of a Law Teacher - Turning Point: Memories of Padmashri Prof. N.R. Madhava Menon*, Universal Law Publishing Co., Delhi, 2009.

conferences, seminars and workshops[6] followed by their publication in the law journals of national and international repute.[7]

Besides, during all these years, as a dedicated law teacher and as an inquisitive researcher, I could fortunately also lay my hands on the proceedings and reports[8] of some of the prominent conferences,[9]

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6 See, for example (details given year-wise): Gurjeet Singh et.al., "Revamping Professional Legal Education: Some Observations on the Role of the Bar Council of India (BCI) and the University Grants Commission (UGC)", Paper Presented at the All India Law Teachers Congress held at NALSAR University of Law, Hyderabad on 24 December 2001; Gurjeet Singh, "Goals and Objectives of Law Schools in their Primary Role of Educating Students", Paper Presented at the International Conference of the International Association of Law Schools (IALS) on the Role of Law Schools and Law School Leadership in a Changing World held at the Australian National Law University, Canberra (Australia) on 26-28 May 2009; and Gurjeet Singh, "Role of Judiciary in Legal Education", Paper Presented at the National Conference on Legal Education: Challenges Ahead organized by the National Law University (NLU), Delhi on 5-6 December 2009.

7 See, for example: Gurjeet Singh, "Indian Legal Research: An Agenda for Reform", *NLSIU Law Journal*, Vol. 6, 1994, pp. 83-94; Gurjeet Singh, "Revamping Professional Legal Education: Some Observations on the LL.B. Curriculum Revised by the Bar Council of India", A.K. Kaul and V.K. Ahuja, (eds.), *Legal Education in India in 21st Century: Problems and Prospects, Proceedings of the All India Law Teachers Congress* (January 22-25, 1999), AILTC, Faculty of Law, University of Delhi, Delhi, pp. 282-283; Gurjeet Singh and Pooja Dhir, "Clinical Legal Education in India: Some Lessons from the National Law School of India University, Bangalore", A.K. Kaul and V.K. Ahuja, (eds.), 1999, pp. 426-440; Gurjeet Singh, "Legal Education in the Digital Age: Some Observations on the Integration, Role and Significance of Information Technology in the Arena of Legal Education and Research", *Supreme Laws Today*, Vol. 3, No. 51, March 2007, pp. 1-8; Gurjeet Singh, "Relevance of Clinical Education in the Law Curricula: Some Observations on the Imparting of Clinical Legal Education at Guru Nanak Dev University, Amritsar", *Vidyasthali Law Journal*, Vol. 5, 2007, pp. 1-20; and Gurjeet Singh, "Reflections on the Emerging Trends and Future Challenges Before Professional Legal Education in India", *Indian Bar Review*, Vol. 36, Nos. 1-4, January-December, 2009, pp. 237-250.

8 These, *inter alia*, include the following: (i) *The Report of the Bombay Legal Education Reforms Committee*, Bombay, 1935; (ii) *The Report of the Bombay Legal Education Committee (The Chagla Committee)*, Bombay, 1949; (iii) *The Report of the Rajasthan Legal Education Committee*, Jaipur, 1955; (iv) *The Law Commission of India, Fourteenth Report on Reforms of Judicial Administration*, New Delhi, 1958; (v) *The Report of the Committee on Legal Education (All India Law Conference of the Indian Law Institute)*, New Delhi, 1959; (vi) *The Report of the Inter-University Board on Legal Education*, New Delhi, 1961; (vii) *The Report of the Committee on Re-Organisation of Legal Education (The Gajendragadkar Committee) in the University of Delhi*, Delhi, 1964; (viii) *The Report of the Kerala University State Commission*, Cochin, 1964; (ix) *The Report of the Academic Council Committee on the Teaching of Law*, Delhi, 1965; (x) *The Report on the Role of the Legal Profession in Asia (The Kandy Conference)* Delhi, 1968; (xi) *Towards Socially*

seminars,[10] workshops[11] and meetings[12] held from time to time with the sole aim of debating and discussing the need for reforms in the state of professional legal education and research in India, which according to Madhava Menon has always been given a 'step-motherly treatment'[13] when compared to the medical, engineering and even to management education in the post-independence period.

Relevant Legal Education: A Report of the University Grants Commission's Workshop on Modernisation of Legal Education, University Grants Commission, New Delhi, 1979; (xii) S.K. Agrawala and Mohammed Ghouse (eds.) *Report on the Status of Teaching in the Discipline of Law, University Grants Commission*, New Delhi, 1981; (xiii) *The Report of the Curriculum Development Centre in Law (The CDC Report*, University Grants Commission, New Delhi, 1990; and (xiv) *The Report of the Committee on Reforms in Legal Education and Regarding Entry into Legal Profession (The Ahmadi Committee)*, Bar Council of India, New Delhi, 1995; and (xv); and *Developments in Legal Education 1995-97: A Report*, Bar Council of India, 1997.

9 Prominent among these are: (i) The Thirteenth Conference of the All India Law Teachers Association (The Bombay Conference), Bombay, 1973; (ii) The All India Law Teachers Conference (The Ranchi Conference), Ranchi, 1978; (iii) The Australia-India Legal Conference, New Delhi, 1996; (iv) The All India Law Teachers Congress (The Delhi Conference), Delhi, 1999; and The First South Asian Conference of Law Teachers on Skills-Ethics Education (The Goa Conference), Goa, 2005.

10 The Kasauli Seminar on Legal Education, Kasauli, 1972, and (ii) The Pune International Seminar on Indian Legal Education, Pune, 1972.

11 Prominent among these are: (i) The Workshop on Clinical Education and Socio-Legal Research held at University of Delhi, Delhi, 31 December 1972; (ii) The Dharwad Workshop on Teaching of Jurisprudence, Dharwad, 1973; (iii) The UGC Workshop on Legal Education held at Madras University, Madras, 20-23 December 1975; (iv) The UGC Regional Workshop on Legal Education held at Panjab University, Chandigarh, 12-14 March 1976; (v) The Third UGC Regional Workshop on Legal Education held at University of Poona, Pune, 28-30 May 1976; (vi) The UGC Regional Workshop on Legal Education held at University of Patna, Patna, 11-14 December 1976; and (vii) The UGC Workshop on Legal Education held at University of Delhi, Delhi, 3-4 January 1977.

12 Prominent among these are: (i) The Law Ministers' (Working Group) Meeting organized by the Ministry of Law, Justice and Company Affairs, Department of Legal Affairs, New Delhi and held at Bhubaneshwar on 22-24 September 1995; (ii) The Three Day All India Consultative Meeting of Bar Councils, Universities, UGC and State Governments organized by the National Law School of India University, Bangalore on Reforming Professional Legal Education (12-14 October 1996); and (iii) The Consultative Meeting of the Experts on Teaching of Human Rights and International Law organized by the Association of Indian Universities, New Delhi (23-24 May 1998).

13 N.R. Madhava Menon, "Clinical Legal Education: Concepts and Concerns", Paper Circulated at the Refresher Course for Law Teachers organized by the Academic Staff College at the NLSIU, Bangalore, 1990, pp. 1-6, at p. 1.

As mentioned above, I have no hesitation in admitting that all these interactions, readings and writings came in handy when I was bestowed with the prestigious assignment as the Vice-Chancellor of the then newly established Rajiv Gandhi National University of Law, Punjab at Patiala in the year 2006.

During the period I served RGNUL as the Vice-Chancellor, I had a number of academic as well as administrative experiences. Most of these were the logical concomitants of the various experiments that I made on both the sides. All these experiences may probably become part of a full-fledged auto-biography or memoirs one day. However, due to the space and time constraints, in the following paragraphs, I am referring only to the four major experiments made by me on the academic front during my tenure in the office.

The sole aim behind my penning down just about four of these experiments is to demonstrate to the new generation of young law teachers as to how even a minor initiative taken or an experiment made in the field of legal education and research can bear major fruits and even bring acclaim, approbation and repute to any new institution in the making, sometimes more than one's expectations also.

On a cursory glance, the present piece may look like an attempt at self-eulogizing, or at best, an attempt towards mutual admiration for some of my colleagues. However, I would like to emphasize here that this is the first hand honest description and an objective evaluation of some of the academic experiments that I attempted during the time I headed a national law university.

1.2 My Academic Experiences as the Founder Vice-Chancellor

The four experiments that I have referred to in the above paragraphs are: (i) Introduction of the Subject of 'Legal and Social Sciences Research Methodology' at the Under-Graduate Level; (ii) Introduction of the Subject of 'Comparative Legal Systems in the World' at the Under-Graduate Level; (iii) Introduction of the Subject of 'Legal Education and Research Methodology'

at the Post-Graduate Level; and (iv) Mandatory Submission of Three Term Papers and a Dissertation in the LL.M. Course

1.2.1 Introduction of the Subject of 'Legal and Social Sciences Research Methodology' at the Under-Graduate Level

I was introduced to the subject of Legal Research and Methodology for the first time when I took admission in Post-Graduation Course in Law (LL.M.) at Guru Nanak Dev University, Amritsar way back in the year 1983. Since ours was the first batch of eight students in the LL.M. Course, we were left on our own to find the study material for the subject as there was nothing available in the Departmental Library. The only paper that was handed over to us was a proposed syllabi having borrowed from the University of Delhi alongwith a list of five or six recommended readings.[14] As far as I can remember, all these readings were on the subject of Social Sciences Research Methodology and none on Legal Research Methodology. It was indeed a herculean task to find the literature on either of these subjects. Another thing that added to our woes was that each one of us was asked to submit two research designs on any two topics of one's choice to the Department out of which the candidate was to be asked to submit a Term Paper ranging between 40-50 pages. Quite surprisingly, this was done irrespective of the fact that we were neither taught even the basics of the subject of legal research methodology in general nor trained to prepare a research design in particular, a practice that till date prevails in some of the universities. That was perhaps the turning point atleast for me to learn the fine intricacies of the subject of research methodology. For this purpose, I had to bank upon the library of the Department of Political Science at the GNDU where the subject of

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[14] I still vaguely remember the titles of these recommended readings. These were: The *Chicago Manual of Style*; MLA Style Sheet (Now it is available in the form of a full-fledged book and its complete title is: Joseph Gibaldi, *MLA Handbook for Writers of Research Papers, Dissertations and Thesis*, Affiliated East-West Press, New Delhi, 2004); and Jonathan Anderson, *Thesis and Assignment Writing* etc. etc. The first and the third titles are out of print now.

'Social Science Research Methodology' was being taught as one of the compulsory subjects to the M.Phil. students, some of whom in turn had produced a number of excellent term papers on different aspects of the subject of social sciences research methodology, something that I tried nearly ten years later with my post-graduate students when I joined the same department as an associate professor from where I had passed out, and was successful, too.

Coming back to the practice adopted in the Department of Political Science, the term papers submitted by the M.Phil students there were the obvious outcome of their having been taught the subject first alongwith their training in preparing research designs to be followed by the writing of their term papers, a practice unlikely followed in the Department of Laws. I must admit that the situation referred to by me proved a blessing in disguise for me, for I could read a lot on the subject that enabled me to prepare two research designs that followed the submission of a full-fledged Term Paper in the LL.M First Semester and which was ultimately followed by a submission of a Dissertation in the Fourth Semester of the P.G. Course. It was during those days of struggling with the subject of research methodology that I got convinced that this subject should compulsorily be taught to the LL.B. students in the very first semester, for training in this field was not required for the teachers teaching the subject and researchers alone, but was also required for the students who aimed at entering the legal profession as advocates as well as judicial officers.

In addition, as briefly mentioned above, I had always been perturbed by the ridiculous practice then prevailing in most Indian universities (and surprisingly it continues till date) whereby without even teaching the subject of research methodology, a candidate was expected first to prepare a research design and then to write a term paper in the first or second semester or year of the P.G. Course and then finally to submit a full-fledged dissertation in the fourth semester or in the second year. It goes without saying that it has often led to the practice of plagiarism in most Indian universities. A lot can be written on this topic, too, but I am not touching it due to the space constraints.

Let me confess one thing, that is, almost for twenty years (from 1986 to 2006), I had been pleading with the various academic bodies of which I was one of the members, and through them, with university authorities to introduce this subject right at the under-graduate level. Very honestly, all my pleadings were simply ignored, sometimes scoffed at, and at other times ridiculed even. However, when I took over the reins of the newly established law university, the subject was introduced and is still being taught in the very first semester of the B.A.,LL.B.(Hons.) Five Years Integrated Course (FYIC). Although there was as such no opposition to the idea of introduction of this course, there were nevertheless apprehensions by some of the learned members of the statutory bodies by which the proposal for introduction of the paper was to be approved. Nevertheless, I was given a go ahead with this first experiment and very obviously all those apprehensions got automatically cleared within a short span of time. I taught this subject all by myself for one full semester to the students of the first batch and later on associated two social sciences teachers with its teaching which proved a boon for the students.

As regards the outcome of this experiment, the fact is that in almost each and every moot court competition wherein the RGNUL students have participated, irrespective of other achievements, they have always been winning appreciations, awards, distinctions and prizes as for as submission of moot memorials is concerned. This speaks volumes about the outcome of introduction of this foundational course at the threshold level. Almost all my colleagues also got motivated and they even used to regularly attend my classes on the subject. I would like to take justified pride in writing that the library of RGNUL is perhaps one of the very few libraries in the country that has in stock more than one hundred and thirty five books on the subject of research methodology alone, something that not only our students admire, but each one of the distinguished visitors visiting the University has also admired. Further, almost each one of these books was selected by me and my colleagues from wherever we went,

whether it was for participation in an international conference or for visiting a World Book Fare or a National Book Fare.

1.2.2 Introduction of the Subject of 'Comparative Legal Systems in the World' at the Under-Graduate Level

Once again, during the time I was studying at the Department of Laws at GNDU, Amritsar, the subject of 'Jurisprudence' used to be taught to the LL.B. students consecutively in two semesters. Whereas in the first semester, the title of the paper used to be 'Jurisprudence and Legal Theory', the title of the paper for the second semester was 'Jurisprudence and Comparative Law'. Thus comparative law was being taught just as a part of the paper two of jurisprudence. Somehow, I took a lot of interest in the subject of comparative law. However, it was taught at such an elementary level, that notwithstanding the evoking of interest in the subject, most of our fundamentals were not made clear to the extent these should have been. Further, I had studied the paper entitled: 'Major Constitutions of the World' in the subject of Political Science, first at the under-graduate (B.A.) level and later at the post-graduate level, that is, during M.A. in Political Science. In the year, 1998, I happened to listen to a very interesting lecture on the topic of 'Major Legal Systems in the World by Professor N.L. Mitra during one of the UGC sponsored four weeks Refresher Courses-cum-Training Programmes for Law Teachers that I attended at the NLSIU, Bangalore. I got so much enamored by the lecture that I wanted to do some hard reading on the topic. However, I could not find adequate literature on the subject even in the library of the NLSIU. Nevertheless, I could get hold of atleast three standard reference books on the subject.[15] The

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[15] These were (titles written according to the year of publication): (i) J. Duncan M. Derrett, *Introduction to Legal Systems*, Sweet and Maxwell, 1968 [Now Available in the form of Reprint by Universal Law Publishing Co., Delhi, 2009];(i) Rene Deavid and John E.C. Brierly, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, Free Press, New York, 1978; and David Annussamy, *French Legal Sytem*, NLSIU, Bangalore, 1995.

more I read about the subject, the more interest it generated in my mind. A chance meeting followed by a number of informal chats with Professor M.K. Nawaz, one of the pioneers in promoting the study of international and comparative law in India[16], during the same Training Programme convinced me of the need for the teaching the subject to the students of law, something that is hardly being done anywhere in the Indian Universities.

Back home, I thought of getting the subject of Comparative Legal Systems (in the form of an admixture of comparative law, comparative constitutional law and major legal systems in the world) introduced first at the LL.B. level and later at the LL.M. level during my tenure as the Head of the Department of Laws at GNDU, Amritsar from 1999-2002. Once again, there could not be any consensus amongst my colleagues on this point and I failed to get the needful done.

However when I joined RGNUL at Patiala, we made another experiment and that was introduction of the subject of Comparative Legal Systems, once again, at the LL.B. level in the second semester. Guest faculty was engaged to teach this subject to the first batch of students. Later on, three teachers, one from the law faculty and two from the social sciences faculty were assigned the task of teaching this subject. Like the subject of Legal and Social Sciences Research Methodology, I co-ordinated with the other teachers. Whereas the teacher of history dealt with the historical perspective of all the prescribed legal systems, the teacher of political science dealt with the subject from her own subject angle. For example the topics like 'Communism', 'Socialism', 'Democracy' 'Dictatorship', 'Rule of

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[16] Professor M.K. Nawaz was associated for a very long time with the Indian Society of International Law at New Delhi and has always been credited for the upliftment of the study of International Law and Comparative Law through his writings published in the Indian Journal of International Law. At the time when I met him, he was an serving as an Adjunct Professor of International and Comparative Law at the NLSIU, Bangalore.

Law', 'Totalitarianism' etc. etc. were discussed in the class both by the political science teacher as well by the law teacher. I myself dealt with the subtleties of the subject like explaining to the students the chief characteristics as well as the similarities and differences between the 'Common Law System' the 'Roman Law System' and the 'Civil Law System' etc. etc. We also taught the young students the Islamic Legal System based on the religious scriptures and traditions alike. There was a wonderful rapport amongst the four of us, one each from the disciplines of history, political science, and law, I myself being the co-ordinator. I have no hesitation in admitting that in addition to teaching the subject from the legal angle, I also used to attend the classes of my young colleagues from the social sciences faculty and it goes without saying that even many of my fundamentals got cleared by attending their classes. This was one of the best examples of collaborative teaching, a unique practice that the NLSIU, Bangalore often boosts about. We followed their foot-steps while teaching this subject. That was perhaps something novel about the teaching of this subject.

As regards its outcome, let me state frankly, this is not a subject that could bring us results so quickly like the subject of legal and social sciences research methodology. However, RGNUL perhaps is the only university where the subject of Comparative Legal Systems in the World is being taught in such a detailed manner and that too collaboratively by the law teachers and social sciences teachers. An attempt is being made to widen the horizon of the student by way of teaching them the subtleties, uniqueness, merits and drawbacks of the various legal systems, thereby inculcating in the young minds the comparative as well as a critical approach to the study of law in general and to the study of comparative law and of the various legal systems functioning in the world in particular.

At one time, before I associated the social sciences teachers with this subject, a stage had come that we had thought of discontinuing the teaching of this subject because of the lack of availability of literature as well as because of the dearth of teachers. As a matter of fact, non-

availability of literature on the subject was perhaps the sole reason for unwillingness of some of the teachers to teach this subject. However, there was strong resentment by the students against its discontinuation which was followed by their undertaking to compile the study material by themselves. It was then only then I thought of associating two of my colleagues from social sciences background with the teaching of this subject that paved the way for adoption of a multi-disciplinary approach to the teaching of the subject of law, something which is the need of the day in the post-globalized world and something that RGNUL can proudly claim as being one of the pioneers in the exercise. On the literature front, our library can today boost of having in stock nearly fifty books on the subjects of comparative law[17] and on different legal systems in the world,[18] including some standard works on the components and functioning of

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17 Prominent among these (names of the authors in an alphabetic order) are: H.C. Gutteridge, *Comparative Law*, Universal Law Publishing Co., Delhi, 2010; Jan M. Smits, *Elgar Encyclopedia of Comparative Law*, Edward Elgar & Co., London, 2006; K. Zweigert, *Introduction to Comparative Law*, Oxford University Press, New York, 1998; Mathias Reimann, and Reinhard Zimmermann, *Oxford Handbook of Comparative Law*, Oxford University Press, London, 2006; Peter D. Cruz, *Comparative Law in a Changing World*, Routledge, London, 2007; Raymond Youngs, *English, French and German Comparative Law*, Cavendish Publishing Co., London, 2009; and Werner F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Platinum Publishing Co., London, 2000.

18 Prominent among these (names of the authors mentioned in an alphabetic order) are: Anke Freckmann and Thomas Wegerith, *The German Legal System*, Sweet & Maxwell, London, 1999; Donald Gifford, *Understanding the Australian Legal System*, Cavendish Publishing Co., London, 1996; E. Allan Farnsworth, *Introduction to the Legal System of the United States*, Oxford University Press, New York, 2010; Elena Merino-Blanco, *Spanish Law and Legal System*, Sweet and Maxwell, London, 2006; Gary Slapper, *English Legal System*, Cavendish Publishing Co., London, 2001; J.O. Boylan-Kemp, *English Legal System*, Sweet and Maxwell, London, 2008; Joseph Raz, *Concept of a Legal System: An Introduction to the Theory of Legal System*, Clarendon Press, Oxford, 1980; Kate Malleson, *Legal System*, Oxford University Press, New York, 2007; Martin Partington, *Introduction to the English Legal System*, Oxford University Press, New York, 2008; Michael Zander, *Cases and Materials on English Legal System*, Cambridge University Press, New York, 2007; Penny Darbyshire, *English Legal System*, Sweet and Maxwell, London, 2005; and S.H. Bailey, *Modern English Legal System*, Sweet and Maxwell, London, 2002.

the Indian Legal System.[19] This is in addition to the availability of more than two hundred and fifty titles on the subject of International Law, one of the rare and proud possessions for any new law university's library. I have not seen such a huge collection of books on the subject of legal and social sciences research methodology and on comparative law and legal systems in the library of any of the law schools across the country, something I have the right to feel proud about.

1.2.3 Introduction of the Subject of 'Legal Education and Research Methodology' at the Post-Graduate Level

Whereas the subject of Legal Research and Methodology is of late being taught as a full-fledged subject to the post-graduate students in some of the universities, including the law universities, the subject of 'Legal Education and Research Methodology' is hardly being taught anywhere. There may, however, be some exceptions. RGNUL was perhaps the first national law university where, on following the University Grants Commission (UGC's) guidelines, the subject of 'Legal Education and Research Methodology was introduced at the post-graduate level right in the very beginning when we started the PG Course. I was of the firm view that most students pursue post-graduation course in law in order to join the teaching profession. It should, therefore, be mandatory for them to know the brief history, chief components, novel experiments, major developments, emerging trends and the prominent challenges being faced by the country in the arena of legal education and research. In my opinion, rightly or wrongly, any person joining the noble profession of teaching ought to know about the complete anatomy of the subject. I have no hesitation in admitting that having gone through the history of legal education as well as through most of the reports of the various conferences,

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[19] Fali S. Nariman, *India's Legal System*, Penguine Books, New Delhi, 2006; Joseph Minattur, *Indian Legal System*, The Indian Law Institute, New Delhi, 2006; and Veena Bakshi, *Elements of the Indian Legal System*, Faculty of Law, University of Delhi, 2009.

meetings, seminars and workshops, my mental horizon had got widened and I could do justice to the profession I had embraced by choice. Keeping in view this fact, we introduced the aforesaid subject. I would like to take pride in admitting that, like the under-graduate students, our post-graduate students also started contributing papers and participating in a number of conferences, seminars and workshops, thanks to the training and orientation given to them in the subject of research methodology.

As regards the outcome of this experiment, I would like to mention here that four of our students who completed their post-graduation from RGNUL joined us as teachers, though on lecture basis only. They are good law teachers in the making. We can pin high hopes on them that they shall become committed, dedicated and devoted law teachers who are in dearth in the country and are required anywhere and everywhere.

1.2.4 Mandatory Submission of Three Term-Papers and a Dissertation for the Post-Graduate Law Students

As mentioned earlier, it was mandatory for us as the post-graduate students of law to study the subject of legal research and methodology at Guru Nanak Dev University at Amritsar. Sixty marks were reserved for the theory paper and forty reserved for the term paper that was to be evaluated by an external examiner. The submission of a term paper in the first semester was ultimately followed by the submission of a dissertation in the fourth semester. Thus, no component of research was taught to the students in the remaining three semesters. To me it was not an appropriate course of action for a post-graduate student of law, more particularly for the one who was pursuing the course with the sole purpose of joining the teaching profession. Such a student was necessarily required to stay in touch with research tools, techniques and training. That is why when we at RGNUL made it mandatory for every post-graduate student in law to submit one term paper each in all the three

semesters. This was done with a view to keep the post-graduate students constantly on the track of research.

As regards the outcome of this experiment, let me confess here that the students of the initial two batches indeed found it a herculean task and a perplexing exercise. At times, their submissions were delayed also and we had to even condone the delays. However, no such problem was found with the succeeding batches of the post-graduate students who were always ready with their submissions on time, whether it was the submission of a research design or of a term paper and even of the LL.M. dissertation.

As regards; its outcome, I would like to reiterate here that even this experiment proved to be a success because I could see majority of post-graduate students writing research papers for presentation in the conferences, seminars and workshops and for publication in law journals. Above all, it also enabled me to inculcate in my young colleagues the practice of guiding post-graduate students from the very early days of the joining the teaching profession by the former. In addition, that also obligated my colleagues to stay abreast with the latest developments in the subject on which they were guiding the post-graduate students.

1.3 Concluding Observations

In the above paragraphs, I have endeavoured to demonstrate as to how a few academic experiments carried out with utmost conviction and sincerity at RGNUL are likely to prove as important milestones in the history of this university. My learned readers would probably agree that every experiment that we make in our life does not always bring instant rewards. Nevertheless, we continue striving in our lives and wait patiently for the results. This is precisely what I and some of my motivated colleagues attempted to do so at RGNUL.

In summing up, I would like to state that my life till date as a law teacher has indeed been interesting and my tenure as the founder

vice-chancellor of a national law school has equally been eventful. Establishing an institution virtually from scratch and bringing it on the international map within a short span of four and half years has indeed been a challenging as well as a formidable task on the one hand, and a life time opportunity to fall in the category of institution builders for the nation on the other. There have been mixed experiences, some pleasant and some unpleasant. I have, therefore, no hesitation to admit that all the experiments that I attempted did not bear the fruits as per my expectations. Nevertheless, today when I sit back, relax and reflect and look towards RGNUL which is now touching new academic heights under the able stewardship of Professor Paramjit Jaswal, an equally committed law teacher by choice and a wonderful human being, I am convinced that the candle that I had lit five years ago is slowly turning into a *deepawali*. On being satisfied with bringing RGNUL on the international map in so short a span of time, I am compelled to say to myself, "The journey was indeed difficult, but the destination was equally delightful."

CORPORATE CRIMINAL LIABILITY : ORIGIN, NATURE AND SCOPE

Abhinandan Bassi*

1.1 Introduction

Criminal liability of corporations has become one of the most debated topics of the 20th century. The debate became especially significant following the 1990s, when both the United States and Europe have faced an alarming number of environmental problems, antitrust frauds, food and drug false statements, mass worker suicides, bribery, obstruction of justice, and financial crimes involving corporations. The most recent and prominent case in the United Sates has been the Enron scandal in which one of the largest accounting firms in the world, Arthur Andersen LLP, was charged with obstruction of justice[1]. Some corporations, including Dynergy, Adelphia Communications, WorldCom, Global Crossing, Health South, Parmalat (in Italy), and Royal Ahold (in Netherlands) falsified their financial disclosures. Other corporations, among which are Royal Caribbean, Olympic Pipeline, Exxon, Pfizer, Bayer, and Shering-Plough Corporation[2], breached the environmental or health and safety laws. McWane Inc., one of the world largest manufacturers of cast-iron pipes, has an extensive record of violations causing deaths[3].

The corporate crimes resulted in great losses. The consequences that most directly affect our society are the enormous losses of money, jobs, and even lives. At the same time, the long-term effects of these crimes, such as the damaging effects upon the environment or health, which may not severely

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1 *Arthur Andersen LLP* v. *U.S.*, 544 U.S. 696, 2005.

2 See, Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, at http://www.corporatepredators.org/ top100.html

3 David Barstow and Lowell Bergman, "Deaths on the Job, Slaps on the Wrist", *New York Times*, 10 January, 2003, p.

affect us now, should not be underestimated. The reaction to this corporate criminal phenomenon has been the creation of juridical regimes that could deter and punish corporate wrongdoing. Corporate misconduct has been addressed by civil, administrative, and criminal laws. At the present, most countries agree that corporations can be sanctioned under civil and administrative laws. However, the criminal liability of corporations has been more controversial. While several jurisdictions have accepted and applied the concept of corporate criminal liability under various models, other law systems have not been able or willing to incorporate it. Critics have voiced strong arguments against its efficiency and consistency with the principles of criminal law.

In this paper, there is an attempt to determine the purposes of corporate criminal liability, the reasons why some jurisdictions adopted this concept, but others still refuse to accept it, the models of corporate criminal liability developed so far, the reasons why corporate criminal liability developed differently in different countries, and the lessons we could learn from these developments. Different countries have adopted various models of criminal liability or refused to adopt any due to their peculiar historical, social, economical, and political developments. Based on these developments, each country found it appropriate to respond to the criminal behaviour of corporations in different ways.

1.2 Origin of Corporate Criminal Liability: The Global Perspective

Corporate criminal liability has its origins in ancient law, and became the centre of the doctrinal discussions at the end of the 19th century. The history, laws, economics, and politics unique to each country have had a remarkable influence on the adoption and development of the concept of corporate criminal liability. This influence resulted in different models of corporate criminal liability. The concept of criminal liability of corporations has had a different evolution under civil law systems as compared to its development under common law systems. At the same time, under the civil law or common law systems, corporate criminal liability has developed

differently to reflect the historical and socio-economic realities of different countries.

The historical evolution of corporate criminal liability shows that corporate criminal liability is consistent with the principles of criminal law and the nature of corporations. Furthermore, the historical development of corporate criminal liability reveals that criminal liability of corporations is part of an important "public policy bargain. The bargain balances privileges granted upon the legal recognition of a corporation—such as limited liability of corporate shareholders and the capability of a group of investors to act through a single corporate form—with law compliance and crime prevention pressures on the managers of the resulting corporate entity."[4]

1.3 Overview of Corporate Criminal Liability and Different Legal Systems

None of the systems is perfect; each one has advantages and disadvantages. Although the American system seems to be the best reply to the criminal corporate phenomenon, other models of corporate criminal liability have some elements that should be considered for the purpose of creating a better model. The main goals of criminal liability of corporations are similar to those of criminal law in general. The first characteristic of corporate criminal punishment is deterrence—effective prevention of future crimes. The second consists in retribution and reflects the society's duty to punish those who inflict harm in order to "affirm the victim's real value."[5] The third goal is the rehabilitation of corporate criminals. Fourth, corporate criminal liability should achieve the goals of clarity, predictability, and consistency with the criminal law principles in general. The fifth goal is efficiency, reflected by the first three goals mentioned above, but also by the costs of implementing the concept. Finally, we should not forget the goal of general fairness.

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4 Richard Gruner, Corporate Criminal Liability and Prevention, *Law Journal* Press, 2nd ed., 2004, pp. 2-7.

5 Murphy Jeffrie G. and Jean Hampton, *Forgiveness and Mercy* 130, 1988.

Although corporate criminal liability initially started by imitating the criminal liability of human beings, new models of criminal liability, such as the aggregation or self-identity theories, have been developed to better fit the corporate structure and operation. The American system of corporate criminal liability has been the most developed and extensive system of corporate criminal liability created so far. The American model includes a large variety of criminal sanctions for corporations (such as fines, corporate probation, order of negative publicity, etc.) in attempt to effectively punish corporations when any employee commits a crime while acting within the scope of his or her employment and on behalf of the corporation.

The most distinguishing and bold element of the American model of corporate criminal liability is the adoption of the aggregation theory. This theory provides that corporations can be held criminally liable based on the act of one employee and on the culpability of one or more other employees who, cumulatively, but not individually, meet the requirements of *actus reus* and *mens rea* of the crime. Although this system meets the goals of retribution, rehabilitation, predictability, and clarity, it apparently has the tendency of being a bit over-deterring and costly[6]. It also has some significant spill-over effects on innocent shareholders and employees, and, some argue that, due to the adoption of the aggregation theory in particular, it lacks consistency with the traditional principles of criminal law.

The English and French models proved to be more restrictive mainly due to their requirement that the individuals acting on behalf of the corporation hold a high position or play a key function within the corporation's decisional structure. Moreover, these systems refused to adopt the aggregation theory. Due to the contemporaneous tendency of corporations to fragment and delegate the power to decide and act, the prosecution of a significant number of crimes is prevented. Thus, although the requirements of clarity and consistency with the traditional principles of criminal law are met for the most part, these models seem to be under-deterring, less

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6 V.S. Khanna, "Corporate Criminal Liability : What Purposes Does It Serve?" 109, *Harv. L. Rev.*, pp. 1477, 1509.

retributive[7] and overall, less efficient. Moreover, due to the lack of the sanction of criminal probation the way it is instituted in U.S. and, in England, due to the lack of various other forms of sanctioning, the rehabilitative requirement is not adequately satisfied.

In Germany, the criminal liability of corporations is non-existent. Instead, Germany implemented a comprehensive administrative-penal system that regulates corporate criminal wrongdoing. The German legislators believe that the administrative liability of corporations fulfils the goals of deterrence, predictability, clarity, and general fairness, and is also less costly to implement than corporate criminal liability. Moreover, by refusing to adopt the concept of corporate criminal liability, the German law system pays tribute to the traditional concepts of the criminal law. Thus, Germans argue that the administrative-penal system is sufficient. However, many critics have emphasized the close similarity between the German administrative-penal law and the criminal law and suggested that this system might be just a façade for criminal sanctioning without the protections offered by the criminal procedure.

The German system underemphasizes the role of the moral stigma that accompanies any criminal sanction; therefore, it is not characterized by the retribution of the criminal punishment. In addition, the lack of corporate criminal liability might create the undesirable effect of attracting corporations whose acts are not tolerated by the criminal law of other countries; this, in turn, would increase the level of corporate crime.

The Continent European countries have based their legal systems on long history and traditions that have permanently marked the development of their laws. In civil law countries, the acts are not tolerated by the criminal law of other countries; this, in turn, would increase the level of corporate crime. Furthermore in civil law countries, the doctrinal issues heavily influenced the laws and judicial decisions. And the tradition has been that corporations cannot commit crimes. Germany still refuses to accept the

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[7] *Ibid.*

criminal liability of corporations and remains loyal to the old maxim *societas delinquere non potest.*

Some of the reasons for this refusal have been the alleged corporations' lack of capacity to act, lack of culpability, and inappropriateness of criminal sanctions[8]. The most important reason has been the belief that the moral stigma of criminal sanctions is not necessary to fullfill the scopes of the punishment. At the same time, German corporations have been extremely well regulated by the very advanced German system of administrative law. Thus, Germany has not yet considered it necessary to override the old doctrinal restraints on corporate criminal liability.

France has abandoned the old maxim *societas delinquere non potest* and adopted a comprehensive, yet restrictive, system that addresses corporate criminal liability. This change was a much needed response to the increasing corporate crime phenomenon, especially when France lacked the very well developed and established system of administrative law previously developed by Germany. The French system is more restrictive compared to the American one because it is relatively new and the legislators have been probably cautious when implementing new concepts. Moreover, the adoption of corporate criminal liability has encountered a strong opposition from the French corporations. Unlike, civil law systems, the common law legal systems have not struggled with doctrinal issues at the same level of intensity.

The Anglo-American legal system has adopted the concept of corporate criminal liability as soon as it became necessary (due to the increasing corporate crime and lack of adequate civil or administrative sanctions) without thinking and re-thinking the old doctrinal traditions and arguments the way Germany or France did. The English and American law systems incorporated corporate criminal liability models easily. Although the English model is still much more restrictive than the American one, several authors predict that the English model will soon undergo substantial

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8 *Supra note* 6.

changes towards a model similar to the American one. Some of the reasons that prevented the adoption of an extensive criminal corporate liability model in England have been the possible negative effects on innocent individuals and the high costs that corporations would have to pay for a monitoring system that would effectively prevent crimes.

1.3.1 Under the Roman Legal System

Aside from the existence of the Roman state and its territorial units called *civitas* or *coloniae*, the right of individuals to constitute trade, religious, and charitable associations has been recognized early in the development of the Roman law. The Roman entities were called *universitates personarum* (or *corpus/ universitas*, which included the Roman state and other entities with religious, administrative, financial, or economic scopes) and *univesritates rerum* (which included entities with charitable scopes). Upon creation by authorization, the entities had their own identity, owned property separate from that of their founders, and had independent rights and obligations. Although these entities were viewed as a fiction of the law, and despite the fact that the Roman doctrine considered that these associations lacked independent will, in some authors' view, an entity could commit a crime and criminal causes of actions against them existed[9].

Later, in the 12th-14th centuries, the concept of corporate criminal liability evolved; the Romanic law clearly imposed criminal liability on the *universitas*, but only when its members were acting collectively[10]. At the same time, Pope Innocent IV created the basis for the maxim *societas delinquere non potest* by claiming that, unlike individuals who have willpower and a soul, can receive the communion, and are the subjects of God's and emperor's punishments, *universitas* are fictions that lack a body and a soul, therefore, cannot be punished. However the majority of the doctrine rejected this argument because of the realties of that time, and

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9 Streteanu Florin and Radu Chirita, *Raspunderea Penala a Persoanei Juridice*, 7 Rosetti (ed.), 2002.

10 *Id.*, at p. 11.

admitted the existence of juristic persons and their capacity of being sanctioned for their crimes if certain conditions were met. The emperors and popes used to frequently sanction the villages, provinces, and corporations[11].The sanctions imposed could be fines, the loss of specific rights, dissolution, and spiritual sanctions upon the members of the corporations, such as the loss of the right to be buried, or excommunication[12].

1.3.3 Under the French Legal System

In France, Ordonnance de Blois of 1579 enacted the criminal liability of corporations. The crime committed must have been the result of the collectivity's decision. Therefore, although the corporations were still considered legal fictions, the existence of corporate criminal liability sustains the conclusion that corporate criminal liability was not incompatible with the nature of the corporations. Before the French Revolution, the French Grande Ordonnance Criminelle of 1670 established the criminal liability of corporations on similar basis. In addition, the ordinance provided for the simultaneous criminal liability of individuals for committing the same crimes as accomplices. The French Revolution brought extreme changes in the French law; the corporations, including the provinces and non profit hospitals, have been completely eliminated and all their goods confiscated[13]

The notion of corporation was incompatible with the individualist aspirations of the revolutionary government[14]. Malblanc and Savigny are the first authors sustaining the principle *societas delinquere non potest* in the 19th century[15]. The main argument was that a corporation is a legal fiction which, lacking a body and soul, was not capable of forming the

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11 *Id.*, p. 12.
12 *Id.*, pp. 13-14.
13 *Supra note* 9, p. 23.
14 Stessens, Guy, "Corporate Criminal Liability: A Comparative Perspective", 43 *Int'l & Comp. L.Q.*, 1994, p. 493.
15 *Supra note* 9, pp. 24-25.

criminal *mens rea* or to act in *propria* persona. Moreover, corporate criminal liability would violate the principle of individual criminal punishment[16]. German jurists also adhered to the "fiction theory." Thus, E. Bekker and A. Briz argued that corporations have a pure patrimonial character which is created for a particular commercial purpose and lacks juridical capacity. Therefore, corporations cannot be the subjects of criminal liability[17]. Critics of the "fiction theory," such as O. Gierke and E. Zitelman, argued that corporations are unities of bodies and souls and can act independently. The corporations' willpower is the result of their members' will.[18]

F. von Liszt and A. Maester were some of the principal authors who tried to substantiate the concept of corporate criminal liability during the nineteenth century. They argued that the corporations' capacity to act under the criminal law is not fundamentally different from that under civil or administrative law; corporations are juristic persons that have willpower and can act independently from their members[19]. During the time of these doctrinal disputes, the number and importance of corporations in the European society increased significantly. The laws became more flexible and the states' role in the process of incorporation diminished[20]. For the purpose of controlling the corporate misconduct, the Council of Europe recommended that "those member states whose criminal law had not yet provided for corporate criminal liability to reconsider the matter[21]." France responded by making several revisions of its Penal Code for the purpose of modernizing its text.

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16 Leigh L.H.; "The Criminal Liability of Corporations and Other Groups: A Comparative View", 80, *Mich. L. Rev.*, 1982, p. 1508.

17 *Ibid.*

18 *Ibid.*

19 *Id.*, *citing* F. von Liszt, *Tratado de Derecho Penal* 299-300 (Rues ed.), 1999, *See also* A. Maestre, Les Personnes Morales *et. al. Probleme de Leur Responsibilite Penale*, 137, 1899.

20 *Ibid.*

21 *Supra note* 16, p. 494.

The revision of 1992 officially recognized the corporate criminal liability because, in the opinion of the French legislators, it made more judicial sense[22] and because it lacked other effective ways of sanctioning criminal corporate misconduct. This process culminated with the Nouveau Code Penale in 1994[23]. The French New Penal Code established, for the first time in any civil law system, a comprehensive set of corporate criminal liability principles and sanctions[24] providing in article 121-2 that, with the exception of the State, all the juristic persons are criminally liable for the offences committed on their behalf by their organs or representatives[25]

The establishment of the corporate criminal liability attracted the critiques of thousands of corporations that could not believe in "such a revolution."[26] However, France's example was followed by numerous other European countries. Thus, Belgium, through the Law of May 4, 1999, modified article 5 of the Belgian Penal Code and instituted the criminal liability of juristic persons[27]. Netherlands adopted the concept of corporate criminal liability even earlier, in 1976. Article 51 of the Dutch Penal Code provides that natural persons as well as juristic persons can commit offences. In 2002, Denmark modified its Penal Code and established that corporations may be liable for all offences within the general criminal code[28] Germany on the other hand, due to doctrinal issues, still resists the idea of incorporating corporate criminal liability in its legal system. In Germany, corporate

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22 *Supra note* 16, p. 520.

23 Bouloc B; *La Criminalisation du Comportament Collectif – France, in* La Criminalisation du Comportament Collectif: *Criminal Liability of Corporations* (H. de Doelder & Klaus Tiedemann (eds.), *Kluwer Law Int'* l, 1996, pp. 235, 237.

24 Orland Leonare & Charles Cachera, *Essay and Translation: Corporate Crime and Punishment in France : Criminal Responsibility of Legal Entities (Personnes Morales) Under the New French Criminal Code (Nouveau Code Penal)*, 11 Conn. J. Int'l L., 1995, pp. 111, 114.

25 *See,* Albert Maron and Jaques-Henri Robert, *Cent Personnes Morales Penalment Condamnees,* JCP G 1999, p. 123, (a quantitative and qualitative study of the first one hundred decisions cited by the French Chancellery).

26 *Supra note* 23, p. 238.

27 *Supra note* 9, pp. 29-30.

28 Sara Sun Beale and Safwat, "What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability", 8 *Buff. Crim. L.R.*, 2004, pp. 89, 97.

criminal liability is still governed by the maxim *societas delinquere non potest* and corporate misconduct is the subject of a very developed system of administrative and administrative-penal law[29] Germany's administrative-penal system, called *Ordnungswidrigkeiten* (*OwiG*),[30] is the successor of *Ubertretungen*, a category of petty offences. The reason for "this growth of administrative procedures is of course to be found in the evolution of the Etat-Gendarme to the twentieth century welfare State, resulting in an enormous expansion of the domain of the State...[31], Italy, Portugal, Greece, and Spain followed the German model and refuse to hold corporation criminally liable. For example, Italy imposed a system of administrative liability of corporations through the Decree-Law No. 300 of September 29, 2000 and the Decree-Law No. 231 of May 8, 2001[32]. However, the Italian doctrine argues that this administrative liability is in reality, criminal in nature because it is connected to the commission of a crime and is applied by using rules of criminal procedure[33].

Due to historical circumstances, the evolution of common law systems has been different and did not embrace the Roman concepts. Unlike the civil law, which has its sources in legislative acts, the sources of the common law are the judicial decisions and the legislative acts. The adoption of the concept of corporate criminal liability has followed a conservative course under the English law[34]. Initially, England refused to accept the idea of corporate criminal liability for several reasons. Corporations were considered legal fictions, artificial entities that could do no more than what

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29 Hirsch H.J., "La Criminalisation du Comportament Collectif – Allemange", in La Criminalisation du Comportament Collectif: Criminal Liability of Corporations 31, (H. de Doelder & Klaus Tiedemann (eds.), *Kluwer Law Int'l,* 1996), p. 31.

30 Gunter Heine, "New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience—or Vice Versa?", *St. Louis-Warsaw Transatlantic L.J.*, 1998, p. 174.

31 *Supra note* 14.

32 *See,* "La Relazione al Decreto Legislativo Guida Normativa", Il Sole 24 Ore S.P.A. (ed.), 2001.

33 *Supra note* 9.

34 Harding C., "Criminal Liability of Corporations-United Kingdom", La Criminalisation du Comportament Collectif: Criminal Liability of Corporations (H. de Doelder & Klaus Tiedemann (eds.), *Kluwer Law Int'l*), 1996, pp. 369, 382.

"legally empowered to do (*ultra vires* theory)." Because corporations lacked souls, they could not have *mens rea* and could neither be blameworthy, nor punished. Chief Justice Holt decided that corporations could not be criminally liable, but their members could[35]. In addition, corporations were very few in number, incorporation being a privilege granted by the crown. Therefore, the influence of corporations on the society was minimal[36].

1.3.3 Under the English Legal System

During the 16th and 17th centuries, corporations became more common and their importance in the socio-economic life increased. A need for controlling corporate misconduct became more and more obvious. Corporations have been recognized as independent entities which owned property distinct from that of their members[37]. The first step in the English development of corporate criminal liability was made in the 1840s when the courts imposed liability on corporations for strict liability offenses[38]. Lord Bowen decided that the most efficient way of coercing corporations was by introducing the concept of corporate criminal liability in the English law[39]. Soon after, by borrowing the theory of vicarious liability from the tort law, the courts imposed vicarious criminal liability on corporations in those cases when natural persons could be vicariously liable as well[40].

In 1944, the High Court of Justice decided in three landmark cases[41] to impose direct criminal liability on corporations and established that the *mensrea* of certain employees was to be considered as that of the company itself. The motivation of the decisions was vague and confusing due to the lack of clear and organized criteria for attributing the *mens rea* element to

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35 *Supra note* 9, p. 34.

36 Brickey Kathlene, *Corporate Criminal Liability, 2nd Edition, New York Press, 1991.*

37 *Id.*, p. 69.

38 *Regina* v. *Birmingham & Gloucester R.R. Co.*, (1842) 3 Q. B. 223.

39 *Regina* v. *Tyler*, 173 Eng. Rep. 643 (Assizes 1838).

40 *Regina* v. *Stephens*, (1866) L.R. 1 Q.B. 702

41 *DPP* v. *Kent and Sussex Contractors, Ltd.*, [1944] 1 All E.R. 119 (Director used a false document); *Moore* v. *Bresler*, [1944] 2 All E.R. 515 (Tax evasion); *R.V. I.C.R. Haulage, Ltd.*, K.B. 551 (Common Law Conspiracy), 1944.

corporations[42]. This issue was clarified in 1972 in a case[43] in which the civil law *alter ego* doctrine was used to impose the criminal liability on corporations; this is now known under the name of "identification theory."[44] The Chamber of Lords compared the corporation to a human body, different individuals representing different organs and functions of the juristic person (*e.g.* the directors and managers represent the brain, intelligence, and will of the corporation).

1.3.4 Under the American Legal System

The willpower of the corporations' managers represented the willpower of the corporations. This theory was later criticized and slightly modified, but this decision still represents the landmark precedent in the English corporate criminal liability. The United States initially followed the English example, but later developed differently and more rapidly due to the important role of corporations in the American economy and society. The foundation of most forms of political organization in the American colonies was the corporate charter which perpetuated the corporate form of governance[45].

Unlike the English courts, the American courts were much faster in holding corporations criminally liable[46]. Initially, the American courts promoted similar arguments against corporate criminal liability[47]. The courts started by imposing criminal corporate liability in cases of regulatory or public welfare offenses not requiring proof of mens rea—nuisance, malfeasance, non-feaseance and vicarious liability cases[48]. At the beginning of the 20th century, the corporate criminal liability concept was widely accepted in the American society and was expanded to *mens rea* offenses. The Court held

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42 *Supra note* 14, p. 496.
43 *Tesco Supermarkets Ltd. V. Natrass*, [1972] A.C. 153.
44 See, *Supra note* 34, p. 370.
45 See, *Supra note* 36, p. 74.
46 See *Id.*, at p. 63.
47 *Supra note* 14, p. 496.
48 *People* v. *Corporation of Albany*, XII Wendell 539 (1834) (non-feasance); *State* v. *Morris Essex R.R.*, 23 Zabrinski's N.J.R. 360 (1852) (misfeasance).

in *New York Central & Hudson River R.R. v. U.S.*[49] that the defendant corporation can be responsible for and charged with the knowledge and purposes of its agents, acting within the authority conferred upon them. The Court held that the law "cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and [giving] them immunity from all punishment because of the old doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."[50]

At the present, corporate criminal liability is virtually as broad as individual criminal liability, corporations being prosecuted even for manslaughter[51].

1.3.5 The Scope of Corporate Criminal Liability

There are three systems of determining for which crimes the corporations can be held liable. Under the first system—general liability[52] or plenary liability[53]—the juristic persons' liability is similar to that of individuals, corporations being virtually capable of committing any crime. The second system requires that the legislator mention for each crime whether corporate criminal liability is possible. The third system consists of listing all the crimes for which collective entities can be held liable[54].

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49 212 U.S. 481 (1909) (sustaining the constitutionality of the Elkins act which provides that the acts and omissions of an officer acting within the scope of his employment were considered to be those of the corporation).

50 *Id.*, at p. 495.

51 *Supra note* 36, See also *Supra note* 9 at p. 46.

52 *Id.*, at p. 112.

53 Cristina De Maglie, "Centennial Universal Congress of Lawyers Conference-Lawyers and Jurists in the 21st Century: Paper: Models of Corporate Criminal Liability in Comparative Law", *4 Wash. U. Global Stud. L. Rev.* 2005, pp. 547, 552.

54 *Ibid.*

The *first* system has been adopted by England, Netherlands, Belgium, Canada, and Australia.[55] In England, the corporations are liable for almost any type of crimes. Although general liability is the rule, there are some limits based on the principle *lex non cogit ad impossibilia.*[56] Thus, juristic persons are not liable for crimes punished only by imprisonment.[57] Presently there are only two crimes punishable only by imprisonment murder and treason. Under the same principle, corporations are not liable for crimes expressly excluded by the legislator or crimes that, due to their nature, cannot be committed by corporations. Hence, corporations cannot commit bigamy, incest, perjury, or rape[58] even though, some authors argue that such crimes could be committed by corporations as instigators[59].The English courts have held that corporations can be sued for manslaughter[60].

The *second* system has been implemented in France. Thus, under article 121-2 of the *French Penal Code*, the juristic persons are criminally liable only when the law or regulation expressly provides for such liability. Thus, when one wants to know whether a corporation is liable for a certain crime, he or she must look in the code/law, under the section for that specific crime, to see whether the legislator mentioned the possibility of engaging the criminal liability of corporations. This system has its rationale in the science of criminology; corporations are sanctioned for specific crimes based on the frequency of the corporations' involvement in such crimes[61]. However, this system is not comprehensive. By trying to exclude the crimes that cannot be committed by corporations, the French legislators inadvertently omitted some labor and economic crimes, and also neglected the fact that even the crimes that cannot be committed by corporations as

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55 See; "La Criminalisation du Comportament Collectif: Criminal Liability of Corporations" (H. de Doelder & Klaus Tiedemann (eds.), *Kluwer Law Int'l*, 1996).
56 *Supra note* 9, pp. 112-13
57 *R.* v. *I.C.R. Haulage, Ltd.*, 1944 K.B. 551 (Crim. App.).
58 *Ibid.*
59 See, *Supra note* 9, p. 113, *citing* R. Card, *Introduction to Criminal Law*, 1988, p. 195.
60 *R.* v. *P & O European Ferries (Dover) Ltd.*, 93 Cr App Rep 72 (1990), UK.
61 *Supra note* 14, p. 498.

authors can probably be committed by corporations as instigators or accomplices[62].

The *third* model is reflected by the American law. The U.S. Sentencing Guidelines include a detailed list of the offenses that can be committed by corporations[63]. Corporate criminal liability virtually extends to all the crimes that can be committed by individuals. Thus, a corporation can be convicted for theft, forgery, bribery, and manslaughter or negligent homicide.[64] Also, in *People v. O'Neil*, even though the corporation has not been found guilty, the court has not denied the possibility that corporations can be held criminally liable for murder[65].

1.3.6 Who are accountable for Corporate Criminal Liability?

Initially, it has been argued that corporations are not capable of forming the material and mental elements of a crime due to their immaterial and highly regulated existence. The attribution of the acts and the mental state of persons acting on behalf of the corporation to the corporation it was said to contravene the principle of individual punishment underlying the criminal law. These arguments failed in most legal systems, but the sphere of individuals and the conditions in which they can lead to the criminal liability of corporations differs dramatically from country to country. The core argument against corporate criminal liability has been the belief that a corporation cannot have *mens rea* and therefore, cannot be blameworthy or guilty of a criminal offense.[66] Critics showed that the corporate will and power of decision are exercised through the collective will of people managing the corporation. Therefore, it is said that the *mens rea* element of a criminal offense does not belong to the corporation, but to the members who made the decision to take a specific course of action.[67] The corporation

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62 *Supra note* 9, pp. 118-119.
63 U.S. Sentencing Guidelines, p. 8 A1.
64 *Granite Construction Co.* v. *Superior Ct.*, 149 Cal. App. 3d 465 (1983); Vaughan $ Sons, Inc. v. State, 737 S.W.2d 805 (Tex. Crim. App., 1987).
65 *People* v. *O'Neil*, 194 Ill. App. 3d 79 (1990).
66 See, *Supra note* 39 at p. 37; *Supra note* 23.
67 *Supra note* 9, p. 52.

would be punished without being blameworthy and this would be against the criminal law principles.[68]

The majority of doctrine recognizes the independent existence of a corporate will which does not always identify itself with that of the collective will of members of the corporation. The corporation's capacity to act and decide has been recognized in contract, administrative, and constitutional law. Therefore, if a corporation has the capacity to think and decide when it is a part to a contract (and thus being the subject of contractual rights and obligations), it cannot be sustained that corporate will power exists when it produces legal effects, but not when the effects created are illegal (criminal offenses).[69] Moreover, being widely accepted that corporations have civil liability, it would be difficult to explain why the corporation should not be held liable when the offense committed is more serious (criminal offense as opposed to civil offense). The culpability of corporations exists and it is sufficient for the culpability required by the criminal law.[70]

1.4 Conclusion

Several countries were, and some still are refusing to accept the concept of corporate criminal liability due to doctrinal, political, and historical reasons. Out of those formerly refusing to accept this concept, some started to slowly change their views. Why now? What has changed? The realities of our times have been changing so much that legislatures have realized that doctrinal issues are less important than the prevention and appropriate punishment of large-scale white-collar crimes, money-laundering, illegal arms sales, environmental harm, product liability, and many others. Some of the countries that have newly introduced the corporate criminal liability in their legal systems provide for restrictive systems of engaging liability and punishing criminal activities of corporations; that might be because they are

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68 *Supra note* 29, p. 38.
69 *Id.*
70 *Supra note* 39, p. 38

apprehensive of rapid and extreme changes in a short period of time. Or may be the realities of their societies are not sufficiently pressuring; the historical, social, economic, and political realties differ from country to country, and these differences have a strong influence on the legal systems. Also, the influence of the interests of powerful corporations can not be ignored.

Hopefully, all the legal systems will achieve uniformity regarding this issue. Although the system developed in United States is presently considered the most advanced in the world, the American model has a few drawbacks that could probably be eliminated by using elements from other models or by creating new solutions. The American system's disadvantages are the significant spill-over effects on innocent employees and shareholders, the possible over-deterring effect, and the high costs of implementing corporate criminal liability. However, its advantages outweigh its disadvantages. The American model seems to better reflect the actual developments of corporate structure and, thus, it is better suited to punish corporate crime. The retributive and rehabilitative effects of criminal punishment are almost perfectly reflected by the American model. Moreover, this system is clear, predictable, consistent with the principles of criminal law, and fair.

The French and English systems are also clear, predictable and consistent with the general principles of criminal law. Moreover, they do not have significant side effects on innocent individuals and are not over-deterring. However, these systems seem to be less deterring and, sometimes, unfair like in the English system for example, when the corporation is liable even when the manager defrauded the corporation itself. The prosecution of corporations is very difficult due to the significant restrictions of these models. Thus the criminal law cannot be effectively achieved. In addition, these systems, together with the German one, would probably have the effect of attracting potential corporate criminals seeking to avoid liability.

Corporations are independent juristic persons that can cause harm. Therefore, corporations should bear the responsibility of their actions. Although corporations have been initially conceived as a method of avoiding personal liability, and although its members will feel the side

effects of sanctioning corporations, members do not lose more than what they were willing to risk from the beginning (at incorporation). Moreover, they can prevent corporate crime by adopting special preventive measures, as the American model suggests. The corporate criminal liability models developed so far show that the only way to effectively punish and battle corporate crime is to criminally punish corporations.

Prosecution of individuals only is unjust not only to them, but to society at large because convictions of individuals will rarely affect the way corporations will conduct their business in the future. Moreover, civil and administrative liability of corporations is not sufficient. Victims do not always have the financial resources to pursue a civil claim. Although the administrative liability system promoted by Germany has some efficiency, similarly to civil liability systems, it lacks the procedural guarantees and the stigma characteristic to criminal law.

Criminal law is the only one that reaffirms all the values trampled on by corporate criminals. Criminal law punishes justly; its irreplaceable retributive, deterrent, and rehabilitative characteristics satisfy the public demand for vengeance. Criminal punishment of corporations sends a symbolic message: no crime goes unpunished and a just punishment includes the moral condemnation of society.

REVIEW OF ARTICLE 27.3 (b) UNDER TRIPS AGREEMENT : A CRITICAL ANALYSIS

Dr. D.P. Verma*

1.1 Introductory

In the era of globalization the pace of dissemination of technology has developed unprecedently and as a result, the tightening of Intellectual Property Rights, especially Patent Laws are targeted to achieve this goal. Trade Related Aspects of Intellectual Property Rights (TRIPs) which was the late inclusion in the multilateral trade negotiations under the auspice of GATT only in eighth round at Uruguay and now forms an integral and important agreement in WTO, is the most contentious area and largely debated all around the world because of its far reaching ramifications especially in the area of patents. The TRIPS Agreement had widened the scope of patents subject matter in Article 27 by providing that all the inventions are patentable whether worked locally or imported in the country of its grant. However, some exemptions were given under Clause 2 & 3 of the same Article but has already been provided in exemption clause that the provisions of Article 27.3 (b) is to be reviewed after four years time after the implementation of the TRIPs Agreement. Since WTO came into force from 1-1-1995 and review of these clauses were due from 1999 and till date review is under consideration as deadlock still persists. There is now divergence of opinion among two different fractions on this issue. The attempts being made by major biotechnology companies to patent biological materials taken from developing countries are being resisted. Furthermore, the development and release of genetically modified seeds and crops are causing concern in various quarters. The countries do not want to

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compromise with food security of their population. In light of the ongoing review negotiations under which there are certain issues which have been highlighted by different countries, the present paper tries to sum up some critical issues in different perspectives. Since the review of Article 27.3 (b) revolves around Convention on Biological Diversity (CBD) and Traditional Knowledge (TK) an effort has been also made to briefly examine the relevant provisions of these terms and related aspects of implementation to this effect. The objective of the study is to generate and increase understanding of the relationship between TRIPS and CBD including TK. The study explores a number of issues that could be relevant to developing countries in addressing the interface between these disciplines where the understanding of law and economics pose unique analytical challenges to policy-makers. The methodology adopted is purely analytical and based on the existing available materials.

1.2 Scope of Patent Laws under Trips

The subject matters of patents earlier to TRIPS Agreement were determined by the National Governments according to its suitability keeping in view its social and economic development. But TRIPS was purposely intersected in GATT/WTO just to enhance the level of protection to patents and also the subject matters to be covered by the member countries in compliance thereof so as to harmonize the standard at international level. Article 27 of the TRIPS provides that:

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre-public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.

The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

Therefore, from the perusal of the Article 27 of TRIPS, the general rule is framed that all the inventions are patentable subject to certain exceptions which can be laid down by member countries keeping in view the relevance of the invention for public order, morality, environment and animal kingdom including plants. In addition to the exception found in Article 27 the member countries may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with the normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate

interests of third parties.[1] However very comprehensive definition has been tried by this provision but at the first go the scope for maneuvering has been left. The countries can form their own laws in case of plant protection and use the exception clauses according to its own compatibility. Indian Government utilizing these exceptions has gone for *sui generis* system providing for plants by enacting *Protection for Plants Variety and Farmer's Rights Act*, 2001. The controversy arises as being a member to CBD Indian government has also incorporated its theme in the *Biological Diversity Act*, 2002 also. Besides that Indian Government has also enacted a legislation titled "*The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, 2006." The review of Article 27.3 (b) cannot be analyzed without giving reference to relationship between TRIPS and CBD.

1.3 TRIPS and Convention on Biological Diversity (CBD)

CBD was the result of the growing realization of the need to arrive at a balanced crossing point between intellectual property convention and issues related to bio-diversity, biotechnology and bio-conservation. The Convention on Biological Diversity (CBD) was adopted in 1992 at Rio De Janeiro in Brazil. Whereas the TRIPS as already mentioned forms an integral part of WTO Agreement.

1.3.1 Convention on Biological Diversity

The objectives of this Convention are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies and by appropriate funding.[2] The Convention authorizes the member countries to take care

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1 *Agreement on Trade Related Aspects of Intellectual Property Rights*, 1994. (Annexure I C), Article 30.

2 *Convention on Biological Diversity*, 1992, Article 1.

of both in situ and ex situ conservations. The Convention does not neglect the Intellectual Property protection but makes it obligatory on the contracting parties to take measures so that basic objectives of the Convention are not forfeited. Articles 15 of the Convention recognize the sovereign rights of the State over their natural resources and make any legislation to protect genetic resources. The access on these resources can be had only after the prior informed consent. Further the Convention also provide that each Contracting Party shall take legislative, administrative or policy measures as appropriate and in accordance with Article 16 which deals with technology transfer and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.[3]

Article 2 of the Convention has further defined the following terms to following effect:

- "Biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.
- "Biological resources" includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.
- "Biotechnology" means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify

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3 *Id.*, Article 15 (7).

The aim of the Convention is very clear as it mentions that biotechnology is of great importance in development of R&D and contracting parties are free to use and transfer the technology without disturbing eco system and sustainable development. Article15 and 16 of the Convention together also looks forward for achieving the same objective but Clause 5 of the Article 16 provides that the Convention parties "shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of, and do not run counter to its objectives". The focus on the words "subject to national legislation and international law" has not set the controversy on rest as which law will prevail in case of conflict. Except technology transfer as common objective both these treaties creates controversy in many respects and result is exposed as the review of the Article 27.3 of the TRIPS could not be passed since 1999 only because of the reasons of overlapping provisions of these two treaties.

Since, biotechnology is going to be an important aspect of the industrial research and self reliance the Convention protects the interest of the developing countries as it provides to promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, inter alia, in accordance with decisions of the Conference of the Parties taken in consequence of recommendations of the Subsidiary Body on Scientific, Technical and Technological Advice.[4] Article 17 of the Convention provide for the exchange of information among member countries and provide that such exchange of information shall include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1. It shall also, where feasible, include repatriation of information. Therefore Articles 12, 17

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4 *Id.*, Article 12 (b).

along with Article18 of the CBD, promoting training, information exchange and technical cooperation respectively are equally important for developing countries. Biodiversity is intrinsically associated with the way of life of people. It has cultural and socio-economic importance and is one of the major sources of food and income for a large section of the society. For a long time, the genetic resources and biological diversity of all types of living organisms on the Earth were considered the common heritage of all of the humanity. However, there have always been great imbalances in the distribution of this natural wealth. The economically most interesting original regions in terms of agriculturally useful plants are primarily in the countries of the south.[5]

1.3.2 Traditional Knowledge

Traditional Knowledge (TK) is the product of the continuity of creative skills and craftsmanship in a variety of cultures, traditions and beliefs since ancient period.[6] Traditional knowledge passes from generation to generation through customary practices. Some of the knowledge was generally used by all members of the society and others kept secret but used for the welfare of the society. The constant use of the TK has made it useful and relevant even today. [7] Generally the TK is now been treated as in public domain. Domestic laws of majority of the countries do not have any provisions in their national laws to protect these knowledge systems from being misappropriated for commercial purpose by the industrial houses.[8]

Article 8(j) of the CBD requires that parties subject to its national legislation, respect, preserve and maintain knowledge, innovations and

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5 Tappeser, Beatrix and Baier, Alexandra, "Who owns Biological Diversity?" available at http://www.biodiv.org, accessed on October 26, 2009.

6 V.K. Gupta, "Intellectual Property Rights in Agriculture" in S.P.Satarkar, *Intellectual Property Rights and Copyrights* (ed) Ess Ess Pub. Delhi, 2003, p. 166.

7 N.S. Gopalakrishnan, "Traditional Knowledge, Information Technology and Development- The Challenges," *Cochin University Law Review*, Vol. XXIX, No. 2, June 2005, p.133.

8 *Ibid.*

practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. The issues are far away from clarity and require greater technical understanding of the basic concepts and principles of Intellectual Property and their application in the specifics of concrete users of TK. The core theme of patent is invention not discovery and as far as the patent for genes and TK are concerned it can never be regarded as invention as they already have existence. Traditional knowledge and its relationship to the formal IPR system has emerged as a mainstream issue in international negotiations on the conservation of biological diversity, international trade, and intellectual property rights including the TRIPS Agreement. The General Treaty on the International Scientific Discoveries (1978) defines scientific discovery as "the cognition of phenomena, properties or laws of the material universe not hitherto recognized and capable of verification.[9]

1.3.3. The Contentious Issues

With the emergence of modern biotechnologies, genetic resources have assumed increasing economic, scientific and commercial value. Traditional knowledge, whether or not associated with those resources, has also attracted widespread attention worldwide now a day as the big industrial houses are eying on this bank for research and development of new technology and opened a debate for the preservation of TK and biodiversity. In the case of traditional knowledge, this task is very complex. First, certain forms of traditional knowledge such as beliefs or methods are not proper subject matter for intellectual property protection

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[9] International Bureau of WIPO, Elements of Industrial Property. WIPO/IP/ACC/86/1, para 2-9, quoted by Dr. G.B. Ready, *Intellectual Property Rights and The Law*, 2nd ed., 2001, p. 5.

and the policy reasons that underpins the exclusion of these categories of traditional knowledge are probably unshakable. However, most forms of traditional knowledge are excluded for supposedly kind reasons, such as the passage of time (public domain) or the fact that no identifiable author or inventor can be found.

The World Health Organization estimates that 80% of the world's population depends on traditional medicine for primary healthcare; Traditional knowledge is sometimes used to develop commercial products such as new pharmaceuticals, herbal medicines, seeds, cosmetics, personal care and crop protection products; For example, traditional medicine may be used to guide the screening of plants for medically active compounds or traditional crop varieties may be used to develop new commercial crops.[10] The companies involved in R&D do use this knowledge for commercial exploitation and extracting their property. This is termed as bio-prospecting. In many cases, they seek intellectual property rights in the form of patents or In recent years there has been a growing concern about 'biopiracy' the unauthorized commercial use of genetic resources and TK without sharing the benefits with the country or community of origin, and the patenting of spurious 'inventions' based on such knowledge and resources.[11] Well-known examples include a US patent on turmeric for healing wounds, which is common knowledge in India; and patents on basmati rice from India/Pakistan; and ayahuasco used in indigenous Amazonian healing.[12] Despite provisions in the Convention on Biological Diversity which require equitable benefit-sharing it is difficult to prevent biopiracy. The CBD provides for the benefit sharing but the provision under TRIPs regime allow patenting without requiring benefit-sharing.

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10 Krystyna Swiderska, "Banishing the Biopirates: A New Approach to Protecting Traditional Knowledge" *GATEKEEPER 129* International Institute for Environment and Development (IIED) 3 Endsleigh Street, London WC1H 0DD (2006) retrieved from www.iied.org/pubs/ pdf/full/14537IIED.pdf on March 2009, pp. 1-29.

11 *Ibid.*

12 *Ibid.*

There are certain issues such as what about the most genetic resources that had already been collected before 1993. Similarly, so much TK has already been documented and can be freely accessed from Publications and databases. Traditional Knowledge Digital Library (TKDL) a project sponsored by Government of India to create a database on Indian traditional medicinal practices using the tools of digital technology realized that large number of patents are already taken in US and EU based on the traditional knowledge from India.[13] The foul play may be there as patent administration or authority does not go in deep prior art search before granting patent and any concealment may lead to grant of a patent. Third world governments apprehend biopiracy as a threat to national economic interests and an extension of colonial exploitation. For indigenous and local communities, the removal of traditional knowledge and resources from community commons into private property regimes can prevent them from using and controlling these resources. This poses a threat to livelihoods which depend on free access to TK and bio-resources. ICSIR could only get a patent cancelled on widely known traditional knowledge of turmeric in US only after producing written documentation of such use in India. [14] As natural reserve of biological diversity, which is required for any crop improvement activity, developing countries have shared this reserve freely for global needs, without any compensation of any sort, leave alone, an acknowledgement.[15] There are special areas of concern to India, and that includes its rich traditional knowledge base, in particular its great strength in traditional medicine. Indeed, traditional medicine (TM) plays a crucial role in health care services and the health needs of a vast majority of people in developing countries, including India. The protection of TM under intellectual property rights (IPRs) raises two types of issues. First, to what extent is it feasible to protect the existing

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13 *Supra note* 7, 2005, p.140.

14 Jayshree Watal, *Intellectual Property Rights in World Trade Organisation. The Way Forward for Developing Countries.* 2000, p. 174.

15 Sudha Mysore, "Adoption and Implementation of Intellectual Property Rights: Experience of Selected Countries" *Journal of Intellectual Property Rights*, Vol. 7., 2002, p. 34

IPR system? Patents or other IPRs may cover certain aspects of TM. There have also been many proposals to develop *sui generis* systems of protection. Such proposals are based on the logic that if innovators in the 'formal' system of innovation receive compensation through IPRs, holders of traditional knowledge should be similarly treated.[16]

1.4 Relation Between TRIPS AND CBD

The CBD does not restrict the patenting of natural resources in the form of genetic resources, but proposes benefit sharing with the country of origin. The convention confirms the sovereign rights of the country of origin on its natural resources. The only respite given in TRIPs is to generate member's own *sui generis* system and relaxation of leaving certain subject matter in national interest out of the purview of patents had succeeded to get the developing countries during Uruguay Round to be agreed for inclusion of TRIPS in the Negotiation.

Article 16.3 of the CBD addresses the issue of access to and transfer of technology, which makes use of genetic resources to those countries, particularly developing countries, which provide the genetic resources. Article 15 supports this by providing that sharing of results of research and development and the benefits arising from the commercial and other utilization of genetic resources should take place in a fair and equitable way, and upon mutually agreed terms, with the party providing such resources. Whereby, in textual form, the TRIPS Agreement seeks to balance the objectives of promoting technological innovation and facilitating access to and transfer of technology through the provision of appropriate standards of intellectual property protection. It, therefore, reinforces the right of governments to adopt measures to prevent abuse of intellectual property rights by rights holders or practices that

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[16] R.A. Mashelkar, "Protecting Intellectual Property" available on http://www.indiaseminar.com/2005/547/547%20r.a.%20mashelkar.htm accessed on 15th March, 2009.

adversely affect technology transfer.[17] The TRIPS Agreement provides for the minimum standards of protection, meaning that WTO members are free to adopt higher standards of intellectual property rights protection if they deem fit. Furthermore, WTO members are free to determine the appropriate method for implementing the Agreement within their own legal system and practice.[18]

Article 8 of TRIPS appears to support this by providing that while formulating their intellectual property laws, WTO members can adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development. Therefore, this article appears to give fairly a broad discretion to WTO members to evolve national legislation that suits their development needs. So for instance, members may decide to restrict research or the development or use of technology to suit their development. But measures adopted by members must be consistent with the provisions of the Agreement. However, technology transfer clause(s) exists in many articles of the TRIPS Agreement but the result depends upon capacity of the recipient to absorb and use the technologies. The TRIPS provide for *sui generis* system in case of plants patenting but no clear cut guidelines are formed.

The relationship between TRIPS and CBD has given rise to many issues and many policy makers and members of civil society are concerned that the TRIPS agreement promotes private commercial interests at the expense of other important public policy objectives, those contained in the CBD; TRIPS agreement is creating serious challenges to the successful implementation of the CBD, including in relation to access and benefit sharing, protection of traditional

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17 *TRIPs Agreement*, 1994, Article 8.
18 *Id.*, Article 1.

knowledge, technology transfer and the conservation and sustainable use of biodiversity.[19]

1.5 North South Confrontation

The review of Article 27.3(b), currently taking place in the TRIPS Council, has revealed that the WTO membership is unclear as to what an *effective sui generis system* is or should be, leaving the matter completely open to interpretation. Some developed countries argue that the model provided by UPOV is the best *sui generis* system to date. The countries of the South are full of natural resources and genetic wealth. The countries who do have technological advancement do favour patenting for life forms and those with high levels of biodiversity, but lower technological development differ from these countries. The countries with advanced technology and financial resources are more inclined to accept the IPR based systems that support technological value added but negate traditional and local community rights.

The USA has not till date ratified the CBD and this shows the intention of US as how they are eying to explore the natural wealth of the southern countries which have been very rich in biodiversity. The developing countries have gone for *sui generis* system but allowed patenting of micro organisms and natural occurring genes which will indirectly destroy the basics of the CBD. It has been suggested that cultivated plants may be subject to a specialized form of protection, e.g. Plant Variety Protection (PVP) as prescribed by the International Union for the Protection of New Varieties of Plants (UPOV). However, Article 27.3(b) does not refer specifically to UPOV or PVP. TRIPS had given the flexibility to member countries to opt for any means at par with patents. The basic objective of these

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[19] WWF, CIEL, 2001, pp. 11-12 quoted by Carlos M Correa, "Intellectual Property Rights under WTO and Animal Genetic Resources" *Journal of Intellectual Property Rights*, Vol. 7 January 2002, p. 21.

flexibilities was, however, with a view to develop the farming sectors of the developing countries but in other sense the developed countries had made the developing countries to accept the negotiation in Uruguay Round by relaxing some norms that too with the clause of reviewing Article 27.3 of TRIPS within four years after coming into force.

The inclusion of microorganisms as life forms capable of being patented pursuant to Article 27.3(b) is a result of the developments in national case laws. The practice of extending intellectual property rights to life forms has been started in many developed countries. For over 200 years living organisms had been excluded from patent laws; life forms were considered a "product of nature" and not a human invention. The non-patentable status of living organisms changed with the landmark decision of the Supreme Court, USA in *Diamond vs. Chakraborty* in 1980, when a genetically modified bacterium was granted a patent. The United States of America believes that an exception to patentability, authorized by Article 27.3(b), is unnecessary and, therefore, treats plants and animals and non-biological and microbiological processes as patentable subject matter under its patent law. Naturally occurring plants and animals, however, are not patentable subject matter under Section 101 of the U.S. Patent Law.

Prior to 1980, the U.S. Patent and Trademark Office had interpreted Section 101 of the U.S. Patent Law, with some notable exceptions, as not intended to cover living things such as laboratory created micro-organisms, since Section 101 states that utility patents are available for "any new and useful process, machine, manufacture, or composition of matter..." In the score of years following that landmark decision, the U.S. Patent and Trademark Office has consistently granted patents on such micro-organisms, including unicellular organisms, bacteria, yeast, fungi and other living organisms, and on non-biological and microbiological processes. In addition, the U.S. Patent and Trademark Office grant patents on both

plants and animals. The United States views that change in the interpretation of the U.S. Patent law as extremely fortuitous. [20]

In India too, on 15.1.2002. the Kolkata High Court granted a patent to Dimminaco A.G. for an invention involving micro-organisms, opening up new opportunities for obtaining patents in India on micro-organisms related inventions which were earlier not granted.[21] A patent has been granted by European Patent Office to Biocyte for use of any stem cell from umbilical blood whereby mother cell of blood when introduced into the diseased part of the body can repopulate with new healthy blood cells.[22]

Life and living beings were considered the product of nature, created by god and not to be owned by private individuals. It was only in 1980's when departure from conventional patent law was witnessed.[23] While developed countries, notably the USA, find no inconsistencies between the two treaties, several developing countries have indicated the need to reconcile them, possibly by means of a revision of the TRIPS Agreement.[24]. Thus, the relationship between intellectual property rights and the traditional knowledge is of prime importance to developing countries in particular.

The grant of patents on non-original innovations which are based on what is already a part of the traditional knowledge of the developing world, have been a cause of great concern to the developing world. It was CSIR that challenged the US patent No. 5, 401, 5041, which was

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20 Council for Trade Related Intellectual Property Rights, communication from US, Review of the Provisions of Article 27.3(b), IP/C/W/162, Oct. 29, 1999, para 2.

21 Suresh Sukheja, "*Patenting of Micro-Organisms in India*" FICCI May, 2008. Available on http://www.ficci.com/ipr/may2008.pdf

22 Justice Markandey Katzu, "Intellectual Property Rights and Challenges Faced by the Pharmaceutical Industry", 2004, SCC (j), 52.

23 For detail See, N.S Sreenivasulu., C B Raju, Shetty H Shekhar, "Patenting Genetically Modified Life Forms : Legal Issues and Challenges", *Indian Bar Review* Vol. XXXII (3&4), 2005, p. 498

24 Carlos M Correa, "Intellectual Property Rights under WTO and Animal Genetic Resources" *Journal of Intellectual Property Rights* Vol. 7, January, 2002, p. 21.

granted for the wound healing properties of turmeric. In a landmark judgment, the US Patent Office revoked this patent in 1997, after ascertaining that there was no novelty; the findings by innovators having been known in India for centuries. This case was followed by yet another case of revocation in May 2000 (Neem Patent, EPO patent no. 436257). India filed a re-examination request for the patent on Basmati rice lines and grains (US Patent No. 5,663,484) granted by the USPTO, and Ricetec Company from Texas decided to withdraw the specific claims challenged by India and also some additional claims.[25]

The grant of patents linked to indigenous knowledge of the developing world needs to be addressed jointly by the developing and the developed world. A recent study by an Indian expert group examined randomly selected 762 US patents which were granted under A61K35/78 and other IPR classes having a direct relationship to medicinal plants in terms of their full text. Out of these patents, 374 patents were found to be based on traditional knowledge, not that all of them were wrong.[26] Therefore, the concern of the governments of the third world countries seems to be justified for non-original inventions in the traditional knowledge systems of the developing world. At the international level, there is significant support for opposing the grant of patents on non-original inventions. For example, more than a dozen organizations from around the world got together to oppose the EPO neem patent and the entire process took five years.

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

Indian Government has passed *"The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, 2006"

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25 *Supra note* 16.
26 *Ibid.*

in December 2006. Section 3.1(k) of the Act has particularly mentioned that Schedule Tribes and other forest traditional dwellers shall have the right of access to biodiversity and provide community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity. This Act has for the first time recognized the rights over the traditional knowledge of the community who for generations are using that as a matter of right. For the first time, the law recognizes and vests forest rights in scheduled tribes and other traditional forest dwellers, thereby undoing the historical injustice done to them. Recognizing such rights for forest dwellers brings along a challenging process for determining what exactly these rights are and developing the processes to protect them. The implementations of this Act will be a challenge to the Government in coexistence with the TRIPs norms. How does the foreigners and MNCs react or conforms to this is to be seen in future.

1.6 Review of Article 27.3(b)

Though not many years have elapsed since the general entry into force of the TRIPS Agreement, several proposals have already been submitted in order to review it. Some of these cover areas that belong to the "in-built agenda" (UNCTAD 1999), that is, issues relating to geographical indications (Article 23.4), the patentability of biological inventions (Article 27.3(b)) and "non-violation" cases (Article 64). There are, in addition, many proposals that go beyond such limited review. Regarding review of Article 27.3(b) the member countries of WTO has submitted their representations before TRIPS council and holds different views regarding aspects relating to relations between TRIPS and CBD, IPR's and Traditional Knowledge, patenting of micro-organisms and genetic sectors or life forms. The Developing Countries along with Least Developed Countries had been successful in exercising pressure as a collective house upon developed world or industrialized countries which was instrumental in incorporating the provisions in Uruguay Round of multilateral trade negotiation.

The Doha Ministerial Conference held in November 2001 had also unanimously concluded on the note that certain issues of Trade Related Aspects of the Intellectual Property Rights (TRIPS) would be negotiated and reviewed. Among other issues discussed the issues regarding Review of Article 27.3 (b) relating to patentability of micro-organisms and non-biological and micro-biological processes; and Review of implementation of TRIPS Agreement under Article 71.1 and other relevant new developments pointed out by the member countries regarding this Article; were the highlights. At Doha it was also speculated to examine the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and protection of traditional knowledge (TK) and folklore; The Doha Ministerial Declaration also laid down stress upon that while undertaking the Work Programme relating to TRIPS Agreement 'the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of TRIPS Agreement and shall take fully into account the development dimensions arising from the mandate of the Work Programme.[27] Another important thing the TRIPS Agreement holds is the Article 71.1 which runs as "The Council shall, having regard to the experience gained in its implementation, review it in two years after that date and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement".

Countries may, therefore, want to keep their options open in relation to the provisions of Article 27.3(b) of the TRIPS Agreement and avoid any narrowing of the options for IP protection in the conventional future. Article 27.3(b) allows them to exclude from patentability of plants and animals but not micro-organisms. It also requires them to provide for the protection of new plant varieties using patents, or an effective *sui generis* system, or a mixture of both. This Article has caused

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[27] Declaration on the TRIPS Agreement and Public Health Ministerial Conference Fourth Session Doha, 9-14 November 2001, WT/MIN (01)/DEC/2 20, November 2001, Para 19.

controversy in both developing and industrialized countries and the negotiators included the requirement to review its provisions in 1999. This was to be done by the Council for TRIPS at WTO but the deadlock still persists.

The International Union for the Protection of New Varieties of Plants (UPOV) was adopted in its first Convention in 1961 and revised three times in 1972, 1978 and 1991. The main aims of the Convention are to promote the protection of the rights of breeders of new plant varieties and the development of agriculture. The modification of the Convention in 1991 sought to maintain the effectiveness of breeders' rights in the face of changing technologies. A key addition was designed to prevent genetic engineers from adding single genes to existing varieties and exploiting the modified variety with no recognition of the contribution of the breeder of the existing variety. Such modified varieties are now seen as 'essentially derived' varieties and may not be exploited without the consent of the original breeder.

During past some years the Council for TRIPS, has discussed the issue of the implications of patent protection in respect of life forms and *sui generis* plant variety protection for access to, and transfer and dissemination of technology. The three main agendas in the review structure are the Art 27.3(b), relationship between TRIPS and CBD and the protection of traditional knowledge and folklore. Discussions have also been in number of other issues such as capacity building of the developing countries and least developed countries and technology transfer to these countries to fulfill the objectives of Article 7 of the TRIPS.

In the discussion, one view has been to put emphasis on the concern that intellectual property rights in respect of life forms and genetic material could impede access to, and raise the cost of technology in this area, by virtue of the exclusive rights given to right holders to prevent others from using the protected technology. Whereas the African Group has said that the issue of whether and how IPRs such as patents and plant breeders' rights lead to the relocation of investment, transfer and

dissemination of technology and research and development in developing countries needs to be examined.[28] United States in response, has said that full implementation of TRIPS provisions, including those in Article 27.3(b) by developing countries, would build confidence among investors, both domestic and foreign, stimulating investment in innovative and creative businesses in these countries.[29] Japan supporting the US view had further reiterated that where technology is in the hands of the private sector, it can be transferred most effectively through market mechanisms such as licensing and that for licensing agreements adequate intellectual property protection is an important premise. Experience shows that the benefits to recipients and users of technology exceed the cost of acquiring that technology and they can in time themselves become producers of the follow-up technology.[30] The importance of the patent system for discouraging secrecy and its disclosure requirements for facilitating the dissemination of technological and scientific knowledge has already been referred to.

European Communities are stressing that access by the developing world to these important technologies, as well as their capacity to deal with the potential risks associated with these technologies remains limited. Agricultural technology and biotechnology in particular are, therefore, important issues to be nailed in the context of transfer of technology and capacity building.[31]

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28 See "Review of the Provisions of Article 27.3(b), Communication from Mauritius on Behalf of the African Group" , IP/C/W/206, 20 September 2000.

29 See Communication from the United States - Views of the United States on the Relationship Between the Convention on Biological Diversity and the TRIPS Agreement, 13th June 2001, IP/C/W/257. Also see Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, views expressed by US, IP/C/M/29, 6 March 2001, para. 184.

30 See Review of the Provisions of Article 27.3(b) – Communication from Japan, IP/C/W/236. 11 December, 2000.

31 Review of Article 27.3(B) of the TRIPS Agreement, and the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge and Folklore, IP/C/W/383, 17 October, 2002, para. 15.

By means of a communication, dated 2 March 2004, the delegations of Bolivia, Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela submitted a Checklist of Issues on the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) with the aim of facilitating more focused, structured and result-oriented discussions on this issue.[32] These countries were in favour of establishing a relationship of mutual supportiveness and harmony between the TRIPS Agreement and the CBD would, therefore, enhance the credibility of the patent system by contributing to the realization of the stated principles and objectives of TRIPS itself. In this context, the TRIPS Agreement and the CBD could be seen as two sides of the same system, aimed at promoting a consensual access to and sustainable use of genetic resources, whilst ensuring the fair and equitable sharing of the benefits arising out of the utilization of the components of biodiversity.[33] The countries that are technologically developed are keen to review the provisions of the TRIPS mentioned in Article 27.3 (b). In 2006 they represented to TRIPS Council that[34] plant and animal inventions, as well as other biotechnological inventions, should be accorded adequate patent protection, in the same way as inventions in other fields of technology, in order to promote private sector investment in inventive activities that contribute to solving problems in both developed and developing countries in areas such as agriculture, nutrition, health and the

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32 See "The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity (CBD) - Checklist of Issues, 2 March, 2004" presented by Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela IP/C/W/420 and IP/C/W/420/Add.1. "Request of Bolivia to be Added to the List of Sponsors of Document" 5th March, 2004.

33 See "The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity (CBD), and the Protection of Traditional Knowledge - Elements of the Obligation to Disclose Evidence of Prior Informed Consent under the Relevant National Regime", Document presented by Bolivia, Brazil, Cuba, Ecuador, India, Pakistan, Peru, Thailand, Venezuela IP/C/W/438, 10 December, 2004.

34 Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, Views expressed by Japan, IP/C/M/32, 23 August, 2001 para. 142; Switzerland, IP/C/M/30, 1 June 2001 para 161 and United States, IP/C/M/39 , 21 March 2003, para 114.

environment; for this purpose to be adequately met, it is necessary to have international rules for the protection of plant and animal inventions rather than relying on differing national rules.[35]

Another view that has been expressed by developing countries including India was that patents on life forms give rise to a range of concerns, including in regard to development, food security, the environment, culture and morality: These include:[36]

- concerns relating to the implications of patent protection in the field of plants for access to, and the cost, re-use and exchange of, seeds, by farmers, as well as concerns about the displacement of traditional varieties and depletion of biodiversity.

- concerns relating to the grant of excessively broad patents, which do not fully meet the tests of patentability and the consequent problems of "bio-piracy" in respect of genetic material and traditional knowledge and of the costs and burdens associated with the revocation of such patents;

Another area of concern has been the view that present international arrangements, which it has been said protect the interests of innovators but do not adequately protect the countries and communities that supply the underlying genetic material and traditional knowledge, need rebalancing, in particular to make the principles of the CBD in regard to prior informed consent and benefit sharing more effective. Most developing countries feel that the attempt by the TRIPS Agreement (Article 65) at a global standardization of patent laws is in conflict with the thrust on 'diversity' by the Convention on Biodiversity (CBD). They feel that intellectual property rights must not be in conflict with

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35 Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, Views expressed by Singapore, IP/C/M/25, 22 December, 1999 para 80.

36 Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings and Views Expressed by India, IP/C/M/25, 22 December, 1999, para 70, & IP/C/M/24, 17 August, 1999, para 80.

conservation and sustainable uses of biodiversity, an issue that been neglected by those who composed the TRIPS Agreement. Since the majority of the people in the south depend on biodiversity for their livelihoods and survival, the hijack of their resources and knowledge through IPRs is the hijack of their lives and livelihood.[37]

1.6.1 Indian Vis a Vis Developing Countries' Stand

India and Kenya have another view that has been expressed, is that patents on life forms give rise to a range of concerns, including in regard to development, food security, the environment, culture and morality.[38] Therefore, many developing countries have pressed to retain the exceptions, but provide clarification or definitions of certain terms used in Article 27.3(b), especially with a view to clarify the differences between plants, animals and micro-organisms;[39] and asking for either amendment or clarification of Article 27.3(b) to prohibit the patenting of all life forms, more specifically plants and animals, micro-organisms and all other living organisms and their parts, including genes as well as natural processes that produce plants, animals and other living organisms.[40] It has also been suggested that the Article should be amended to prohibit the patenting of

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37 Vandana Shiva , "Intellectual Property Protection in North/South Divide", in Christopher Heath, and A K Sanders *Intellectual Property in The Digital Age.*(eds.) Kluwer Law international , Hague, 2001, p. 113.

38 Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, Views expressed by India, IP/C/M/25, 22 December 1999, para. 70, & IP/C/M/24, 17 August, 1999, para 80; Views expressed by Kenya, IP/C/M/28, 23 November 2000, para. 143.

39 Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, Views expressed by Brazil, IP/C/M/30, 1 June, 2001, para 156 and 183, views expressed by India, IP/C/M/26, 24 May, 2000, para 55.

40 Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, Views expressed by India, IP/C/M/29, 6 March, 2001, para 163, Views Expressed by Kenya, IP/C/M/28, 23 November, 2000, para 146, IP/C/M/40, 22 August, 2003 para 109.

inventions based on traditional knowledge or those that violate Article 15 or other provisions of the CBD.[41]

India has particularly suggested that it should be made clear that parts of plants and animals are excludable from patentable subject-matter[42]and raised questions, whether biological material such as cell lines, enzymes, plasmids, cosmids and genes should qualify as micro-organisms?[43] Whether the mere act of isolation of genetic material from its natural state would satisfy the test of non-obviousness or of the inventive step?.[44]

The view has been expressed that the negotiating history of the TRIPS Agreement shows that the negotiators were not able to agree that the task of isolating a bacterium would satisfy the inventiveness test.[45] Ratifying the Indian stand Brazil has also said that, however, costly it may be today to isolate a micro-organism, in many instance it may correspond better to a mere discovery than to an invention. [46] Members should be able to limit the grant of patents in respect of micro-organisms to those that had been trans genetically modified and satisfy the requirements of patentability.[47]

Whereby contending this issue, Japan, Switzerland and US said that mere discoveries not involving human intervention, are not considered

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41 See Communication from India, 12 July 2000, IP/C/W/196; Also see Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, Views expressed by Kenya, IP/C/M/40, 22 August, 2003, para 107.

42 See Review of the Provisions of Article 27.3(b) - Communication from India 3 November, 1999, IP/C/W/161.

43 *Ibid.* Also see Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, Views expressed by India, IP/C/M/25, 22 December, 1999, para 70.

44 Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, Views expressed by India, IP/C/M/29, 6 March, 2001, para. 161; also see views expressed by Zimbabwe, IP/C/M/39, 21 March, 2003, para. 112.

45 Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, Views expressed by India, IP/C/M/29, 6 March, 2001, para. 161.

46 See Review of Article 27.3(b) - Communication from Brazil, IP/C/W/228, 24 November, 2000.

47 *Ibid.*

patentable subject-matter. [48] Examples have been given to illustrate the point, relating to ores, natural phenomena, chemical substances or micro-organisms found in nature. Life-forms in their natural state would not satisfy the criteria for patentability in the TRIPS Agreement.[49]

The Group of African countries wide different communications has suggested that the Council for TRIPS should adopt a Decision on Protecting Traditional Knowledge (TK)[50] which affirms that: TK and inventions of local communities should be protected under a special regime either under IPRs or *sui generis* systems. Local communities and national authorities shall have exclusive rights in perpetuity to any information documented or entered into public registers, to prevent any access or use they have not expressly authorized or any application that is inconsistent with the rights of local communities under this Decision.

The existence of TK in any form or in any stage defeats novelty, inventiveness and originality for the purpose of patent or copyright protection. No intellectual property rights shall be granted on anything derived from or based on TK or *in situ* genetic resources without compliance with the Convention on Biological Diversity; any breach of this principle shall result in nullification of any such IPRs.

On the other hand, one group of industrialized countries who had been anchors for implanting IPRs in the trade Negotiations opines otherwise

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48 Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, Views expressed by Japan, IP/C/M/29, 6 March 2001, para. 151, Views expressed by Switzerland, IP/C/M/30, 1 June 2001, para 164.

49 Council for Trade Related Aspects of Intellectual Property Rights, Minutes of the Meetings, Views expressed by United States, IP/C/M/28, 23 November, 2000, para 131, IP/C/M/25, 22 December 1999, para 71, and Review of the Provisions of Article 27.3(b) - Further Views of the United States - Communication from the United States, IP/C/W/209, 3rd October, 2000.

50 Council for Trade Related Aspects of Intellectual Property Rights, Joint Communication from African Group IP/C/W/404 of 26 June, 2003.

as they want to explore this wealth of developing countries commercially by restricting the use by patenting inventions created by use of natural or genetic resources. Developed countries had been in favour of a patent regime where all the inventions including plants and animals, micro-organisms are patentable.

The review is also seen as part of a wider process that will determine what choices countries will have over their access to, sustainable use of, trade in and benefits arising from the use of plants, animals and biological processes. There is concern that the results may affect a nation's capacity to provide food and livelihood security for its citizens. Despite the ongoing review, most developing countries have already TRIPS-compliant legislations in place. Least developed countries have until 1 January 2016. It is almost clear that it is very difficult to escape the conclusion that a full and thorough review of Article 27.3(b) is imperative. The efforts for forcing any inappropriate legislation upon developing countries and their farmers, it is important to seriously review the Article as originally agreed and clarify its scope, meaning and objectives taking into account all these interests and concerns. One of the Round of WTO Ministerial Conference at Seattle had already witnessed the worldwide anger of the farmers especially of developing countries leading to failure of talks.

1.7 Conclusion and Suggestions

The countries of the south are full of natural resources but could not explore them due to fragile patent regimes and lack of financial resources to utilize in research. The fear ahead may develop that the knowledge which we all have may be a far dream for us in future. Developing countries are demanding that when profits are gained through bioprospecting the benefits and technologies developed should be shared with the original suppliers of the generic sources or traditional knowledge.[51] The CBD reaffirms that countries have sovereign rights

[51] Jayshree Watal, *Supra note* 14, 2000, p. 17.

over the genetic resources in their jurisdiction and calls for the fair and equitable distribution of the benefits arising out of the utilization of genetic resources. The problem lies in the ambiguous wording and lack of credible enforcement mechanism for the provisions of the CBD.

Since, it is an established fact that the inclusion of the TRIPS at Uruguay Round Negotiation was primarily the effort of developed world and that too at the behest of it's multinationals. When they were finding it difficult to curb the reverse engineering methods adopted by the industries of developing countries, the solution was only the harmonization of patent laws to the tune of developed countries. The patent laws formulated by third world according to its suitability were main reason for development of their industries. The harmonization of the patent laws in some context was a solution to their hegemony over the market and they, however, managed to inculcate this by bringing TRIPS provisions in the ambit of WTO. The package deal compulsion and sanction threat was also responsible for the developing and LDCs to finally bow to the pressure of the north. The lollipop was, however, given to developing world in the form of putting some exception to the Article 27 that too with the condition of review after four years from its implementation in 1999. But this time the developing countries have nothing to lose and collectively they have resisted this till date and had been bargaining for the protection of their interests. The doing away with the flexibilities will have far -reaching and even irreversible, adverse consequences for the country's economy and polity, particularly for the peasantry and working classes. Still, there are doubts that the Uruguay Round obligations were made in a non-transparent manner. Now, it is an acknowledged fact that developing countries were burgled in that round and it turned out to be a severely adverse bargain. The interest of the developing nations are increasingly neglected in our contemporary global community which is dominated by developed nations as the trade and commerce of developing countries is going to be enriched with a rapid speed as they are rich in biological resources and traditional knowledge (TK), and the industrialized countries are not able to tolerate this enrichment as it is adversely affecting their trade. The

other major controversy is that the existing TRIPS agreement forces all countries to accept a medley of new biotech patents covering genes, cell lines, organisms and living processes that turn life into commodities. Governments all over the world have been persuaded into accepting these 'patents on life' before anyone understood the scientific and ethical implications.

Keeping in view above stated facts the following suggestions can be made;

1. The review of TRIPS must be held giving CBD and TK due consideration by resolving a compatible solution.
2. In the ongoing review of the patentability of micro-organisms and non biological and Micro -Biological processes, India should argue authoritatively for the exclusion of these subjects matter from patentability.
3. The issues of access to biological resources, prior informed consent and benefit sharing should be pursued in the WTO in line with the CBD.
4. The member countries who do not acquire sufficient technological base must be allowed to have some relaxations for some extra period and efforts should be honestly made to develop their technological base.
5. The clear cut definitions should be given to terms included in Article 27.3 so as to avoid ambiguity in its implementations.
6. India along with other developing countries should press for a review of TRIPS in the broader context of reviewing its impact and pressing for changes in the Agreement itself on the basis of experience the countries do have in practical aspects.
7. Expedite negotiations on Protection of Geographical Indications in the WTO, in order to extend it to agriculture, natural goods, manufactured goods or any goods of handicraft or goods of industry or food stuff on the lines elaborated earlier.
8. Transparency should be maintained while discussing these matters at negotiations and while accepting any norms, Parliament should be taken into confidence.

9. Possible mechanisms for additional protection of indigenous knowledge to support innovation and biological diversity conservation should be made by equitable sharing of the benefits arising from the contributions, including elements using traditional knowledge, made by indigenous and local communities.

10. The best solution for the time being till going for comprehensive review, another clause can be added to Article 27 as Clause (4) whereby inventions derived from biological materials and TK already in public domain can be kept out of purview of patents.

11. If comprehensive review takes place, it must be assured that the right of WTO Members to implement measures to ensure a balance of rights and obligations is retained. WTO Members should examine the potential anti-competitive effect of strengthened intellectual property rights, to fully implement Article 40. The other provisions which require close look are the provisions relating to compulsory licenses as permitted by Article 31 of TRIPS and the wording in Article 27 regarding working of the patent rights. The words 'or imported' needs itself be reviewed.

12. The objectives and principles laid down in Article 7 and Article 8 of TRIPS Agreement are supported by the preamble to the TRIPS Agreement, which desires to ensure that "measures and procedures to enforce intellectual property rights do not themselves become a barrier to legitimate trade" and the need for "effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems". Therefore, the transfer and dissemination of technology is the essential objective of TRIPs Agreement as well as of whole WTO Agreement as preamble enunciates the objective of raising the standards of living and expanding the production of trade in goods and services. It requires a balanced mechanism to look into whether it is being achieved or not?

Article 8.2 similarly acknowledges that WTO Members may need to develop appropriate measures to prevent the abuse of intellectual property rights by rights holders, or the resort to practices that unreasonable restrain trade or affect the international transfer of technology. Therefore, to ensure any misuse, an agency to check all these developments are required at international level.

ROLE OF DEVELOPING COUNTRIES IN SHAPING ANTI-DUMPING LAW

Dr. P. Sree Sudha*

Liberalization, Privatization and Globalization also known as LPG have tremendously changed the functioning of the developing and developed economies. As the developing economies discard their trade restrictions and open their markets for trade in goods and services, a number of new issues are emerging.[1] One of the important issues in trade led development is the use of anti-dumping provisions by the developing country Governments in dealing with the problem of dumping. Dumping is defined as the sale of goods at a lower price in the international market compared to the domestic market.

From the beginning the developing countries supported multilateral efforts to regulate Anti-dumping actions, even though there were some basic disagreements between them and the developed countries. Initially, the main difference was over the categories of dumping to be subjected to multilateral control. The developing countries argued that all known types of dumping at the time namely, price dumping,[2] exchange dumping,[3] social dumping,[4] and service dumping,[5] should be regulated. The

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1 Kufuor "The Developing Countries and the Shaping of GATT/WTO Antidumping Law", *Journal of World Trade* No.32, Vol. 6, 1998, pp.167-196.

2 See, for further details "A Study on Special and Differential Treatment in the WTO Agreements". Center for Research and Training AALCO Secretariat; Asian African Legal Consultative Organization, New Delhi, India. Accessed from the web site: http://www.aalco.org/A%20Study%20on%20Special%20and%20Differential%20Treatment%20in%20the%20WTO%20Agreements.pdf.Last visited 20th March 2006.

3 Dunn, Alan M "Antidumping." In Stewart, Terence P., (ed.), The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation, Washington, DC: American Bar Association, 1996, p. 246.

4 Chad P. Bown The WTO and Anti-dumping in Developing Countries Department of Economics & International Business School, Brandeis University July 2006 Web Site : http://www.brandeis.edu/~cbown/ Last visited 19th June, 2010.

developed countries, however, wanted to have a restricted definition of dumping which would exclude the latter three categories of dumping from international consideration. Finally, the definition of dumping adopted in GATT Article VI was one proposed by developed countries.[6] Article VI does not specifically mention the need to consider the particular concerns of the Contracting Parties of the developing countries. However, ostensibly, a concern to their interests can be found in paragraph[7], which sets out provisions specific to the dumping of primary products; these being the developing countries' main exports. The increased use of trade remedy measures by developing countries in the recent years has witnessed a gradual increase.

Until approximately two decades ago developed countries were the main users of such measures. Furthermore, many of those measures were targeted against imports from developing countries and transition economies. Since then, the situation has changed dramatically and developing countries particularly those that are at a higher stage of development – have become important users. Among the trade remedy measures used, the bulk has taken the form of anti-dumping measures.[8] In the free trade regime since the developing countries are exposed to competition from the imports of foreign companies the developing countries are using anti-dumping mechanism to create a level playing field.

The ability of these countries to maintain open trade policies and to further liberalize their external trade of course is becoming increasingly dependent on how far they have been able to establish viable and effective institutional frameworks for applying trade remedy measures, like

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5 See also, Jackson (1969), World Trade and the Law of GATT at pp. 401–424.

6 Compare Stewart, 'Antidumping' in The GATT Uruguay Round: A Negotiating History (1986–1992), Vol II, 1993, pp. 1406–1409.

7 Krishna, Raj (1997) Anti-dumping in Law and Practice, World Bank working paper No. 1823, 1997.

8 Messerlin, Patrick and Tharakan, P.K.M. 'The Question of Contingent Protection, *World Economy*, No. 22 (9), 1999, p. 1251.

safeguard actions, anti-dumping and countervailing duties. At this juncture the aim of this paper is to discuss the stand of developing countries in WTO ministerial conferences starting from Kennedy Round to Recent Hong Kong Ministerial conference, next section focuses on problems encountered by developing countries in applying anti-dumping measures, next section deals with the aspect of Special and Differential Treatment and examine its usefulness in matters of dumping, further it throws some light on popular cases on anti-dumping where India is a party and finally ends with a conclusion and suggestions.

1.1 Stand of Developing Countries in Ministerial Conferences

1.1.1 Kennedy Round (1963-67)[9]

The contribution and influence of the developing countries in the shaping of the Anti-dumping Code at *Kennedy Round* was minimal. At the time of *Kennedy Round* trade talks, the contracting parities addressed the issue of dumping.[10] They proposed a footnote to this Article that would have allowed for reference to third country export prices in their domestic markets whenever they were alleged to be dumping.[11]

1.1.2 Tokyo Round (1973)

The *Tokyo Round* had been launched at the end of the ministerial meeting held in Tokyo September 1973, in which it was declared that

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9 It is also called 1967 Code.

10 "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or which the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin."

11 John W. Evans, *United States Trade Policy : New Legislation for the Kennedy Round*, Harper and Row, New York, 1967, p. 29.

"the negotiations shall be conducted on the basis of the principles of mutual advantage, mutual commitment and overall reciprocity".[12]

During the *Tokyo Round* the Swiss participants devised a formula for downward harmonization of tariffs.[13] Reciprocity continued to play a role because delegations were willing to offers made by others. Therefore, the formula reduction approach eliminated neither the inclination nor the ability of the negotiators to wrangle deals for particular products to be included in the overall package of tariff cuts.[14]

1.1.3 Developing Countries and the 1979 Code

After the adoption of provisions of *Kennedy Round* GATT started giving attention to developing interests in the context of its Anti-dumping framework. GATT working party was established[15] to examine the special problem of the developing countries under *Kennedy Round*, the difficulties they faced in adhering to the *Kennedy Round*, along with proposals for their adherence and for the application of the 1967 Code to their exports. Thus, developing countries argued that at the heart of the solution to this problem would have to be the recognition that in their case it was not sound policy to rely on home

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12 W.A. Brown, an early observer of GATT, has noted that its "its achievements are not only the speeding up and broadening of the process of tariff negotiation through the multilateral-bilateral technique, but the creation of an esprit de corps and a sense of mutual respect and trust among the contracting parties in meeting many common problems."

13 The Swiss formula Z=AX was "generally accepted by the main industrialized countries as a working hypothesis; . . . [however], there were considerable variations in its application. The European Economic Community and the Nordic Countries – followed later by Australia- used the coefficient 16, whereas the coefficient 14 was used by United States, Japan and Switzerland. Canada employed its own formula. These variations were designed to yield an approximately equal average cut in each country's overall tariff. Certain other countries, New Zealand for example, resorted to the item-by-item technique", GATT, The Tokyo Round of Multilateral Trade Negotiations Geneva, April 1971, p. 46.

14 John H.Jackson, Jean-victor Louis, and Mitsuo Matsuhita. "Implementing the Tokyo Round: Legal Aspects of Changing Economic Rules", *Michigan Law Review* 81 December, 1982, p. 364.

15 GATT working party was established in 1970.

market prices or production costs as normal value and all exports from developing countries should be based on international prices for the goods concerned, and not on home market prices or production costs. The representatives of the developed countries admitted that the developing countries pointed out that Article 2(d) of the 1967 Code foresaw that price comparison when there was an unusual market situation in the country of export.[16] However, the Working Party concluded that a compromise on the matter was not possible at the time. "Generally speaking, however, as was the case in the *Kennedy Round*, the negotiations on Anti-dumping during the *Tokyo Round* were mainly conducted by the industrialized countries. Thus, the resulting 1979 Code was again primarily an agreement that catered for the concerns of this group of countries". [17] Finally, concessions to the developing countries were set out in Articles 13 and 14 of the 1979 Code, "Taking into account the particular trade, development and financial needs of developing countries". [18]

1.1.4 Uruguay Round (1986-1994)

The *Uruguay Round* Multilateral Trade negotiations concluded on 15th April 1995 in Marrakech provided elaboration on the basic principles to govern the determination and application of the three main contingent measures namely anti-dumping, countervailing duties and safeguards. Since then contingent protection has evolved into a global phenomenon with an increasing number of countries adopting contingent protection laws and making use of them. The bulk of contingent protection however falls on the instrument of Anti-

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16 In the *Norway-Salmon Case* it was held that there is no hierarchy between two options – using prices when exported to third countries or constructed normal value.

17 Kofi Oteng Kufour, "The Developing Countries and The Shaping of GATT/WTO Anti-dumping Law", *Journal of World Trade* No. 32(6), 1998, p. 189.

18 Miranda, Jorge, Raul A. Torres and Mario Ruiz, "The International Use of Anti-dumping: 1987-1997." *Journal of World Trade*, No.32 (5), 1998, p. 5.

dumping.[19] Antidumping has now become an important trade policy tool for developed and developing countries. Developing countries came up with several proposals during the *'Uruguay Round'*.

During the *Uruguay Round* the review rights of the Panels became an important issue. Developing countries were in favor of broader standards of review for the Panels. This was aimed at checking what they saw as the encroaching protectionist abuse of AD laws. It was argued that the broad discretion which successive AD Codes allow domestic authorities could be counter balanced by allowing the Panels wide powers of review.[20] However, some industrialized countries insisted on a highly restrictive standard review that could compromise the reforms achieved at the *Uruguay Round.*

1.1.5 Singapore Issues (1996)

It was the first WTO ministerial conference held at Singapore in December 1996. In this, developing countries discussed on competition policy, agriculture, anti-dumping, and peak industrial tariffs. A proposal[21] was made regarding desirability of transparency in the injury determination proceedings in anti-dumping. Another problem for the developing countries was the situation where AD investigators accumulated the impact of imports allegedly dumped in their respective customs territories with serious consequences for the developing countries. To tackle this problem, Korea[22] proposed that determinations concerning the existence of material injury to the domestic industry imports that constitute 2 per cent or less of the total market for the like product in the investigating country should not be cumulatively considered with imports from other countries under

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19 McDonald, Brian, *The World Trading System: The Uruguay Round and Beyond,* St. Martin's Press: New York, 1998.

20 Prusa, Thomas J. "On the Spread and Impact of Anti-dumping." *Canadian Journal of Economics*, No. 34, 2001, p. 591.

21 WT/MN (96)/ST/27.

22 WT/MIN (01)/DEC/1.

investigation. Singapore also made submission regarding below cost sales provision of the *Uruguay Round* negotiations. [23]

1.1.6 Geneva Issues (1998)

This is the second Ministerial Conference of WTO, conducted from 18th to 20th May 1998. In this session issues on importance of multilateral trading system, protection of trade interests of developing countries, transparency of WTO operations, frame work for trade expansion and international trade relations among Members were discussed.[24]They also stressed on the points of Singapore for overall development of multilateral trade. There is no special talk regarding anti-dumping in this ministerial conference.

1.1.7 Seattle Issues (1999)

The third ministerial conference of WTO held in Settle in the year 1999. More than 60 percent of the developing country members of WTO have actively participated in this ministerial conference. During the negotiations, developing countries wanted modifications in a wide range of existing Agreements to take into account their trade interests or special problems, including the "operationalzing" of 'special and differential treatment' provisions. They also introduced new subjects into the WTO such as trade and debt, transfer of technology, protection of traditional knowledge, bio resources, and geographical indications on products originating from their countries. [25]

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23 See Welber Barral on "Antidumping Measures: Prospects for Developing Countries", Accessed from the web site: www.ssrnpapers.com, last visited 10th July, 2010, p. 24.

24 Accessed from the web site: www.lexmercatoria.org last visited 25th January, 2010.

25 Press Release/160 of WTO by WTO Director Mike Moore; On "It is vital to maintain and consolidate what has already been achieved", 7 December, 1999 on Seattle Ministerial.

The second area of focus was the reform of existing agreements on Anti-dumping. Anti dumping has become the protectionist's "weapon of choice" in many developed and developing countries alike, but for many reasons, developing-country exporters suffer disproportionately from the use of this weapon.[26] Specific modifications based on their experiences, including prohibitions on investigating and penalizing the same product twice. Their focus[27] on the provisions of ADA is follows:

In order to restrict the initiation of back-to-back investigations, no investigation shall be initiated for a period of 365 days from the date of finalization of a previous investigation for the same product resulting in non-imposition of duties. The lesser duty rule shall be mandatory while imposing an anti-dumping duty against a developing-country Member by any developed-country Member. There shall be an undertaking to this effect under Article 9.1.Article 2.2 shall be clarified so that where sales on the domestic market do not permit a proper comparison, the margin of dumping is determined by comparison with the export price to a third country, and only where this is not representative should the export price be determined on the basis of the constructed value of the cost of the product in the country of origin.

Article 15 of the Agreement on Implementation of Article VI is only a best-endeavor clause. Consequently, Members have rarely, if at all, explored the possibility of constructive remedies before applying anti-dumping duties against exports from developing countries. Hence, the provisions of Article 15 need to be operationalized and made mandatory.

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26 Source: www.isd.org.ministerial.seattle Last visited: 19 May, 2010.

27 Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/354.

The existing *de minims* dumping margin of 2 per cent of export price below which no anti-dumping duty can be imposed (Article 5.8), needs to be raised to 5 per cent for developing countries, so as to reflect the inherent advantages that the industries in these countries enjoy vis-à-vis comparable production in developed countries.

Article 5.8 should also be clarified with regard to the time frame to be used in determining the volume of the dumped imports. The definition of "substantial quantities" as provided for in Article 2.2.1 (footnote 5) is still very restrictive and permits unreasonable findings of dumping. The substantial quantities test should be increased from the present threshold of 20 per cent to at least 40 per cent. Article 2.4.1 shall include details of dealing with foreign exchange rate fluctuations during the process of dumping. Article 3 shall contain a detailed provision dealing with the determination of the material retardation of the establishment of a domestic industry as stipulated in footnote 9.

As developing countries liberalize, the incidence of dumping into these countries is likely to increase. It is important to address this concern, since otherwise the momentum of import liberalization in developing countries may suffer.[28] There should be a provision in the Agreement, which provides a presumption of dumping of imports from developed countries into developing countries, provided certain conditions are met. The annual review provided under Article 18.6 has remained a pro forma exercise and has not provided adequate opportunity for Members to address the issue of increasing anti-dumping measures and instances of abuse of the Agreement to accommodate protectionist pressures. This Article must be appropriately amended to ensure that the annual reviews are

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[28] Also see Chad P. Bown on "The WTO and Antidumping in Developing Countries, JEL No. F13, accessed from the web site: http://www.brandeis.edu/~cbown/.last visited 12 July, 2010, p. 15.

meaningful and play a role in reducing the possible abuse of the Anti-Dumping Agreement.[29]

1.1.8 Doha Issues (2001)

Doha Declaration lists 21 subjects, most of these involve negotiations; other work includes actions under "implementation", analysis and monitoring. This Ministerial conference is responsible for major changes in the anti-dumping laws (Article VI of GATT). At implementation stage also anti-dumping was placed in a top priority. At Doha developing countries concerns on textiles, anti-dumping, subsidies...etc were addressed.

The Ministers agreed to negotiations on the Anti-Dumping (GATT Article VI) and Subsidies Agreements. The aim is to clarify and improve disciplines while preserving the basic concepts, principles of these agreements, and taking into account the needs of developing and least-developed participants. Many of the developing nations in the "Friends of Anti-dumping" group argued that trade remedy action disproportionately affects their economies, and that the Anti-dumping Agreement should require that developed nations provide some form of "special and differential treatment" when investigating products originating in developing nations.[30]

The final language of the Doha Ministerial Declaration regarding trade remedies read as follows:

In light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and

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29 Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda WT/GC/W/355.

30 Source: DOHA.W/MIN (01) dec/w/1 Adopted on 14 November, 2001.

effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices that they seek to clarify and improve in the subsequent phase.[31]

1.1.9 Cancun Issues (2003)

The Fifth Ministerial Conference in Cancun was held in the year 2003 addresses many key issues and problems relating to developing countries and anti-dumping. The developed countries, led by the US and EC, worked very hard to get their agenda accepted opening up markets in the developing world for their goods, services and companies, whilst continuing to protect their own turf especially in agriculture.[32]

During the initial phase of negotiations, participants have indicated the provisions in the two WTO agreements that they would like to clarify or improve in the subsequent phase. More than 100 submissions have been tabled by participants in the 10 formal meetings of the negotiating group held since February 2002, many of them on the Anti-Dumping Agreement. In addition, some participants have made specific proposals for clarifying and improving the Agreements.

Members believe that the existing Anti-Dumping Agreement should be improved to counter what they consider to be an abuse of the way anti-dumping measures can be applied, as indicated by the rising trend of dumping actions and growing number of WTO disputes in this area. An informal group of 15 participants calling themselves "Friends of Anti-

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31 The WTO agreements contain special provisions which give developing countries special rights. These special provisions include, for example, longer time periods for implementing agreements and commitments or measures to increase trading opportunities for developing countries.

32 "What went wrong at Seattle", Accessed from the web site: http://www.sparn.org/document/doooo446/index.php. Last visited 12 February, 2010.

Dumping Negotiations" have tabled many proposals for tightening disciplines on the conduct of anti-dumping investigations.

It has proposed a number of improvements and clarifications to the agreement. Some developing countries have also taken the opportunity to raise in the negotiating group a number of outstanding implementation issues. These issues include "operationalizing" the provision in the agreement (Article 15) for more favorable treatment of developing countries.

1.1.10 Hong Kong Issues (2005)

The sixth Ministerial Conference of WTO was held at Hong Kong in the year 2005. First, negotiators presented formal written papers indicating the general areas in which the participants would like to see changes in the agreements. A compilation of the 141 proposals was published by the Chairman in August 2003, just prior to the Cancun Ministerial.[33]Second, after Cancun ministerial and through other ongoing negotiations, negotiators began discussing their positions in more detail, sometimes proposing legal drafts of suggested changes.[34]

This phase helped negotiators develop a clearer idea of what proponents of specific changes are seeking, and "a realistic view of what may and may not attract broader support in the group."[35] The Chairman's report emphasizes "we are not dealing with ... big picture issues, but with a very large number of highly specific issues" and the result of discussions will be based on the "precise details of the drafting." Therefore, he said,

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33 Simon J. Everett "The WTO Ministerial Conference in Hong Kong: What Next?" WT/MIN(05)/W/3/Rev. 2, paragraph 1, University of St. Gallon and CEPR January, 2006.

34 Dunn, Alan M. "Antidumping." Stewart, Terence P., ed., The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation, Washington, DC: *American Bar Association*, 1996, p. 246.

35 See, World Trade Organization, Negotiating Group on Rules, Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules, Note by the Chairman, TN/RL/W/143, August 22, 2003.

traditional means of arriving at consensus in WTO discussions such as "modalities" may not work in this context.[36]

The Chairman of the Rules Committee further noted that any consensus on changing the ADA, or other trade remedy agreements is likely to involve internal trade-offs on trade remedies in exchange for external linkages that is, perceived successes in other areas of DDA (Doha Development Agenda) negotiations, such as improved agricultural market access or services trade.[37] Others agree, speculating, therefore, that any agreement on changes to trade remedies is not likely to take place until the end of the round.

1.1.11 Hong Kong Ministerial Text

In Appendix D of the Hong Kong Ministerial Declaration issued on December 18, 2005, WTO members reaffirmed that "achievement of substantial results on all aspects of the Rules mandate" is important to the further development of the rules-based multilateral trading system. The document recognized that negotiations, especially on antidumping procedures, have intensified and deepened and that "participants are demonstrating a high level of constructive engagement."[38]

The Group was directed "to intensify and accelerate the negotiating process" and completes the process of analyzing proposals by Participants on the AD Agreement as soon as possible."[39] The Chairman was then directed to prepare consolidated text of the Anti-dumping

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36 WTO, Negotiating Group on Rules on "Report by the Chairman to the Trade Negotiations Committee," TN/RL/16, March 28, 2006, p. 1.

37 See CRS Report RL 32060, The World Trade Organization: The Doha Development Agenda, by Ian Fergusson.

38 World Trade Organization on "Negotiating Group on Rules: Submission from the European Communities Concerning the Agreement on Implementation of Article VI of GATT, 1994 (Anti-Dumping Agreement)." *TN/RL/W/13*, July 8, 2002. [http://docsonline.wto.org]

39 World Trade Organization; Ministerial Declaration: *WT/MIN (01)/DEC/1*, November 14, 2001, paragraph 28.

Agreement based on the previous negotiating papers which will become the "basis for the final stage of the negotiations."[40] The draft document also suggests that WTO members are committed to "enhancing the mutual supportiveness of trade and the environment, note that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector" through prohibiting subsidies that lead to over-fishing and overcapacity.[41] In this context, the draft directs the Negotiating Group on Rules to intensify and accelerate the negotiating process.[42]

1.1.12 Major Issues in Negotiations

The Anti-dumping Agreement, perhaps by design, is somewhat ambiguous. Many countries, especially the "Friends of Anti-dumping," would like to see more in [43] World Trade Organization. Specific definitions and guidelines in order to provide some type of harmony in nations' implementation of trade remedy laws. However, most of the proposals, if implemented, could also lessen the ability of petitioners to obtain relief. Because the Agreement, in essence, is designed to provide general rules for various administrative officials in WTO member countries to follow when calculating dumping margins, determining injury, and granting relief, many of the proposals involve highly technical changes that are beyond the scope of this report.

It is important to note that the Doha Development Agenda ('DDA') mandate specifies that negotiations on trade remedies are intended to "clarify and improve" the WTO Agreements rather than to eliminate them. With this in mind, many WTO members have identified key

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40 WTO Negotiating Group on Rules; Note by the Chairman: "Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules." *TN/RL/W/143*, August 22, 2003, p. 1.

41 See, WTO Negotiating Group on Rules. Report by the Chairman to the Trade Negotiations Committee. *TN/RL/13*, 19 July, 2005, p. 2.

42 *Ibid.*

43 *Supra note* 35.

provisions they seek to address in future negotiations through proposals formally submitted to the WTO Negotiating Group on Rules.[44]

This discussion of DDA negotiations on anti-dumping focuses on suggested changes (1) for which there seems to be broad support among WTO members, and (2) which could potentially result in significant amendment to U.S. laws or administrative procedures.[45] Several of these recommendations could affect methodologies used by authorities to determine injury and calculate dumping margins. Another proposal seeks mandatory termination of AD orders after a specified period.[46]

From the above discussion it is evident that developing countries played a reasonable role in shaping of anti-dumping law in various ministerial conferences of WTO. The following section will throw some light on problems faced by developing countries in applying anti-dumping law.

1.2 Problems encountered by developing countries in applying anti-dumping measures:

Many developing countries do not have the framework needed for applying anti-dumping measures[47] In relation to application of these measuere they are subjected to lot of problems like lack of legal expertise, financial challenges etc., and following section will throw some light on that.

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44 Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules; Note by the Chairman. August 22, 2003, TN/RL/W/143, Available at Web site: http://docsonline.wto.org. Last visited 29 November, 2009.

45 Prusa, Thomas J. "Anticompetitive Effects of Antidumping." Presentation at American Enterprise Institute, March 18, 2004.

46 One representative example of this view is World Trade Organization. Negotiating Group on Rules. "Proposal on Reviews," Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong; China; Israel; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand. TN/RL/W/83, April 25, 2003 [http://docsonline.wto.org].

47 K.D.Raju on "The WTO Appellate Body Jurisprudence On Anti-dumping: A critical review", Accessed from the Web site: http://www.phdcci.in/publicaton /Anti-dumping.pdf. Last visited 12 May, 2005.

1.2.1 In settling anti-dumping disputes

There are number of problems faced by developing countries in settling an anti-dumping dispute. They are primarily:

2.1.2 Lack of legal expertise

Many developing countries suffer from a lack of national legal expertise in WTO matters, both within Government and in the private bar. Diplomatic postings have generally been filled by non-lawyers.[48]Most developing countries have only one or two lawyers to address WTO matters, whether in Geneva or in the home capital. There are few private lawyers in the country knowledgeable about WTO law. WTO law, as opposed to traditional "public international law," has not traditionally been taught in developing countries, although this is changing in some countries. Many developing countries have, as a result, become dependent on education at law schools in the United States and Europe to develop local talent, provided that talent returns home.

Most developing country officials must work in a foreign language in WTO judicial proceedings within this "Anglophone organization".[49] Although English, French and Spanish are the three official languages of the WTO, English predominates. Even French and Spanish-speaking delegates are at a linguistic disadvantage.[50] To participate effectively, developing countries need to master the legal nuances of multiple three-hundred page WTO judicial decisions, often with limited legal training, and to do so in a foreign tongue. Developing countries tuned to adapt from models used by larger developing countries for WTO dispute settlement, such as Brazil, which, in turn, have learned from US and EC models. Like the United States, EC, and Brazil, developing countries can

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48 Hokeman, B., and M. Kostecki, "The Political Economy of the World Trading System from GATT to WTO": *Oxford University Press*, 1995.

49 Anderson, James E., "Domino Dumping II: Antidumping", *Journal of International Economics* No. 35, 1993, p. 133.

50 From the developed countries, Switzerland could be mentioned as an example of a country that has chosen not to adopt any national legislation in this context.

reorganize and better co-ordinate their ministries to target more resources at opening foreign markets for their exports.

Some developing countries have created specialized trade bureaucracies or created specialized dispute settlement units within the foreign ministry. Some have attempted to adopt career paths to ensure greater continuity in WTO representation.

Developing countries could obtain more technical assistance from development agencies and foundations regarding opportunities for them to exercise their WTO rights. The WTO, UNCTAD, and the Advisory Centre on WTO Law are now providing training programs in WTO dispute settlement, which many officials have attended.[51]

Training in dispute settlement rules, however, is not sufficient. A central part of any dispute settlement process is the identification of potential legal claims 'naming and blaming'. The European Commission realized that it lacked such information after the Developing countries could request assistance from development agencies and foundations to help them identify trade barriers, broken down on a sectoral basis. UNCTAD and the World Bank jointly developed a software program named SMART (Software for Market Analysis and Restrictions on Trade) as a tool to assist developing countries during the *Uruguay Round* negotiations. WTO system was established in 1995. It hired consultants to identify and report on sectoral trade barriers, which reports spurred a number of successful WTO complaints.[52]

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51 See Gregory Shaffer, "Can WTO Technical Assistance Serve Developing Countries," in Preparing the Doha Development Round: Challenges to the Legitimacy and Efficiency of the World Trading System (ed.) Ernst-Ulrich Petersmann, Oxford University Press, 2005, On the Advisory Centre on WTO Law (ACWL) program, Accessed from the web site: http://www.acwl.ch/e/training /training_e.aspx (last visited May 10, 2009).

52 Hoeckman B. and M. Kostecki, *The Political Economy of the World Trading System: the WTO and Beyond*, 2nd edition, Oxford University Press, 2001, pp. 94-95. The software has been installed in a large number of developing countries. It

The software permits countries to run a simulation of the trade effects of trade barriers so as to inform their negotiating strategies.[53] Similar systems could be developed for the purpose of WTO monitoring and enforcement. Hoekeman has proposed[54] that an "independent Special Prosecutor or Advocate" be mandated "to identify potential WTO violations on behalf of developing countries," which he terms an "outsourcing of discovery." Such a move would address "both the resource constraints".

1.2.3 Financial challenge

A major challenge faced by developing countries is that they have fewer resources to spend on legal assistance to defend their WTO rights. Their Government budgets are constrained, often compounded by debt obligations, and there are high opportunity costs to investing in WTO litigation as opposed to other social needs. Compared to larger, wealthier Members, developing countries face much higher relative and absolute costs in WTO litigation. Legal costs are relatively fixed for WTO complaints in comparison to trading stakes that vary considerably among members. If the system is sufficiently complex to require a developing country to hire a foreign outside law firm in order to litigate effectively, the attorney's fees would likely cost at least US $400,000, and possibly much more. The US and EC, for example, have respectively participated as a party or third party in around 98% and 86% of WTO cases that resulted in an adopted decision.[55] Because of their prior and ongoing litigation experience, the US and EC face fewer start-up costs for an individual case.

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has been incorporated into UNCTAD's TRAINS system (Trade Analysis and Information System). See http://r0.unctad.org/trains/.

53 The software has been installed in a large number of developing countries. It has been incorporated into UNCTAD's TRAINS system (Trade Analysis and Information System). Accessed from the web site http://r0.unctad.org/trains/. Last visited 12 May, 2010.

54 *Supra note* 52.

55 See Bernard Hoekman, "Strengthening the Global Trade Architecture for Development," 1:1 *World Trade Review*, 1, 2002, p. 36.

In the case ***Chile—Price Band System and Safeguard Measures relating to Certain Agricultural Products***, the Association of Argentine Edible Oil Industries (known by its Spanish acronym as CIARA) paid a law firm US $400,000 just to write the brief "for providing a first draft of the demand and being available for specific consultations," even though this limited legal work was found to be "less useful than expected."[56] Many claims, such as Brazil's against U.S. cotton subsidies, have resulted in significantly greater legal costs.

In the cotton case, it is stated that Brazil's cotton trade association faced legal fees of over US $2,000,000. USA and EC-based multinational firms are willing to pay much more. In the US-EC Boeing Airbus dispute, it is estimated that fees were running at $1,000,000 per month and could reach $20,000,000 for each company if the case is not settled. Each company had hired a major US law firm to represent it so as to provide the respective USA and EC trade authorities with maximum assistance to defend their commercial interests.[57]

From the above reasons it would appear that internal legal costs should be the same for all WTO members, rich and poor. However, the internal costs of bringing an individual case can actually be higher for a developing country, unless legal assistance is subsidized. Since developing countries export a narrower array and smaller value of exports, they are less likely to have experience in WTO litigation. They are less likely, in socio-legal terms, to be "repeat players." Because they do not litigate multiple cases, as do larger countries, they do not benefit from economies of scale when mobilizing resources for a single case. As a result, legal costs in a single case should be higher for a developing country, unless it receives subsidized assistance. In addition, a poor

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56 Panagariya, Arvind 'EU Preferential Trade Policies and Developing Countries', 2002, available online at: http://www.columbia.edu/~ap2231/Policy%20Papers/Mathew-WE.pdf (last visited: 13 July 2010).

57 Staiger, Robert W. Frank A. Wolak, *Measuring Industry Specific Protection Antidumping In the United States*, Brookings Paper and economic Activity: Microeconomics 1994, p. 51.

country, whose population may make less than $2 a day,[58] must consider the greater opportunity costs confronting it on account of its scarce resources. Instead of expending money on outside US or European legal counsel, it could focus on other development and social concerns. Legal expenses have been rising for all WTO members on account of the growing complexity of WTO jurisprudence. Litigation at the international level involves a distant forum in which legal expertise tends to be U.S. and Euro-centric, highly specialized, and expensive. Complainants can face fees ranging from $300-$600 or more an hour when they hire private law firms to advise and represent them in WTO cases.[59] The WTO Appellate Body's more contextualized, case-specific jurisprudence has increased the demand on lawyer time. Increasingly, the WTO Appellate Body appears to be requiring higher standards of proof, involving greater use of statistical trade data as opposed to legal presumptions. As a result, the cost of legal expertise has soared.

In the WTO context, simply put, the benefits for most developing countries to bring a case are less likely to exceed the threshold of litigation costs that make bringing a case worthwhile. Similarly, where the affected private sector in a developing country could finance the lawsuit, the potential benefits are less likely to justify the litigation costs, compared to the benefits for U.S. and European companies and trade associations. It is thus of little surprise that 97 of the WTO's 117 non-OECD members have never filed a WTO complaint.[60]

1.3 Special and Differential Treatment (S&D)

Special and Differential Treatment (S&D) is an issue which has got a paramount importance to the developing countries. Though this

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58 Samulson. P.A. "Gains from International Trade once Again." Re printed in International Trade: Selected Reading, Jagdish Bhagwati (ed.) *Cambridge, Mass: MIT Press*, 1981, p. 991.

59 Hokeman. B. and M. Kostecki, "The Political Economy of the World Trading System from GATT to WTO": Oxford University Press, 1995.

60 Anderson, James E. "Domino Dumping II: Antidumping", *Journal of International Economics* No. 35, 1993, p. 133.

principle is not exclusively significant to issues of dumping, it nevertheless is very crucial in taking special care of the vulnerable interests of the developing states when fitted against developed states.

1.3.1 Special and Differential Treatment (S&D) and Agreement on Anti-dumping -1994 (ADA)

There are several conceptual premises underlying the provision of S&D in the WTO agreements. Several authors discussed theoretical underpinnings of S&D arrangements in GATT in detail.[61] This section deals with the special provisions for providing such treatment in the ADA.

A central problem for the developing countries in respect of possible AD measures against their exports is that their home market prices for domestically, manufactured products are in most cases higher than those in their export markets. This home market price distortion is largely due to inefficient cost structures, which result primarily from the production conditions under which firms in these countries operate. These include high cost of capital, labour market conditions, labour laws, poor infrastructure facilities and bad governance.[62] It is, therefore, not a sound policy to rely on home market prices/production costs as normal values in dumping investigations against developing countries.

During the *Kennedy Round* the developing countries raised this issue and proposed a footnote to Article 2(d) of the 1967 Code that would have allowed for reference to third country export prices instead of prices in their home country whenever they were alleged to be dumping. The proposal was however rejected due to strong objections by the

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61 South Centre, "Special and Differential Treatment: Background and Policy Issues at Stake", Accessed from the Web site: <www.southcentre.org/ publication/s&d/s&d-03.htm > Last visited 30th May 2010.

62 Michalopoulos , Whally "Special and Differential Treatment in the Millennium Round" *CSGR Working Paper* No. 30/99, May 1999.

developed countries who finally 'tailored the 1967 Code suit their interests'[63]

The special and differential treatment is enshrined in article 15 of ADA, it reads:

"It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of AD measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying antidumping duties where they would affect the essential interests of developing country Members".

Article 15 thus requires developed countries to give special regard to the situation of developing countries when considering the application of AD measures but does not make any specific provision for addressing how they should do it. It is not surprising that the developing members are of the view that developed Members do not comply with Article 15 when imposing anti-dumping duties.[64] India raised this issue in both the DSB cases in which it was an affected party.After discussing problems faced by developing countries in applying anti-dumping measures the following section throws some light on case laws where the interest of the developing countries were not recognized in anti-dumping matters.

1.4 Case Laws

1.4.1 European Communities – Anti-dumping Duties on Bed linen from India: [65]

In this case two main issues are raised:

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63 Kufuor, "The Developing Countries and the Shaping of GATT/WTO Antidumping Law", *Journal of World Trade* 32, 6, 1999, p. 167.

64 G/ADP/W/416 dated 8 November 2000, G/ADP/M/15 dated 14 March 2000, G/ADP/M/16 dated 20 September 2000, G/ADP/M/17 dated 9 April 2001, and G/ADP/M/18 dated 21 November 2001.

65 WT/DS141/R, Report of the Panel adopted on 30 October, 2000.

1. Whether the obligation to explore for constructive remedies arose only at the time of levy of final anti-dumping duties or also at the time of provisional measures?

2. What is the nature of obligation imposed on the developed countries?

India asserted that the two sentences of Article 15 are separate and distinct, and that the first sentence does not impose any specific legal obligation, but simply expresses a preference that a special situation of developing countries should be an element to be weighted when making that evaluation. The second sentence, however, imposes a specific legal obligation to 'explore possibilities'. In India's view, this requires a determination (or assessment whether the essential interests of the developing country concerned were involved, to be made after a determination (preliminary or final) of dumping and injury caused thereby, but before the application of anti-dumping duties, including the imposition of provisional measures. Then (still before provisional measures are imposed) the investigating authorities are required to explore possibilities of constructive remedies 'provided by for this Agreement'.

India claimed that the reference to remedies provided for by the ADA indicates that such remedies may consist of, among others, the non-imposition of anti-dumping measures, or an undertaking. India rejected the notion that any procedural mechanisms, such as simplified questionnaires or extensions of time, can ever satisfy the requirements of the second sentence of Article 15 Japan and United States also put forward their arguments as third party. Egypt argued that Article 15 of the ADA obligated the EC to explore the possibilities of constructive remedies before applying anti-dumping duties, and that the EC failed to comply with this provision, as it did not suggest to the Egyptian exporters the possibility of, for instance of price undertakings.

India further asserted that the EC acted inconsistently with Article 15 of ADA by not exploring possibilities of a constructive remedy prior to the imposition of anti-dumping duties (provisional or final) and by not reacting to detailed arguments from Indian exporters pertaining to Article 15. According to India, despite repeated and detailed arguments by the Indian parties stressing the importance of the bed linen and textile industries to India's economy, the EC failed to even mention India's status as a developing country, let alone consider or comment on possibilities of constructive remedies. India also pointed out that TEXPROCIL (The Cotton Textiles Export Promotion Council of India), acting on behalf of Indian procedures and exporters, had communicated to the European Communities its desire, and that of its members, to offer price undertakings. India alleged that this offer was rejected by the EC without substantive consideration.

The EC agreed that the second sentence of Article 15 imposes a legal obligation on Members and also that bed linen producers were part of the textile industry, that this was an "essential interest" of India, and that anti-dumping duties would 'affect' this interest.

The EC asserted that its practice, when developing countries were involved in an anti-dumping investigation, was to give special consideration to the possibility of accepting undertakings from their exporters. In this case, EC argued, the reason for not undertaking was accepted was that none had been offered by the exporters within the time-limits set by the EC Regulation. Under EC procedures, undertakings had to be offered during the 10 day period following the disclosure of the confidential final dumping margin calculations for investigated producers. In this case, such disclosure was made on 3rd October 1997. The EC asserted that these time-limits were a reflection of those imposed by Article 5.10 of the ADA, and the general obligation to manage investigations expeditiously (Article 6.14 of the ADA). The EC pointed out that the offer from TEXPROCIL referred to by India was made, as TEXPROCIL's letter had indicated would be the case, and thus the EC replied that it would

no longer be able to consider any offers of undertakings, as it was necessary to proceed to conclude the investigation.

The Panel noted that Article 1 of the ADA provides that: "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT, 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement". Therefore, the phrase "before applying Anti-dumping duties" in Article 15 is meant for before the application of definitive Anti-dumping measures. Considering the whole of the AD, the Panel concluded that the term "provisional measures" is consistently used where the intention is to refer to measures imposed before the end to the investigative process. The ADA clearly distinguishes between provisional measures and anti-dumping duties, which consistently refers to definitive measures. The Panel noted that there is no instance in the Agreement where the term 'anti-dumping duties' is used in a context in which it can reasonably be understood to refer to provisional measures. Thus, the ordinary meaning of the term "anti-dumping duties" is used in a context in which it can reasonably be understood to refer to provisional measures.

On the nature of obligation on the developed countries, the Panel pointed out that the term "explore" is defined as to "investigate; examine scrutinize". Therefore, while the exact parameters of the term are difficult to establish, the concept of "explore" clearly does not imply any particular outcome. Article 15 does not require that "constructive remedies" must be explored, but rather that the 'possibilities' of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, and in light of the object and purpose of Article 15, the Panel concluded that the 'exploration' of possibilities must be actively undertaken by the

developed country authorities with a willingness to reach a positive outcome.

The Panel following the decision of GATT Panel in the case of *EC-Brazil Cotton yarn*[66] held that Article 15 imposed no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.

It however, imposed an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.

The Panel further held: "We cannot come to any conclusions as to what might be encompassed by the phrase 'constructive remedies provided for under this Agreement' – that is, means of counteracting the effects of injurious dumping – except by reference to the Agreement itself. The ADA provides for the imposition of anti-dumping duties, either in the full amount of the dumping margin, or desirably, in a lesser amount, or the acceptable price undertakings, as a means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute 'constructive remedies' within the meaning of Article 15".

On 14th October, 1997, counsel for TEXPRICIL informed the TEXPRICIL representatives that the letter had been submitted, asked that the details of the formula for undertakings be sent at TEXPROCIL's earliest convenience, and noting that the EC authorities had indicated that "Bed linen was" too complicated a product for undertakings". There was no response from the EC until

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66 ADP/137, Report of the Panel adopted by the Committee on Anti-dumping Practices on 4 July, 1995.

a letter to counsel for TEXPROCIL dated 22nd October, 1997. That response noted that the letter from counsel for TEXPROCIL had reached the EC the last day of the period for offering undertakings, but that "no detailed offer of price undertakings has been made yet". The EC response noted that the investigation was to be concluded within 15 months of initiation under EC law (in this case, by 13th December, 1997), and continued to state that the EC authorities would "not be in a position to consider any offer of undertakings which your client may be considering submitting at this stage".

The Panel found that no formal proposal of a price undertaking was made. However, in light of the expressed desire of the Indian producers to offer undertakings, the Panel held that the EC should have made some response upon receipt of the letter from counsel for TEXPROCIL dated 13th October, 1997. The rejection expressed in the EC's letter of 22nd October, 1997 did not indicate that the possibility of an undertaking was explored, but rather than the possibility was rejected outright. Therefore, the Panel held that the EC did not explore the possibilities of constructive remedies prior to imposing anti-dumping duties. "In our view, the EC simply did nothing different in this case, than it would have done in any other anti-dumping proceeding-there was no notice or information concerning the opportunities for exploration of possibilities of constructive remedies given to the Indian parties, nothing that would demonstrate that the EC actively undertook the obligation imposed by Article 15 of the ADA. Pure passivity is not sufficient, in our view, to satisfy the obligation to 'explore' possibilities of constructive remedies, particularly where the possibility of an undertaking has already been approached by the developing country concerned.

Thus, we consider that the failure of the EC to respond in some fashion other than bare rejection, particularly once the desire to offer undertakings had been communicated to it, constituted a failure to "explore possibilities of constructive remedies", and therefore

conclude that the EC failed to act consistently with its obligations under Article 15 of the ADA.[67]

14.2. In the case of United States – Anti-dumping and Countervailing Measures on Steel Plate from India, [68]

India argued that USDOC violated the first sentence of Article 15 of the ADA by failing to give special regard to India's status as a developing country when considering the application of Anti-dumping duties.

India contended that the nature of the "special regard" will vary from case to case, but must at least involve some extra consideration of the arguments of respondents in developing countries. In this case, India claimed that USDOC should have given 'special regard' to the special situation of SAIL as a developing country respondent when making choices in connection with calculating the final dumping margin, rather than treating SAIL in the same way as any other exporter.

India claimed that the US violated the second sentence of Article 15 of the ADA by failing to explore the possibilities of constructive remedies provided for in the Agreement before applying the duties. India claimed that SAIL failed a proposal for a suspension agreement (the equivalent in US practice of a price undertaking) with USDOC but the USDOC officials only orally states that they would not discuss a suspension agreement because the US steel industry and US Congress would oppose any such agreement. According to India, SAIL was treated no differently than developed country exporters would have been in this regard.

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67 The Panel Report, 238, Para 6.

68 WT/DS206/R, Report of the Panel adopted on 28 June, 2002.

The US claimed that USDOC explore the possibilities of constructive remedies. The US referred to the letter from SAIL proposing a suspension agreement, and noted that SAIL was invited to attend, and did attend, a meeting with USDOC officials to discuss the possibility. According to the US, while USDOC indicated at that meeting that SAIL's proposal would be considered, USDOC officials also pointed out that suspension agreements were rare, and required special circumstances that might not exist in this instance.

According to the US, this satisfied the obligation to explore possibilities of constructive remedies, and demonstrated that USDOC did not have a closed mind on the possibility, but simply rejected the proposed suspension agreement, as it was entitled to do. The Panel rejecting India's argument that a general obligation is imposed by first sentence to Article 15, the precise parameters of which are to be determined based on the facts and circumstances of the particular case, held that Members cannot be expected to comply with an obligation whose parameters are entirely undefined. The Panel further reiterated that Article 15 only requires special regard "When considering the application of anti-dumping measures under this Agreement.

According to the Panel, the phrase "when considering the application of anti-dumping measures under this Agreement" refers to the final decision whether to apply a final measure, and not intermediate decisions concerning such matters as investigative procedures and choices of methodology during the course of the investigation. The Panel further held that Article 15 requires that special regard must be given "to the special situation of developing country Members" which can not mean the situation of companies operating in developing countries. According to the Panel, simply because a company is operating in a developing country does not mean that it somehow shares the "special situation" of the developing country

Member. Referring to the Panel in *EC-Bed linen,* [69] decision that Article refers to 'remedies' in respect of injurious dumping, the Panel held that the possibility of applying different choices of methodology is not a 'remedy' of any sort under the ADA. Therefore, according to the Panel, Article 15 does not impose any obligation to consider different choices of methodology for the investigation and calculation of anti-dumping margins in the case of developing country Members.

According to the Panel, the requirement to explore did not include the requirement to provide the basis of result of that exploration as was contended by India. The Panel further agreed with the US that USDOC did explore the possibility of suspension agreement which satisfied the requirement of Article 15.

India had further contended that the US should have imposed lesser duty. The Panel held that Article 9.3 suggests Members to impose lesser duty as a desirable conduct if possible, but does not make it mandatory. According to the Panel, something that is not made mandatory by one provision of the Agreement cannot be made so by another provision such as Article 15.

The following are some of developing countries proposals to modify the Agreement on Anti Dumping:

- Developed countries initiate repeated investigations on exporters from developing countries. Developing countries demands that a minimum of 365 days must elapse from the date of finalization of a previous investigation resulting in non- imposition of duties. Currently there is no restriction for such repeated investigations.
- Article 15 of the Agreement on Implementation of Article VI provides for constructive remedies before Anti Dumping Duty is

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[69] The Panel Report: *European Communities – Anti-dumping Duties on Imports of Cotton – Type Bend linen from India (EC-Bed linen)*, WT/DS141/R, adopted on 1st March 2001, as modified in other respects by the AB Report, 228, Para 6,

applied. However, in practice members have bypassed this requirement in the levy of the Anti-Dumping Duty, as this is currently a best endeavor clause. Hence, the provisions of Article 15 need to be made mandatory.

- The existing de minimis-dumping margin of 2 per cent of export price, below which no antidumping duty can be imposed, needs to be raised to 5 per cent for developing countries.
- The threshold volume of dumped imports, which shall normally be regarded as negligible, should be increased from the existing 3 per cent to 5 per cent for imports from developing countries. Further the clause providing for the levy of the Anti Dumping Duty for aggregation of Imports from countries less than 3% individually but aggregate to over 7% or more need to be deleted.
- The lesser duty rule should be made mandatory-while imposing an anti-dumping duty, as currently this is quite accepted by number of WTO member countries.

1.5 Conclusion

Developing countries played phenomenal role in shaping anti-dumping law starting from Kennedy Round to Recent Hong Kong Ministerial conference, and India is a leading user of anti-dumping laws at the same time its domestic industries are subjected to anti-dumping measures by developed countries like USA and EU. In the Bed Linen Case EU denied special and differential treatment to Indian textile exports and in Steel Plates case also USA denied to give special and differential treatment to India's steel exports. We cannot see level playing field between developed and developing countries in anti-dumping matters. The above paper clearly suggests that Article 15 of the Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is operationally ineffective. Special and Differential Treatment is widely accepted by all Member States to deal with the vulnerability of developing countries in the free trading system. But this issue has not been well

addressed in the anti-dumping regime. Article 15 is too general to be enforceable. In view of the issues discussed above, one can observe that the anti-dumping regime is still to be developed further in order to accommodate the concerns of developing countries.

ECONOMIC AND MORAL RIGHTS OF THE COPYRIGHT HOLDER UNDER DIGITAL ENVIRONMENT: AN ANALYSIS

Dr. Sachiv Kumar*

1.1 Introduction

Intellectual property was known as *Vidyaa* (Vid + yaa) which means a property which has been invented or made known, and spread with *Gurukuls* which were established throughout India. The sages of these *Gurukuls* invented effective and forceful weapons which they gave to their disciples free of cost; for instance, Lord Ram was given divine weapons by Vishwamitra. The sages invented scriptural trusts like Upnishads which they imparted to the world for no costs. Even in the Middle Ages, the Sanskrit poets created their works for the development of the language itself, such as Kalidas, the Great poet, dedicated his drama *Abhigyan Shakuntalam*, for the mere purpose "*Saraswati Struti Mahatee Mahityam*". The Great Hindi poet scribed "*Ramcharit Manas*" for his soul's enjoyment and not for money or property. They did not ask for any money or other benefit for their Great works. *Vidyaa* (new knowledge) was unsaleable but transferable without any cost therefore. Even in modern India upto nineteenth century authors of Sanskrit works, the *Acharyas* gave their manuscripts to the publishers simply for their publication without charging any amount or retaining any copyright.[1] But with the invention of printing and other technological advancement the making of the copy from the original become easier which gave economic and moral threat to the authors and required some protection of the law by the State. With the passage of time the concept of *vidyaa* changed and now the creativity of the author have moral and economic value.

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1 R. K. Nagarajan, *Intellectual Property Law*, 2003, p. 5.

1.2 Evolution of Copyright

In the fifteenth century, the earliest history of printing in England starts when William Caxton introduced the art of printing.[2] An early statute of Richard III in 1483 A.D., informs copier,[3] encouraged the printing of books and permitted their importation, but this statute was repealed fifty years later on protectionist ground i.e. to protect the printers and book binders in England who had prayed to the king to protect their interest as king's natural subjects.[4] And when these printers grew in number in England it became the prerogative of the King to grant licenses to the printers.

The origin of Copyright itself is to protect the commercial interests of the publishers. After printing was invented, a printer or publishing entrepreneur entered the risk of investing on printing creative ideas. These entrepreneurs were considered to be the forefathers of present publishers. They were first to propose to acquire the exclusive copyrights over such ideas and printable creativity. The stationers were first supported from the Crown. In 1534 they secured protection against the import of foreign books and in 1556, the Queen gave power to the stationer through a charter, to destroy the books printed in contravention of statute or proclamation. Thus a licensing system was introduced.[5] In 1556, Philip and Mary granted what was termed as the original character of the stationers company. In order to ensure that the spread of reformed version of Christianity be prevented at any cost. The King acting through Star Chamber,[6] issued decrees in 1556 and 1585, a proclamation in 1623 to enforce the latter decree; and another decree in 1637. The decree of 1556 prohibited the printing contrary to any ordinance

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2 William Caxton English printer, editor, and translator, who introduced printing to England in 1476.

3 F. E. Skone, *Copinger and Skone James on the Law of Copyright*, 1948, p. 5.

4 J. P. Mishra, *An Introduction to Intellectual Property Rights,* Central Law Publications, Allahabad, 2005, p. 53.

5 Madabhushi Sridhar, Whose Intellect ? Whose property ? An Analysis of Copyright and Doctrine of Fair Use with Reference to Print Media, The *ICFAI Jour. of IPR*, 2005, p. 53.

6 The Star Chamber was a court of civil and criminal jurisdiction primarily concerned with offences affecting Crown interests, noted for summary and arbitrary procedure, and was abolished in 1640 A. D. by the British Parliament.

or statute, the decree of 1585 made licensing of every book compulsory. Despite these stringent measures taken by the Crown there had been no opposition from the Parliament; but in 1640 the Parliament abolished the Star Chamber, and declared the decrees issued and sanctions imposed henceforth as illegal. It was issued an ordinance where it was provided that unless a book was first licensed it would not be printed. This was the early development of the copyright.

It was this ordinance which introduced the concept of ownership of the author in his works statutorily for the first time because prior to it the only ownership which the author could have was one permitted under the common law. In doing so, along came the statutory recognition of the fact that there existed a property in the work of author which could not be used without the owner's (real author's) prior permission. This was followed by another ordinance in the year 1649 and an Act thirteen years thence. The Act which was called the Licensing Act declared as unlawful the printing of a book unless, prior to being printed, it has been granted a license to this effect and registered with the stationer's company.[7]

This Act, which was continued by a number of Acts of Parliament subsequently enacted, ultimately expired in May, 1679, much to the dismay of the Stationer's Company,[8] which, under the statute, had now no protection to their copyright. In a desperate move the stationers, who have been rightly termed as forefathers of the modern publisher[9] issued an ordinance in 1681 binding on the members of their Company. This was aimed at emphasizing their right which the stationers though they had by virtue of common law which existed even in absence of Parliamentary protection they enjoyed till

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7 J. P. Mishra, *An Introduction to Intellectual Property Rights,* Central Law Publications, Allahabad, 2005, p. 53.

8 The Worshipful Company of Stationers and Newspaper Makers (better known as the Stationers' Company) is one of the Livery Companies of the City of London. The Stationers' Company was founded in 1403; it received a Royal Charter in 1557. It held a monopoly over the publishing industry and was officially responsible for setting and enforcing copyright regulations until the passage of the Statute of Anne in 1709.

9 W. R. Cronish, *Intellectual Property,* Universal Books, 2001, p. 297.

1679. The ordinance narrated how prior to it the registration with Stationer's Company had provided the registration with a reputation, a proprietary right in the book in point and subsequently the sole right of printing such book. This move was further indicated by another ordinance issued by the company in 1694 which provided for imposition of penalty at the rate of twelve pence per copy should somebody infringe the copyright of one who had got it by virtue of its registration with the Stationer's Company.[10]

The idea of copyright protection only began to emerge with the invention of printing, which made it possible for literary works to be duplicated by the mechanical processes instead of being copied by hand. This led to the appearance of a new trade that of printers and booksellers in England called "Stationers". By the end of Seventeenth Century the system of privileges i.e., the grant of monopoly right by the Crown was more and more criticized and the voice of authors ascertaining their rights began increasingly to be heard.[11] Not only this in 1709, prayers were made to Parliament by interested parties indicating that there had been, for quite a long time no statute or ordinance to protect the copyright of stationers and the instance of violations had acquired such an alarming protection that no authority but the Parliament could set the things right. The results came in response to these prayers in 1709 as the privilege to be regarded as the first Copyright Act in the history of copy right in Britain. This is known as the *Statute of Anne*, 1710 because it becomes effective from April 10, 1710. The interpretation of the provisions of Anne's statute by the House of Lords in *Donaldson* v. *Becket,*[12] in 1774 rang alarm bells in University circles. The House of Lords observed that "the effect of the statute was to extinguish the common law copyright in published works, through leaving the common law copyright in unpublished works unaffected."

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10 J. P. Mishra, *An Introduction to Intellectual Property Rights,* Central Law Publications, Allahabad, 2005, p. 54.

11 Amrendra N. Tripathi, *Prosecution for the Infringement of Copyright Act,* quoted from http://legalserviceindia.com/articles/In_copy.htm, site visited 25 Oct., 2007.

12 F. E. Skone, *Copinger and Skone James on the Law of Copyright*, 1948, p. 5.

After a long debate that ran from 1837 to 1842 between two scholars of opposing view point, came what was termed as *Literary Copyright Act*, 1842, T. B. Macaulay viewed copyright as "a tax on readers for the purpose of giving a bounty to authors"[13] and hence opposed the proposal of Mr. Serjeant Talfourd to extend the copyright to life of author plus sixty years.

A great leap forward was taken in 1885 when Britain participated at *Berne Convention* on Copyright. This Convention to which Britain was a party was further modified in Berlin in 1908 requiring Britain to amend her copyright laws to bring it inline with other nations so as to facilitate Copyright protection to foreigners advised by the Revised Convention. A committee appointed in Britain for the purpose in 1909 gave its recommendations favouring compliance of Revised Convention. The Bill drafted for the purpose, failed in 1910 but was passed with some amendment, in 1911 by the Parliament. Having received the royal sanction on Dec. 11, 1911, it came into force on July 1, 1912. The Act of 1911 was replaced by the *Copyright Act*, 1956 on the basis of a study by a review committee in 1952, known as Gregory Committee. The Withford Committee in 1977 further received the Act of 1956 and suggested a general revision of the Act. This finally culminated into the *Copyright, Design and Patent Act*, 1988.[14]

1.2.1 Evolution of Copyright in India

When the *Literary Copyright Act*, 1842 was passed by the British Parliament which brought many changes in the law of copyright, it was also made applicable in British Colonies besides Britain herself. This Act provides the protection of copyright in books published on British soil, which automatically got an extension to the British India. However, it was worth noting that the period of about one hundred years (from mid eighteenth to mid nineteenth century) that preceded the passage of *Literary Copyright Act*, 1842 had no codified law for the copyright protection in India except the

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13 W. R. Cronish, *Intellectual Property*, 2001, p. 297.

14 J. P. Mishra, *An Introduction to Intellectual Property Rights*, Central Law Publications, Allahabad, 2005, p. 56.

common law principle of "justice, equity and good conscience" which the courts in the administration of East India Company were supposed to allow.[15] The Act of 1842 also provides the protection to the dramatic and musical work. For the enforcement of copyright in the areas under the administration of East India Company as also for promoting the endeavors of knowledge and learning in these areas the Governor-General in Council, on December 18, 1847 passed the *Copyright Act,* 1847 which provided for the protection of copyright in works which had been published in the areas under companies administration for the first time since the passage of *British Act* of 1842, i.e., the *Literary Copyright Act*, 1842.

The *Indian Copyright Act*, 1847 defined copyright and provided for:-

(i) the endurance of copyright;
(ii) the enforcement of infringement of copyright by actions in courts; and
(iii) the registration of copyright, assignment of copyright etc.

The existing law relating to copyright's contained in the *Copyright Act,* 1911 of the United Kingdom as modified by the Indian *Copyright Act*, 1914. The *Copyright Act*, 1957 (14 of 1957) which has been amended time and again by the Copyright Amendment Acts.[16]

1.3 Meaning of Copyright

Copyright is an exclusive right,[17] which is available for creating an original literary[18] or dramatic[19] or musical or artistic work.[20] The Supreme Court in

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15 *Ibid.*

16 The *Copyright Act*, 1957 has been amended in the years 1983, 1984, 1992, 1994, and 1999.

17 The *Copyright Act*, 1957, Section 14; *John Wiley and Sons Inc.* v. *International Book Store*, MIPR 2010 (2) 0283 at 0291; *John Wiley and Sons Inc.* v. *Prabhat Chander Kumar Jain,* MIPR 2010 (2) 0247.

18 *Shyam Lal Pahariaj* v. *Gaya Prasad Gupta*, AIR 1971 All 192.

19 *Fortune Films International* v. *Dev Anand*, AIR 1979 Bom 17.

20 *Associated Publisher (Madras) Ltd.* v. *K. Bashyam alias 'Arya'*, AIR 1961 Mad 114.

of *R.G. Anand* v. *M/s. Delux Films and Ors.*,[21] observed that there can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work. Cinematographic films including sound track and video films and recordings on discs, tapes, or other devices are covered by copyrights. Computer programs and software are covered under literary works and are protected in India under copyrights. Computer program in the *Copyright Act* has been defined as a set of instructions expressed in words, codes, schemes or any other form, including a machine-readable medium, capable of causing a computer to perform a particular task or achieve a particular result. It is obvious that algorithms, source codes and object codes are covered in this definition. In the digital era, copyright is assuming a new importance as many works transacted through networks such as databases, multi media work, music, information etc. are presently the subject matter of copyright. Inspite, of all these awareness on copyright in the country, piracy is believed to be wide spread.

Copyright gives the creator of the work the right to reproduce the work,[22] make copies, translate, adapt, sell or give on hire and communicate the work to public. Any of these activities done without the consent of the author or his assignee is considered an infringement of the copyright. There is a provision of 'fair use' in law, which allows copyrighted works to be used for teaching and for research and development. In other words, making one photocopy of a book for teaching students may not be considered an infringement, but making many photocopies for commercial purposes would be considered an infringement.

A copyright is an exclusive right exercised over the work produced by the intellectual labour of a person.[23] Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of

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21 AIR 1978 SC 1613.
22 *Kartar Singh Giani* v. *Ladha Singh*, AIR 1934 Lah 777.
23 Meenu Paul, *Intellectual Property Laws*, 2004, p. 9.

cinematographic films and sound recording. In fact, it is a bundle of right including inter-alia, rights of reproduction, communication to the public, adaptation and translation of the work. Copyright gives economic incentives for creation as well as protecting author's creativity as embodied in a work. Copyright is the exclusive right to copy a creative work or to allow someone else to do so. It includes the sole right to publish, produce or reproduce, to perform in public, to communicate a work to the public by telecommunication, to translate a work, with some cases to rent the work.

The hallmark of any culture is the excellence of arts and literature. In fact, the quality of creative genius of artists and authors determine the maturity and validity of any culture. Every art needs healthy environment and sufficient protection. What the law offers is not the protection of the interest of the artist or the author's alone enrichment of culture is of vital interest to each society and the copyright law protects this social interest.[24] It is meant to protect the owner of the copyright against unauthorized performance of his work, there by entitling him monetary gain from his intellectual property.[25] The fruits of the labour put by the author or the copyright owner must be enjoyed by the deserving authors and copyright owners and not the pirates, who indulge in plagiarism.[26] Copyright is a property right and throughout the world it has been regarded as a form of property working for special protection in the ultimate public interest.[27] Copyright protects the rights of the authors i.e. the creators of intellectual property in the form of literary, musical, dramatic and artistic works and cinematography films and sound recordings.

1.4 Rights under Copyright

Copyright gives the exclusive rights to the creator or author of the work to reproduce the work and distribute the same to the public.[28] According to the

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24 *Manu Bhandari* v. *Kala Vikas Pictures Pvt. Ltd.*, AIR 1987 Del 13.
25 *Garware Plastics and Polyester Ltd, Bombay* v. *M/s. Tele link*, AIR 1989 Bom 33.
26 *Girish Gandhi* v. *Union of India,* AIR 1997 Raj 78.
27 *Penguin Books Ltd, England* v. *Indian Book Distributors*, AIR 1985 Del 68.
28 *Cherian P. Joseph* v. *K. Prbhakaran Nair*, AIR 1967 Ker 234.

Berne Convention, Article *6bis*[29] there are two types of rights under Copyright i.e., moral rights and economic rights.

1.4.1 Moral Rights

The associated rights with copyright, known as the 'moral right', cannot be transferred and is not limited by the term. As per law the copyright in any work created by an individual when in employment would automatically vest with the employer unless there is an agreement contrary to this between the employer and the employee. These are the rights which maintain a personal link between authors and their works. They include the right to:-[30]

(a) be recognized as the author of a work (right of paternity). This means that authors can chose to sign their names, to not sign their names (remain anonymous), or to sign a fictional name (use a pseudonym) on their works.

(b) object to any changes to the work, which could damage the author's honor or reputation (right of integrity).

Moral rights are independent of economic rights and always remain with the author, even when the economic rights are assigned or sold. The author of a work has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other acts in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation. Moral rights are available to the authors even after the economic rights are assigned.[31]

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29 Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

30 World Intellectual Property Organization, *Learn from the Past, Create the Feature the Arts and Copyright*, WIPO, Geneva, 2007, p. 25.

31 The *Copyright Act*, 1957, Section 57.

There are four Moral Rights of the creator of the work. These are:-

(i) the right of attribution of authorship;

(ii) the right to object to derogatory treatment of work;

(iii) the right not to have a work falsely attributed to an author;

(iv) the right to privacy of photographs and films.

To underline the personal nature of moral rights, they remain with the author or performer even though he may transfer copyright in the work, film or recording concerned to another person. After the author or performer's death, they are exercisable by the author or performer's legal personal representatives. Generally, moral rights will last as long as the copyright in the work, film or recording concerned. Liability for infringement of a moral right arises where a person mistreats a work, film or performance, or makes a use of it, in contravention to one of the rights, or authorises another to do that.

1.4.2 Economic Rights

The authors have the following exclusive right:-

(i) to reproduce the work. This includes any form of copying such as photocopying, downloading, uploading, printing, recording, photographing, scanning, etc.

(ii) to translate the work into other languages.

(iii) to adapt the work. This alteration or transformation usually changes the type of work i.e., making a novel into a movie, or animating a drawing into a cartoon. Character merchandising (using the name or image of a fictional character to sell products such as toys, shirts, caps etc.) may also involve a form of adaptation.

(iv) to exhibit/perform the work in public i.e., displaying photos in an art gallery, performing a play in front of an audience, or playing a CD in a store or restaurant.

(v) to distribute the work by selling copies to the public.

(vi) to broadcast the work, by playing a song over the radio or showing a film on TV or on cable network.

(vii) to communicate the work to the public, by uploading a work onto the Internet.

In short no copyrighted work can be reproduced, translated, adapted, exhibited or performed in public, distributed, broadcast or communicated to the public without the permission of its author. This is what is meant by the phrase all rights reserved found in many works. Authors may decide to sell the economic rights to their works. By selling their rights, authors can concentrate on creating new works while other people take care of the reproduction, translation, adaptation and distribution of their old works. Those who buy the economic rights of authors are also called right holders. Authors who sell the economic rights of their works receive payments called royalties. The person who is the owner of the copyrighted work may either exploit himself through different ways or he can transfer it either in full or in part to others through different ways viz., assignment or licence for a limited term. While assignment is transfer of ownership in rights to assignee, a licence is a permission to do something in respect of work.[32] There are two ways of selling economic rights these are:-

(a) Assignments, and

(b) Licenses

(a) Assignment of the Copyright

The term 'assignment' means the transfer of right or property. An assignment is a transfer or setting over of property, or of some right or interest therein, from one person to another; the term denoting not only the act of transfer, but also the instrument by which it is affected.[33] Assignment is a way of transferring one or more of the author's economic rights so that the person who buys the rights becomes the new owner of the copyright.

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32 M. K. Bhandari, *Law Relating to Intellectual Property Rights*, 2006, p. 43.
33 Black's Law Dictionary, (VII Ed.), 1999.

The owner of the copyright of work has the right to assign copyright to any person. The person who assigns the copyright is called assignor and the person whom rights are assigned is called assignee. However, mere grant of right to publish and sell the work reserving copyright amounts to publishing right and not assignment of copyright.[34] The owner of the copyright may assign the copyright to another person either wholly or partially and either for the whole term of the copyright or any part of it. The owner may place legitimate restrictions on the use of copyright while assigning it to another person. Assignment is a contract between the owner and assignee which has to be in writing,[35] an oral assignment of the copyright is not valid under the *Copyright Act,* 1957. An assignment is a contract entered into between two parties. There is no special form and no particular words required to constitute an assignment.[36] An assignment deed should specify the following particulars regarding the work assigned:-

(i) the identification of the work assigned,

(ii) it should specify the rights assigned,[37]

(iii) the duration of the assignment,[38]

(iv) the territorial extent of such assignment,[39]

(v) it should specify the amount of royalty payable,[40] and

(vi) the assignment shall be subject to revision, extension or termination on terms mutually agreed upon by the parties.[41]

The assignment should contain the identity of the work assigned and should specify the rights assigned, the territorial extent and period of such

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34 M. K. Bhandari, *Law Relating to Intellectual Property Rights*, 2006, p. 43.

35 The *Copy Right Act*, 1957, Section 19(1) An assignment should be in writing and should be signed by the assignor or his duly authorized agent, See also *Srimagal and Co.* v. *Books (India) Pvt. Ltd.*, AIR 1973 Mad 49; *John Wiley and Sons Inc.* v. *Prabhat Chander Kumar Jain,* MIPR 2010 (2) 0247.

36 *Srimangal and Co.* v. *Books (India) Pvt. Ltd.,* AIR 1973 Mad 49.

37 *Supra note* 35, Section 19 (1).

38 *Ibid.*

39 *Ibid.*

40 *Id.,* Section 19(3).

41 *Ibid.*

assignment. If the period of assignment is not mentioned it shall be deemed to be 5 years. If the territory for the assignment is not specified it shall be presumed to extend it to whole of India. It shall also specify the amount of royalty to be paid for the assignment. However, if the assignee does not exercise a right assigned to him within a period of one year the assignment in respect of such right shall be deemed to have lapsed. The dispute between the owner and the assignee shall be settled according to the agreement between them. All the disputes relating to the assignment of any copyright will be decided by the Copyright Board.[42]

The owner of the copyright has different right which can be transferred to one or more than one person. In *Raj Video Vision* v. *K. Mohan Krishnan,*[43] the producer of the film had in 1961 assigned to the original assignee all the rights in the negative and the defendants had derived their rights from the assignees. With the passage of time new technology came into existence of videos, satellite etc. now the producer assigned the video and television rights to the plaintiff to which the defendants objected. In this case the Madras High Court has held that, as the owner of the copyright in the film, the producer had every right to assign any right to anybody, other than the rights already assigned to other. After the assignment of the copyright the assignee has all the right other than moral rights which belongs to the author. The assignee has the right to exploit the right assigned to him. If there is an infringement of the copyright the assignee can sue the infringer in the court of law. It is the duty of the author not to assign the rights which are already assigned to the assigner, but he can assign the other right which was not yet assigned.[44]

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42 The Copyright Board, is a quasi-judicial body, was constituted in September 1958. The jurisdiction of the Copyright Board extends to the whole of India. The Board is entrusted with the task of adjudication of disputes pertaining to copyright registration, assignment of copyright, grant of Licenses in respect of works withheld from public, unpublished Indian works, production and publication of translations and works for certain specified purposes. It also hears cases in other miscellaneous matters instituted before it under the *Copyright Act*, 1957.

43 AIR 1998 Mad 294.

44 *Raj Video Vision* v. *K. Mohan Krishnan,* AIR 1998 Mad 294.

(b) Licencing of the Copyright

A license is an authorization of an act which, without such authorization becomes infringement. Licensing means that the author remains the owner of his economic rights but allows the buyer (or licensee) of the rights to carry out certain acts covered by these rights for a limited time and purpose. In the simplest form, a licence is a revocable permission to commit some act that would otherwise be unlawful. A licence is an authorisation to do a particular act. It is a limited right where the ownership of the copyright still remains with the author. Various rights of a work like, publication rights, in book form or in a cinematograph form, can be licensed to different persons. In licence, the licensee gets the right to do a particular act in accordance with the conditions imposed in the licence deed.

An author may decide to not use some or all of his rights i.e., he may upload his works on the Internet and specify that anybody can use them free of charge. He may also wish to limit the use of the work he uploaded by allowing his work to be used only for non-commercial purposes. In this case, he would allow others to copy, translate, adapt, perform and even broadcast the work as long as they did not make any money from these uses.[45] Chapter VI of the *Copyright Act*, 1957 deals with the procedure of the licences. The Act provides that the owner of copyright in an existing work or the prospective owner of copyright in a future work 'may grant any interest in the right by licence in writing signed by him or his duly authorized agent'.[46] The licence can be classified into three categories:-

(i) Voluntary licences,[47]

(ii) Compulsory licence,[48] and

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45 World Intellectual Property Organization, *Learn from the Past, Create the Feature the Arts and Copyright,* WIPO, Geneva, 2007, pp. 29-30.

46 *John Wiley and Sons Inc.* v. *Prabhat Chander Kumar Jain,* MIPR 2010 (2) 0247.

47 *Supra note* 35, Section 30; Voluntary licences could either be exclusive licence or non exclusive licence. A licence which confers on the licencee to the exclusion of all other persons any right comprised in the copyright in a work is known as exclusive licencee and a non exclusive licence on the other hand does not convey any such right of exclusion.

(iii) Statutory licence.[49]

In *Entertainment Network (India) Ltd.* v. *Super Cassette Industries Ltd.* and *Phonographic Performance Limited* v. *Millineum Chennai Broadcast (P) Ltd. etc. etc.,*[50] the Apex Court has held that compulsory licenses are an exception to the general freedom of the copyright owner to contract. Hence, while granting compulsory licenses court has to struck a balance between rights of the owner of the copyright and the other persons right to get a compulsory license. In *M/s. Super Cassette Industries Ltd.* v. *M/s. Entertainment Network (India) Ltd.*,[51] the Delhi High Court observed that if the person who infringes the right of the owner applies for the compulsory licence than the same cannot be given to the infringer until he stops infringing the same.

1.5 Evolution of the Digital Era and its Impact on Copyright

A significant advance in the evolution of computing systems was the invention of a mechanical adding machine in 1642 by the French scientist Blaise Pascal (1623-1662) which was later developed by various scholars, scientists and professors and called by various names like machine, difference engine etc. The idea of computer networking started in the 1960s when time-sharing services were first available to the public. Early pioneers were General Electric (GE), XEROX, AT &T, IBM government agencies, research laboratories, and universities. ARPANET was built in 1969 by the Advanced Research Projects (ARPA), an arm of the U.S. Department of Defence.

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48 *Supra note* 35, Section 31 and 31A; A statutorily created license that allows certain parties to use copyrighted material without the explicit permission of the copyright owner in exchange for a specified royalty; *Entertainment Network (India) Ltd.* v. *Super Cassette Industries Ltd.*, (2008) 13 SCC 30.

49 *Id.*, section 32 and 32A, which empowers the Copyright Board to grant licence to any person to publish a translation of a literary or dramatic work in any language after a period of seven years from the publication of the work.

50 MIPR 2008 (2) 0129.

51 AIR 2004 Del 326.

Computer systems will continue to find increasing application in every aspect of human activity. The technology has become so good that it is possible to hold a computer in the palm of our hand. It is because of microcomputers, individuals who are not computer professionals are now the majority of users. The basic application of the computer is Business (e-commerce), Multimedia, Health and medicine, Communications, Scientific research and engineering, Industries, Government (e-governance), Military, Theatres, film and television, Transportation (reservation- Air, Bus, Railways etc.), Research and development etc. Presently there is no field of the life which is untouched by this information and communication technology. The use of this technology is good for the protection but a great loss to the intellectual creativity through out the world. Digital technology and the growth of computer networks such as the Internet have posed challenges to the protection and enforcement of copyright throughout the world. Creators and owners of copyright material need to protect their copyright on the Internet. The development of new communications technologies has exposed gaps in copyright protection under the *Copyright Act*.

Today's technological innovations present almost limitless opportunities for the worldwide distribution and promotion of copyrighted works. But these very same technologies also make it possible for anyone with access to a computer and a CD/DVD burner to easily pirate these works with a single keystroke.[52] The traditional methods of infringement of the copyright are now transformed to new hi-tech methods by the use of information and communication technology. By these new hi-tech methods the moral and economic rights of the authors are violated throughout the world. Most of the work of the creators are uploaded to the websites and can be downloaded by the netizens throughout the globe. Developments in information and communication technologies have brought various new methods of producing and disseminating work of the author in new format i.e., digital format. Information, data or work is being produced, processed, stored in

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52 http://www.copynot.com accessed on 15 September 2010.

digital form and distributed over electronic networks. Digital information sources available on the internet include electronic journals, books, conference proceedings, software, speeches, music, videos and films, works of art research reports, photographs, museum objects and many others, most of which are versions of works already protected under copyright works but still there is much to do to protect the same in this digital era from piracy. There is need to update the copyright laws because of the exigencies of digital medium.

As more and more digital products in the network environment are emerging, efficient management and controlled distribution of such products has become one of the important considerations, as never before. Digital and Information technology combined together have made the management and administration of copyright quite difficult. It has made reproduction, distribution and communication of works easier and within the competence of ordinary individual. This has opened up the possibilities of widespread unauthorized copying and distribution of copyrighted works materially affecting the moral and economic interest of the owners.[53] There are websites which disclaim that we are not responsible for the infringement of any right by third party in the shape of uploading and downloading of the copyright matter on or by there website. Adding such a disclaimer on the web site will not necessarily protect the owner from a lawsuit or criminal liability if in fact copyrighted works are being illegally copied and distributed through their website.

Not only the websites but there are various other ways of infringing the economic rights of the author and one such way is loading various softwares without license from the owner. An infringement of copyright work would occur only when there is a substantial reproduction of the original work[54]

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53 Raman Mittal, "Copyright Law and the Internet", S. K. Verma, Raman Mittal (eds.), *Legal Dimensions of Cyber Space*, 2004, pp. 113 at 143.

54 Super Cassettes Industries Ltd. v. *Hamar T.V. Network Pvt. Ltd.*, MIPR 2010 (2) 0321.

without licence. In *Microsoft Corporation* v. *Kiran and Anr.*,[55] it was held by the Delhi High Court that illegal activity of counterfeiting and piracy of computer programmes by loading various software without license onto the hard disk of the computers that were assembled and sold amount to counterfeiting or piracy. Sale of spurious and pirated goods amounts to infringement of copyright.[56] Another way is the communication of the musical work to public in the hotel rooms without due permission i.e. without obtaining license and without paying the requisites royalties amounts to infringement of copyright.[57]

1.6 Indian Copyright Law vis-à-vis TRIPS Agreement

The TRIPS Agreement deals with the protection of the intellectual property rights. Article 9 to 14 of the TRIPS Agreement specifically deals with the copyright and the related rights. It prescribes the extent of protection of the copyright that there is no protection on the ideas, methods of operation or mathematical concepts. The Indian *Copyright Act*, 1957 also specify that copyright persist in the work and not in the ideas. Section 13 of the *Copyright Act* clearly provides the subject-matter of the copyright. In *Gopal Das* v. *Jaganath Parsad,*[58] it was held that the law of copyright does not protect ideas, but they deal with the particular expression of the ideas. The protection of ideas falls not within the laws as to copyright but within the patent laws.

Under Article 10 of the TRIPS Agreement computer programs, whether in source or object code, shall be protected as literary works. Similar provision has been made in the *Copyright Act*, 1957 as "literary work" includes computer programmes, tables and compilations including computer databases. Section 14,[59] further clarify that copyright covers the computer

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55 MIPR 2007 (3) 0214.

56 *Microsoft Corporation* v. *K. Mayuri and Ors.*, MIPR 2007 (3) 0027.

57 *Indian Performing Right Society Ltd* v. *Debashis Patnaik and Ors,* MIPR 2007 (2) 0223.

58 AIR 1938 All 266 at (268), as quoted from Vikas Vashishth, *Law and Practice of Intellectual Property in India*, 2006-2007, p. 887.

59 *Supra note* 35.

programme. Article 11,[60] provides that computer programs and cinematographic works shall not be rented to the public without the authorization of the author or their successors in the title. Under the *Copyright Act* Section 14(1)(b)(ii) which was substituted in the year 1999 which now covers the provisions as specified in the TRIPS Agreement regarding to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme be the exclusive right of the author. In *Raj Video Vision* v. *K. Mohana Krishanan,*[61] it was held that author has all the rights over the film. Section 14(1)(d)(ii) gives right to the producer to sell or give on hire, or offer for sale or hire any copy of the film regardless of whether such copy has sold or given on hire on earlier occasions. This section clothes ample power on the film even it has been sold or given on hire is based on the lawful right conferred on the producer.

The term of protection of the copyright work under the Copyright Act is, in fact, more than the TRIPS Agreement. The TRIPS Agreement prescribes the minimum term of protection and the *Copyright Act,* 1957 protects the work more than minimum term. In fact Section 22 to 29 of the *Copyright Act* is in compatible with the Article 12 of the TRIPS Agreement.

Article 14 of the TRIPS Agreement protects the right of the performers, producers of phonograms and broadcasting organizations these rights were similar to that of the *Indian Copyright Act*. Chapter VIII of the *Copyright Act,* 1957 deals with rights of broadcasting organisation and of performers.[62] The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made. The performer's right will subsist until fifty years from the beginning of the calendar year in which the performance is made. The provisions made in the Indian *Copyright Act* are compatible with the TRIPS

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60 The TRIPS Agreement.
61 AIR 1998 Mad 294.
62 *Supra note* 35, Sections 37 to 39A.

GENETICALLY MODIFIED FOOD AND CONSUMERS' INTEREST : SOME LEGAL AND ETHICAL ISSUES*

Dr. V. K. Sharma**

"Brinjal" a very ordinary vegetable of Indian poors recently evoked oddly extreme reactions among agricultural scientists, genetical experts, environmentalists, political Groups, consumer organizations and NGO's. This is not a common Brijal, but this is genetically modified B.T Brinjal a new variety developed by Maharashtra Hybrid seeds company Ltd. (MAHYCO), acting under license from the global seed giant MONSANTO, utilizing Genetic Engineering in which Brinjal spliced with Gene toxic to insects and taken from the soil bacterium 'Bacillus Thuringiensis' (B.T).

The lobby supporting B.T Crops advancing the opinion that nothing is better than G.M. Technology to save the crops from insects and more production, on the other hand the experts are apprehensive of serious consequences to the health of consumers, genome of the vegetable and ultimately the biodiversity and whole ecosystem of the country. Amidst this controversy the Government has decided to put a moratorium on B.T Brinjal, overruling the experts of Genetic Engineering Appraisal committee (GEAC) which had given its nod for commercial cultivation of this genetically modified food crop.

1.1 The G.M. Food

The Genetically Modified (G.M) crop/food is a variety developed by transforming the genes through utilization of techniques of genetic engineering. B.T cotton was the first GM crop permitted by Government

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for commercial exploitation in India. But this was not a food crop directly consumable by consumers. So far, the entire GM crops existing the world over are those which are not directly consumed by the consumers. The corn, canola, Soyabean, cotton are those G.M. Crops which are consumed in the form of oil or otherwise, after processing. 'B.T. Brinjal' is the first genetically modified food meant for direct consumption by consumers.

1.2 G.M. Food and Consumer

Why such a hue and cry in matter of 'B.T. Brinjal' when we are already commercially exploitating the B.T Cotton? Here the opposition is not to the technology of genetically modification but of its application to a daily used vegetable cooked and consumed directly by commoner. If B.T Brinjal might be permitted for commercial exploitation it would have been the world's first genetically modified vegetable in the dishes of Indian common people. And the world has virtually no experience of long term health implications of the genetically modified vegetable like brinjal eaten often and sometimes raw in our homes. The anti B.T. lobby has used this uncertainty very effectively to argue that we should not take any risk. Caution indeed precaution, is therefore needed cautioning against G.M. food particularly the B.T. Brinjal. The anti B.T. lobby consisting of environmentalists, genetical engineers, agricultural scientists, NGO's and farmers protested against these food as they think, them harmful to human health, animals and environment. Not only this going beyond it an NGO "Gene campaign" even filed a PIL against G.M. food claming them to be risky and dangerous to consumers, which has been pending since 2004 at the Supreme Court.

1.3 Health Hazards of G.M. Food

It is not the B.T Brinjal, the core debate is really about the bio safety of all G.M. foods. Such are the perceived dangers from. G.M. Food that former Central Health Minister Anbumani Ramdoss wrote to Prime

Minister Manmohan Singh asking for moratorium on all G.M. crops including B.T. Brinjal releases for at least 10 years.[1]

Releasing position paper on G.M. Food 'American Academy of Environmental medicine' claimed, G.M. food poses a serious health risk? And called for a moratorium on G.M. Food. The academy observed: "there is more than a casual association between G.M. Food and adverse health effects" G.M. food poses a serious health risks in the area of toxicology, allergy and immune function, reproductive health and metabolic, physiologic and genetic health.[2] The experiments documented on the affects of G.M. food on animals reveals swelling in lungs, blood clotting in stomach and intestine and declining fertility. There is 80% similarity of Human genome with genome of rat. The experiment on rats shows the toxic affect of G.M. food on food canal, lungs and kidneys. Obviously, the G.M. food will be more fatal to human body because it is more sensitive than body of rats.[3] Further no antioxidants found in G.M. food while Natural food contain antioxidants which are helpful in preventing ageing and other fatal disease like cancer etc.

Scientist have revealed a very large number of adverse effects associated with the genetically modified crop plants. The following is just a small list of some of the possible health risks on consuming G.M. food and these adverse effects have been documented following exposure findings[4]-

(a) reduced organ weight

(b) reduced growth

(c) reduced fertility

(d) compromised immune function

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1 www.indiagminfo.org

2 www.nowpublic.com

3 Sharma, Surendra Kumar "B.T. Bengan-Ye Bengan Barbad Karega" Article in Rajasthan Patrika, 2 February, 2010.

4 www.anhcampaign.Org/campaigns/Say No To G.M. Also see, Smith Jeffrey, *Seed of Deception and Smith Jeffrey, Genetic Roulette.*

On December 4th 2008 a group of Doctors from different streams of medicinal system express their serious concern in regard to G.M. Food. In their memorandum to Union Health Minister they pointed out that genetic engineering in our food and farming is inherently risky and irreversible and that decision making in India is currently based on the basis of crop developer's data without any independent research for assessing long term effects.[10] Thus as far as controversy on G.M. food in general and B.T. Brinjal in particular is concerned; it is being brought into the country without proper and independent research on its safety.

1.5 Democracy in Decision Making

In the back drop of this scenario of G.M. food in the country the consumers do not want to be dictated about what is good or right for them; they want to participate in the processes where safety standards are determined. To be protected against products, production processes and services that are hazardous to health or life is the right given to consumers. Keeping in view the nature of G.M. food and no availability of sufficient data about its safety, consumers need to know what they are buying and eating. Consumers may not be willing to jeopardize long term health and safety merely to allow corporation to rush new food to the market. The tremendous lack of credibility of food, drug and agribusiness corporations, the question is: can we trust their research? The situation will get worse as even public institutions, like the agricultural universities getting involved with partnerships for research. It is then difficult to find researchers without conflict of interest. And it is difficult to assess what we are told. We should remember that these all are not simple matters but these are all matters of our body, our health and environment.

1.6 Respect Consumer's Choice: Consumer Must Have a Say

The moot question in this scenario is - should the poor die of starvation or of eating G.M. food? Which will be abundantly available once it is

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10 *Ibid.*

commercially exploited? Can consumer be left in lurch as to their right to choose at the behest of certain vested interest? Authorities while granting permission to commercial exploitation of G.M. food must respect to eight basic rights of the consumers, which over the years become the established icons of the consumer jurisprudence world wide. These are:[11]

(a) The right to the satisfaction of basic needs
(b) The right to safety
(c) The right to be informed
(d) The right to choose
(e) The right to be heard
(f) The right to redress
(g) The right to consumer education
(h) The right to health and sustainable environment

The consumers can not exploit these rights in respect of G.M. Food until and unless they have the proper documented facts regarding safety, side effects, nutritional value, and vulnerability to specific persons to be supplied by reliable legal authority after thorough independent research to control the G.M. Food in the country. The lack of information is one of the main reasons which create suspicion and doubts regarding safety of transgenic food. Thus the question of providing information to consumers has attracted much importance and attraction.

1.7 G.M. Food: Need of Mandatory Labeling

Given the experience in developed countries and our own country, the literate consumers do not want to buy a food without knowing how it is made or produced or what it contains. Probably, the most important justification for labeling G.M. Food is the consumers' right to be informed. It also involves the right to choose and to make informed

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[11] See Consumers International U.K., These consumer rights are also established norms under Section 6 of the *Consumer Protection Act*, 1986, in India.

(e) inflammation

(f) mutations

(g) allergic reactions

(h) new diseases

(i) reduced nutrient content of food

(j) cancer

(k) premature death.

Even if we leave above risks aside, most of the G.M. food is normally tested for allergic reactions, gene transfer-transferring the G.M. food genes inside the gut, into benign bacteria present there and creating effects such as resistance to antibiotics. Thus adversely affecting the immune system of human body.[5]

1.4 Lack of Proper Independent Research as to Safety of G. M. Food in India

The B.T. Brinjal controversy raises so many issues of concern but most critical issue is as regarding the independence of research as to safety of The G.M. Food. Genetic Engineering Approval Committee (GEAC) was set up by the Ministry of Environment and Forests to regulate research, testing and commercial release of G.M. crop, food and organism, which pronounced G.M. Brinjal safe for human consumption. The pronouncement kicked up such a row that government was compelled to back down and seek wider public comments. The GEAC has been accused of bypassing safety and environmental concern and instead working to promote the interests of the international biotech Industry. The Committee was accused by Greenpeace and other NGO's of allowing seed companies to keep secret the result of G.M. field trials on the grounds that they were entitled to protect their IPR. But it is all due to interference of Delhi High Court ruling - that trial data must be revealed

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5 *The Economic Times*, "Editorial: Brinjal on Hold Sensible Choice, For Now", Wednesday, 10 February, 2010.

under the country's *Right to information Act* has brought to light uncomfortable facts about B.T Brinjal. The point here is not that the individual members of GEAC lack integrity, although it does seem strange that many members of the committee are vocal votaries of G.M. food. Rather the point is that the testing process and the data derived, on whose basis GEAC gave go ahead for commercialization of B.T. Brinjal, are not independent casting an aspersion on the integrity of the approval process.

Much of the data on which GEAC relied to grant approval was generated by the G.M. companies themselves. This fact put a question mark on independence of research, who does the research, which is then used to assess and clear the food as safe to eat? Currently, it is the company, in this case monsento-mahyco, which carries out the research and presents the data to the regulatory authority. Monsanto history is not clean and its involvement in the issue is a real complicating factor, it is the same Monsanto who got patented the 'Terminator Seed' for establishing monopoly on world's seed market; and who developed the 'Orange Gas;[6] used during Vietnam war (1962-1970)[7]

The worst suspicion regarding safety were confirmed by the French geneticist Gilles-Eric Seralini,[8] who was commissioned by the Environmental group 'Greenpeace' to check the claims made by MAHYCO to GEAC. Seralini pronounced that the data submitted by monsento-mahyco is insufficient and misleading on several counts. On a visit to the Indian capital in July 2008 Seralini told reporters that he hoped this country would not adopt the commercial use of B.T. Brinjal and allow its people to be turned into "lab rats ", since tests have not yet been carried out on how its consumption would affect human health.[9]

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6 Dainik Bhaskar Knowledge Report- "Ladai Ab Antim Daur Mai" dated 6 February, 2010.

7 About more than 10 lakh people got affected due to use of this gas.

8 Serelini is chairman, Department of Molecular Biology at the University of Caen in France.

9 *Supra note* 1.

c`hoices. It is true that information alone cannot guarantee safety, yet it facilitates understanding and the choice to buy or not to buy.

Labeling of food products is nothing new. Plenty of foodstuffs is being labeled either voluntarily or due to some sort of regulation. A acket of chocolates, biscuits, ice-cream or a bottle of soft drink contains enough information. Why not it is in case of G.M. food? The mounting evidence about G.M. crops related health and environmental risks provide a strong justification for mandatory labeling of G.M. Food in India as well.[12]

1.8 G. M. Food: Ethical and Religious Aspects

In this globalised commercial world the multinational corporations are more likely to be guided by commercial considerations and profit motive. They are sidetracking the ethical norms and religious feelings of the consumers. It is nothing new that they are even not hesitant in making misuse of genetic engineering. There is growing concern among consumers about the religious and ethical principles being threatened by food available in the market. Many consumers prefer not to use product created by transferring genetic material across species boundaries. But genes of animals, birds and fishes are being transferred into vegetarian food material to enhance their quality and characteristics. Vegetarians find that the products storage and sale of a product without sufficient information is not only unethical but also illegal.[13]

1.9 G. M. FOOD: The Legal Control in India

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12 European Commission's G.M.O. labeling law ensures that food must be approved and labeled before it is released into the market and all food that consists of, or contains, GMO's, must satisfy a detailed environmental risk and food safety assessment as a precondition to commercial release. The EU law applies equally to all G.M.O Food and does not discriminate on the basis of origin.

13 The *Prevention of Food Adulterations Act*, 1954.

So far as the legal control on G.M. crop food in India is concerned. The *Food Safety and Standards Act*, 2006 is the only law which define[14] and provide certain clauses to regulate the production, distribution sale or import of these food. Section 22 of this Act declares:

> "No person shall manufacture, distribute, sell or import any novel food, genetically modified articles of food, irradiated food, organic food, food for special dietary uses, functional food, neutraceuticals, health supplements, proprietary food and such other articles of food which the Central Government may notify in this behalf."

Thus, if any G.M. product particularly foodstuff and drugs are sold without the government nod and required information, it would be illegal and manufacturer and seller are liable to penalized. But the question is who would be liable in case a person suffers ill effects after consuming G.M. foods? The answer depends upon whether G.M. food itself is safe or not?, it has gone through proper clinical trials, in independent laboratories and approved through authorized Regulatory Authority which is lacking till date in India.

1.10 The G.M. Food: Need of Regulatory Authority

In the context of critical issues involved in allowing G.M. Food/crops in India a Regulatory Authority having an umbrella control over these food from approval to redress and remediation with the democratic involvement of consumers, independent geneticist, biotechnology experts, agricultural scientists is sine qua non. The omniac compatibility and utility of such a body will depend upon the integrity, impartiality unbiased objective attitude.

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[14] "Genetically Engineered or Modified Food means food and food ingredients composed of or containing genetically modified or engineered organism obtained through modern biotechnology, or food or food ingredients produced from but not containing genetically modified or engineered organism obtained through modern biotechnology."

It is heartening to note that at least B.T. Brinjal fiasco help the fast tracking of long pending Bill [15] 'National Biotechnology Regulation Bill, 2008 which seeks to establish National Biotechnology Regulatory Authority (NBRA) to overhaul the current flawed regulatory system and set up a completely new overarching regime to manage all trades, research, manufacture and import of biotech products in the country. The Bill proposes a three member autonomous Biotechnology Regulatory Authority, along the lines of telecom and other sector wide regulatory mechanism, with an elaborate set up below to make, policy, regulate and monitor the surging business of biotechnology in the country.

We hope that NBRA would provide a statutory framework with the mandate of protecting and conserving the environment and health, food and nutrition security, farmer's rights and livelihood and ensuring social justice through application of modern biotechnology. And such framework will be based on 'Precautionary principle.'

1.11 Concluding Remark

The time about to come will tell the direction and fate of G.M. Food / crop in India but 'B.T Brinjal' controversy and fiasco has established at least that Indian commoner are not 'lab rat' or 'guinea pig' for experimentation of transnational profit motivated biotech industry.

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[15] See *The Times of India*, 14 February, 2010.

DISABILITY ISSUE : AN NEW STRATEGIC ALLIANCE FOR THE DISABILITY RIGHTS MOVEMENT

Dr. Prithpal Kaur*

"All Human Beings are born free and equal in dignity and rights"

1.1 Introduction

Disability is a human rights issue. Disabled people deserve the same rights. The disability movement identified human rights as a major issue in the fight for equal rights and participation of disabled people. International human rights treaties are needed to set a global framework and direction for the equal rights of disabled people worldwide.[1] How humans have evolved as a species is still a mystery, although there are many theories. What we do know is that we have bigger brains than animals and share much of our DNA. And we have evolved into homo sapiens- a species with physical bodies, brains and spirit and abilities for social organization, development, empathy and love.[2]

Approximately 10% of the world's populations who live with a disability continuously encounter barriers to their full participation in society. People with disabilities are often denied access to basic services such as primary health care and education. Employment opportunities are extremely limited, hindering economic self-sufficiency. In some cases, children and adults with disabilities do not receive adequate nutrition or shelter and are particularly vulnerable to abuse and violence. Exclusion and abuse of people with

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1 R.L. Huckstep, *Poliomyelitis : A Guide for Developing Countries*, Churchill Livingstone, Edinburg, 1979, p. 23.

2 P. Joseph Shapiro, *No Pity- People with Disabilities - Forging a New Civil Rights Movement*, Universal Book Traders, New Delhi, 1995, p. 34.

disabilities are violations of their human rights. People with disabilities are entitled to enjoy the same rights as all others.[3]

There are 600 million persons with disabilities in the world today. Eighty percent of them live in developing countries. A staggering 90 million people in India are disabled. That is almost one in every ten. The aim of mentioning these figures here is to illustrate that still 600 million persons with disabilities are being prevented from contributing to society because of the barrier called disability. The world for and of the disabled is changing at a rapid pace and the aspirations as well as expectations of people are also changing as fast.[4]

1.2 Human Rights and Disability Rights

A human rights approach to disability acknowledges that people with disabilities are right holders and that social structures and policies restricting or ignoring the rights of people with disabilities often lead discrimination and exclusion. A human rights perspective requires society, particularly governments, to actively promote the necessary condition for all individuals to fully realize their rights. The goal of a human rights approach to disability is to ensure the equal dignity and equal effective enjoyment of all human rights by people with disabilities. What are referred to as "disability rights" and "the human rights of people with disabilities" are not extra protections or a separate and special category of rights but part of the full range of human rights available to everyone. All people have the right to participate and to exercise self-determination as equals in society.[5]

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3 Indian Council of Social Welfare, *Understanding the Handicapped Child*, Popular Prakashan, Bombay, 1997, p. 89.

4 Report of the W.H.O. Expert Committee on Disability Prevention and Rehabilitation Technical Report Series 663, Geneva, 2003, p. 166.

5 Mahesh Bhargava, *Introduction to Exceptional Children: Their Nature and Educational Provisions*, Sterling Publishers Pvt. Ltd., New Delhi, 1994, p. 82.

Since time immemorial disabled people have been seen as different from other human beings. Legislative and social responses to disabled people's needs and rights have separated or isolated them from their communities. In some places and countries disabled people have been seen as quasi-gods, in others disability has been seen and is still seen as the embodiment of sin.

Disabled people were first in the terrible line of men, women and children lead into Nazi gas chambers.[6] Disabled people have been isolated in institutions, at the back of huts or in inaccessible environments even isolated in their own homes. Religious and moral teachings say that the sin that disabled people can achieve greater humanity or sanctity. Rehabilitation and community services have established a professional and well paid hierarch that has not equalized disabled people's opportunities and they have built ever stronger, separate and de-humanizing environments. Legal systems and statutes throughout the world have specifically denied justice to disabled people saying, among other things, that it is all right to kill a disabled child or adult, though it is considered immoral and illegal to kill able-bodied person.[7]

Scientific genetic advances pose a further threat to disabled people's humanity as genetic 'faults' are seen in terms of potentially disabling impairments and the eradication of these 'fault' genes seen as the only solution for the advancement of the human race for the good life and the pursuit of happiness. Disability is the social response to our impairment, the responses of attitudinal and systemic discrimination, prejudice, stigma and fear. Disability can only be eradicated through social change

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6 A. Fletcher, *Disable Obstacles to Overcoming the Integration of People*, London, DDA, 1995, p. 32.

7 Shivani Gupta, *Overcoming Disability: Health for the Millions*, Vol. 21, No. 6, New Delhi, 1995, p. 12.

and justice and equality for those who are deemed different or deviant because of their impairments, not by fixing impairments.[8]

This subordinate status of disabled people and other groups of humans and an understanding of their shared inequality and injustice can be measure and hopefully, redressed by the Universal human rights instruments. Society has recognized this in relation to women, ethnic minorities and children, but also it is only now that disabled people are being seen as having the same inalienable right to be considered human. As Leandro Despouy, the UN Special Reporters on disability says in the introduction of his report to the United Nations in 1993:

> "The treatment given to disabled persons defines the innermost characteristics of a society and highlights the cultural values that sustain it. It might appear elementary to point out that persons with disabilities are human being as human as and usually even more human than, the rest."[9]

1.3 Disability (Equal Opportunities, Protection of rights and full Participation) Act, 1995

The main objective of this Act is that people with disabilities should participate fully in the life of the community and making it possible for all people to full participation in society for people with disabilities. Access to the transport system should be continuously improved and should be taking into account in all planning and procurement procedures involving the infrastructure, means of transport, traffic and other services.

The Act has several provisions to ensure equal opportunities, protection of rights and full participation of disable people in mainstream activities of the society. The state has been entrusted with the responsibility to

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8 H. Gallagher, *Trust Betrayed: Patients, Physicians and the License to Kill*, Third Reich, New York, Vandamere Press, 1995, p. 45.

9 L. Despouy, *Human Rights and Disabled Persons*, UN, New York, 1993, p. 64.

prevent disabilities, provision of medical care, education, training, employment and rehabilitation of persons with disabilities.[10] The state, however, became alive to the problems of the disable in India on the eve of the International Year for the Disabled Persons, a declaration by the United Nations. The loose ends of the thread were picked up during the decade for the disabled. This did help us in creating conceptual and legal bases for the welfare of the disabled. Interaction with international organizations enables us to adopt new concepts, techniques and strategies.[11]

But still there remains a lot to be done. The wide gap between the development activities relating to the disabled becomes evident when we compare their conditions in the developed countries to those of in India. The disabled in the western countries, for instance, have been encouraged to participate and excel in sports as is evident from the Paralympics held in Atlanta, whereas such a happening seems to be just a dream for the disabled in India. The disabled in the western countries, for instance, have been encouraged to participate and excel in sports as is evident from the Paralympics held in Atlanta, whereas such a happening seems to be just a dream for the disabled in India.[12]

It is pity to not that even a systematic authentic census of the disabled in India does not exist. Consequently, different sources mention different figures. For example, the recent data about the disabled released by the government puts their number at or around at or around sixteen million; whereas the various organizations of the disabled claim their number to be more than 80 million.[13] Such a wide gap is a serious reflection on the quality of policy and programmed adopted for the welfare of the

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10 R.S. Pandey, *Perspectives in Disability and Rehabilitation*, Vikas Publishing House Pvt. Ltd., New Delhi, 1995, p. 33.

11 Indian Council of Social Welfare, *Understanding the Handicapped Child*, Popular Prakashan, Bombay, 1997, p. 78.

12 Robert Perske, *Mental Retardation: The Leading Edge Service Programs*, U.S. Department of Health Education and Welfare, Washington, D.C., 2002, p. 90.

13 Michael Oliver, *Understanding Disability*, Macmillan Press, London, 1996, p. 43.

disabled. Another equally important thing that seems to have been overlooked to a great extent is the proper utilization of means of mass-communication to create awareness among the public about the problems of disables and solutions thereof. One finds that the mass-media is not yet tuned to play its part in effecting a meaningful integration of the disabled into society.[14]

Disabilities are conventionally defined in medical science on a three-point scale established by the World Health Organization in 1980 ranging from impairments, disabilities and handicaps. The World Health Organization,[15] in its International Classification of Impairments, Disabilities and Handicaps, makes a distinction between impairment, disability and handicap. These three concepts are defined by it as follows:

(a) Impairment is "any loss or abnormality of psychological, physiological or anatomical structure or function". Impairments are disturbances at the level of the organs, which includes defects in or loss of a limb, organ or other body structure, as well as defects in or loss of a mental function.

(b) Disability is a "restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being". It describes a functional limitation or activity restriction caused by impairment.

(c) A handicap is a "disadvantage for a given individual, resulting from an impairment or disability that limits or prevents the fulfillment of a role that is normal (depending on age, sex and social and cultural factors) for that individual". The term is also a classification of "circumstances in which disabled people are likely to find themselves".

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14 E. Kallen, *Social Inequality and Social Injustice: A Human Rights Perspective*, Basingstoke and New York, Macmillan Palgrave, 2004, p. 21.

15 Helander, Einar, *Prejudice and Dignity: An introduction to Community Based Rehabilitation.* United Nations Development Programme, New York, 2006.

However, it seems that the definition under Section 2(i) of the Act does not recognize the international classification given by the World Health Organization.[16] It also seems that the Act has tried to cover every kind of disability under Section 2(i), but in fact the term disability is included in a very narrow sense in the Act.

The definition, in fact, has left some of the important categories, which are included in the term disability world over. According to conservative estimates, approximately 6% of India's population is disabled.[17] And if we go by what the UN officials or various other experts say, the figure could very well be in double digits. After all, Australia does admit officially that 18% of their population is affected by one form of disability or the other.

The United Kingdom's disabled population is estimated at 14.2%, whereas in US it is 9%. Why are the numbers as high for such "developed" nations as Australia or UK or USA? The answer is quite simple.[18] Their definition of "disability" is much broader and embracing. For example, in such countries "people with internal conditions" are also considered disabled. These are individuals where the disability is not very visible.

A person with one lung or one kidney or a person with a severe heart ailment would be termed "disabled". In certain countries, even diabetics are given shade under the umbrella of disability.[19]

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16 Desai, Beena, *Armed Forces & Disability, Health for the Millions*, Vol. 21, No. 6, New Delhi, 1995.

17 Helander, E., *Training in the Community For People with Disabilities*, World Health Organization, Geneva, 1989.

18 Bijou, Sidney W., *The Mentally Retarded Child*, Association For Retarded Citizens, Texas, 1999.

19 Kulkarni, M.R., *A Manual On Development of School Programmes For the Intellectually Handicapped*, Federation For The Welfare of Mentally Retarded, New Delhi, 2003.

Such countries and societies are now looking at disability as a social issue and not as a medical one, as is the case in India where disability is a stigma. To be disabled means to be a person without a leg or arm or eye or twisted or worse, crooked! People are ashamed to be labeled "disabled".

The categories, which may be considered to be included in the definition of "disability", are:

(1) ***Difficulty in speaking*** - this category of disability is not included in the Act; whereas this category is covered under the scope of disability by the World Health Organization in international categorization.[20]

(2) ***Disability of the internal organs*** - It is submitted that the term disability should not only include disability of the external organs, but it should also include disability of the internal organs like kidney, lungs, heart. A person belonging to this category also lacks physical ability to do many kinds of physical jobs.

Further, it could be said that mental disability directly relates to the brain, which is an internal organ. Thus, disability of an internal organ like brain can be included in the term "disability"; disability related to other internal organs should also be included in the term "disability".[21]

(3) ***Eunuch*** - It is submitted that this category should be considered both at the national and international level to be included in the category of disability. This is a section of

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20 Bhushan, Shashi, *The Situation of the Handicapped in India*, Institute of Social Sciences, New Delhi, 1988

21 Henderson, A.S., *Introduction to Exceptional Children : Their Nature And Educational Provisions*, Sterling Publishers, New Delhi, 1994.

human being, which is living a life without dignity. These people are fit physically and mentally.

So as to say, they are in better condition than other persons with disabilities. This section is deprived of very many human rights and fundamental rights. They are disabled but their disability is not of the character, which prevents them from performing day-to-day functions.

Because of the social stigma attached to them they are deprived of their family property, right to pursue a profession, right to education and right to get a dignified funeral ceremony after death. Their existence as human being is denied just because they are not categorized as male or female.

As a result, they are totally segregated from the human society and the mainstream, because of this they are forced by the circumstances to get involved in antisocial activities and crimes.

(4) ***Persons suffering from AIDS*** - A person suffering from AIDS carry with him a social stigma in the same way as that of a person who is leprosy-cussed. AIDS weakens the immunity system of a person, which in turn reduces their normal capacity to work. They are prone to health hazards.[22] So, providing special protection is necessary not only for them but also for the society at large.

1.4 Suggestions and Conclusion

In the light of the above discussion, a few general proposals and some specific suggestions have been culled which are otherwise lying embedded in the context. Primarily, it is the Ministry of Social Welfare which is burdened with the responsibility of providing all sorts of

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[22] Christoffle Blindenmission, *Without Holding Hands*, Christoffle Blindenmission, Bensheim, 1979.

services to the disabled. Instead, Ministries of Education, Health, Labour, Home, Industry, Science and Technology, Law and Legal affairs and Agriculture and Rural Development should all join in the venture with the co-ordinating power vesting in the Ministry of Social Welfare.

(1) There is a need to develop indigenous aids and appliances and equipments, which would facilitate the training, employment and the rehabilitation of the disabled.

(2) The disabled themselves should be involved in the identification of their peculiar problems which could constitute the basis of on going research in our national laboratories manned by motivated scientists, technician's engineers, research workers and other specialists in different fields.

(3) Attempt should be made to change the societal attitude of pity towards the disabled and the attitude of the disabled towards themselves as being burden on society.

(4) There are fewer Special Employment Exchanges in number (22 in all) and still much less efficacious in operation because the over-whelming private sector ignores the disabled with impunity. If the chances of the disabled for realistic employment are to be improved, employers covered under the *Employment Exchanges (Compulsory Notification of Vacancies) Act*, 1959 should be compelled to recruit the handicapped persons against all available vacancies for which they are eligible.

(5) At present there are only 16 vocational rehabilitation centers and 11 rural rehabilitation extension centers to cater the needs of the disabled in India. These are too-inadequate to meet the needs of millions of disabled accordingly; increased budget allocation is needed for the creation of the requisite number of vocational centers.

(6) The procedures to enable the disabled to avail themselves of various economic benefits are rather tedious and therefore, need

rationalization in all such respects as the issuance of identity cards, medical certificates and the like.

(7) There is a need to maintain a national register; requiring compulsory registration of all the disabled along with the nature and magnitude of their disability for a systematic planning towards their betterment.

(8) Re-orientation of the society including the disabled themselves through wide publicity is necessary in the light of the social philosophy underlying the new approach to the problem of the disabled and their welfare. Publications, meetings and conferences, seminars and symposium on the theme of disability should be encourage so that disabled and those involved in the rehabilitation process could have a meaningful exchange of experiences. A publicity campaign should be started to educate the disabled about the existing facilities and procedures contributing towards their meaningful existence.

(9) Free education, which is specially made available to the disable, should not be restricted either to a particular level of education or up to a particular age. They should be allowed to continue to explore potential to the fullest possible extent.

(10) Disability issues kept out of politics. In the passing of the law the Parliament has stopped pretending that although disabled people do exist, they cannot be included in the priority list of entitlements claimed by non-disabled Indian citizens. Talking down to disable people in patronizing and paternalistic terms has given way to a language ensuring equality and dignity. Instead of segregation of disabled people there is now emphasis on their full participation and total integration.

In India authorities concerned are yet to take measures to ensure the implementation of the provisions for "Accessibility". The authorities are taking undue advantage of the term "with in the limits of their economic capacity". They are using this term as a defense to negate the right granted by the statute. To ensure strict implementation of the provision,

it is necessary that a deadline must be fixed for the authorities to comply with the provisions of the *Indian Act*. Whereas, the US Act provides specific guidelines for implementation with effective dates, deadlines, alternate arrangements, temporary relief etc. The Act is comprehensive but must be enforced with sincerity and determination.

In conclusion, it could be said that some lacunas and problems in implementation of the *Disability Act*, 1995 makes Indian disability law lag behind in the international scenario. The human rights movement has boldly and categorically shifted the attention of policy makers from the mere provision of charitable services to vigorously protecting their basic right to dignity and self-respect. In the new scenario, the disabled are viewed as individuals with a wide range of abilities and each one of them willing and capable to utilize his/her potential and talents. In country like India the numbers of the disabled are so large, their problems are so complex, available resources are so scarce and social attitudes so damaging, it is only legislation which can eventually bring about a substantial change in a uniform manner.

human rights instruments; and (ii) the life of human rights doctrine, at the very core of global concerns and global governance -- the voice of religion and law spoke for the first time in one language when the Dutch delegate Van Roijen spoke to the United Nations General Assembly in the following words:

> *"...man's divine origin and immortal destiny had not been mentioned in the declaration, for the fount of all those rights was the Supremebeing, who laid a great responsibility on those who claimed them. To ignore that relation was almost the same as severing a plant from its roots, or building a house and forgetting the foundation".*[4]

Hence, the *divine dignity of man* was asked to wear the uniform of the *inherent dignity of man*. It is only the words that changed, not the substance. *It is in this vein that this paper would discuss the global concerns of inherent human dignity and the fragile global governance in the perspective of divine human dignity and the irresponsible divisions among major world religions.*

1.2 Inherent Human Dignity and the Fragile Global Governance: *You are with me*

There hardly is a person in the world with day today general knowledge of current events and affairs who would not understand the meaning of the three digits of 9/11. The 19 terrorists hijacked four commercial passenger airlinerss en route to San Francisco and Los Angeles from Boston, Newark, and Washington DC (Washington Dulles International Airport) in the morning of September 11, 2001. Two of the airliners were crashed into the Twin Towers of the World Trade Center in New York City. The third airliners was crashed into the Pentagon building

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[4] General Assembly, Summary Records, p. 874. And also in Third Committee, Summary Records, p. 755.

(United States' Ministry of Defence) in Arlington, Virginia, just outside Washington DC. The fourth plane crashed into a field near Shanksville in rural Pennsylvania after some passengers and crew attempted to retake control of the airliner which the hijackers had redirected towards Washington DC. 2973 victims and 19 hijackers had died in these attacks. There were no survivors from any of these flights. The casualties belonged to some 70 countries. [5]

This was outright an extremely demeaning international criminal act, involving egregious violations of human rights and disrespect to human dignity of not only 281 million (as per 2000 census) US citizens but of the world as a whole as the main target was the World Trade Center building in New York.

We are living in an age that can in legal and political terms be described as the age of human rights and respect for dignity, for the legal epitome of the contemporary instrument of global governance - the United Nations Charter opens with the words: "We the peoples of the United Nations... reaffirm faith in fundamental human rights, in the dignity and worth of the human person."[6] Yet, in his book *The Lord's Prayer: Bridge to a Better World* a Sri Lankan jurist, Judge Weeramantry, a former Vice-President of the International Court of Justice, highlights the following 10 global concerns facing the mankind today: *(i) terrorism; (ii) genocide; (iii) racism; (iv) torture; (v) narcotics; (vi) militarism (vii) arms races; (viii) hijacking; (ix) environmental devastation; and (x) human rights violations of every kind.*[7]

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5 Source "September 11 Attacks," available at: http://en.wikipedia.org/wiki/September_11_attacks

6 Preamble of the Charter of the United Nations, signed on 26 June 1945 in San Francisco, USA; 192 States are at present members of the United Nations Organization.

7 Weeramantry, Christopher Gregory, *The Lord's Prayer: Bridge to a Better World*, Liguori/Triumph (Liguori, Missouri), 1998, p. 3.

Iraqi aggression against Kuwait[19]. And the third: authorizing during 2003-2004 a "multinational force under unified command" to use force in order to restore security and stability in Iraq.[20] In all these cases, the major State using the force was the United States. Hence, the coercive power which the international community was supposed to have in its own control, and did not have, was substituted by the coercive power mainly of one nation. This in fact is though living theoretical in the post-Charter world and yet in practice employing the pre-Charter mechanisms; manifesting the failure to activate the principle of force monopoly of the community envisaged in Article 43 under Chapter VII of the United Nations Charter. This reflects promoting force monopoly of individual States as against the force monopoly of "we, the peoples of the United Nations.

From North Korea's aggression in 1950 to the recent Uganda's egregious violations of human rights and humanitarian laws the success of the Security Council resolutions, face to face with the loss of millions of human lives and other suffering in the absence of any United Nations coercive force, does indeed not appear very congratulation worthy. From the apartheid regime in the earlier South Africa to the ongoing bloodshed in the Palestine, from the 9/11 terrorist attacks in the United States to the invasion of Iraq, the violations of human rights and humanitarian law and heart rending suffering of the consequent refugees and displaced and destitute civilian populations are the loud alarms of just one thing: the protection of human dignity in the community of *"we, the peoples of the United Nations"* is not possible as long as the system of international rule of law is not backed by a standing and effective international coercive force. In other words, an able, effective and efficient standing international collective security system is the dire need of the time. *Korean* people are as divided today as they were in 1950. Neither have they enjoyed the right to peace and security nor to self-determination, and more so that they are now at daggers drawn with added nuclear weapons. *Palestinian* problem is as much a threat to

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19 Security Council Resolution 678 (1990).
20 *Id.*, 1511 (2003) and 1546 (2004).

world peace and security as it was in 1947. Their self-determination is as distant a dream as it was 58 years ago, and more so with the birth of home grown terrorism. *Yugoslavia* having experienced genocide and blood streams has gone to pieces and now cross in rebuilding. The peoples of *Afghanistan* and *Iraq* shattered to homelessness and foodlessness in the name of terrorism and weapons of mass destruction, respectively. The peoples of *Iran* and *Syria* seemingly the next on the list of facing destinies of *Afghanistan* and *Iraq*. Where for all these peoples, "the peoples of the United Nations", are the rights to human dignity, peace and security! The international rule of law, designed to respect the supreme value and dignity of every individual in the international community, is, in the absence of an organized international community force to sustain that rule of law, obviously failing. If we do not go forward we go backward and that is what the Security Council has been doing as far as establishing a global security system is concerned. It is time that we stop self-congratulating ourselves for averting a third world war. As a matter of fact any averting of such a war, at the cost of letting grow country and region specific military forces and not making it possible to organize the United Nations forces, is constantly multiplying the magnitude of human suffering which may eventually come as a result of finally inevitable global war. None will escape its humanitarian crises, not even the so-called super military powers. The tragedy of the contemporary human rights violations and the resulting humanitarian crises is that the international rule of law is growing in deplorable deficit of the commensurate force monopoly mechanism of international community of "*we, the peoples of the United Nations*". Sooner we realize the better it would be to protect and respect human dignity worldwide, the objective behind the primary responsibility of the maintenance of international peace and security of the primary enforcement agency of the United Nations, the Security Council. It is time that the Security Council started drawing distinctions between the concept of *"peoples"* and the concept of *"rulers"* vis-à-vis *the principle of we, the peoples of the United Nations*. It is time that the Security Council started drawing distinctions between global, regional and national security systems vis-à-vis *the principle of peace and*

security of "we, the peoples of the united nations." It is time that the Security Council had worked for the United Nations' own security forces ever ready to effectively handle any threat to the international peace and security, hence threats to the international rule of law, particularly threats to human dignity in the humanitarian and refugee crises. The genuine collective world security forces in the sense of force monopoly of the international community would be for providing the certainty of a collective force ready to frustrate aggression – for giving to the potential victim the reassurance, and conveying to the potential law-breaker the deterring conviction, that the resources of the community will be mobilized against any abuse of national or regional security forces.[21]

As a consequent decline in the major peace keeping operations the rise in the military regionalism mainly under the leadership of the United States and mainly with the help of the North Atlantic Treaty Organization was visible and it made its major appearance in the Kosovo War of 1999. The NATO, in disregard to the Security Council's leadership simply because of no stronger UN security forces to stop the regional military alliance taking international law in its own hands, moved to the brink of military intervention for the first time in history.

It must be observed that the rise of military regionalism led by the United States developed parallel to the decline of the United Nations peacekeeping operations. It may equally be observed that the world is not safer than it was before the Kosovo War.11 September 2001 terrorist attack on the United States is just one glaring example of the ensuing international criminality. It cannot be denied that among the causes of growing terrorism, one is the individual insecurity of many borne of the failure to protect individual human dignity of the peoples worldwide. The Brahimi Report of 2000 made a clear analysis of this cause and effect circle of the declining international security.

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21 Claude, Inis L. (Jr.), *Swords into Plowshares*, 4th Edition, Random House, New York, 1970, p. 252.

The failure of the Security Council to establish a permanent system of collective security stipulated in the Charter and within the powers and functions of the security organ has encouraged, and perhaps compelled, nations to continue strengthening their separate individual and collective self-defence systems. The Security Council has, by constantly authorizing individual United Nations Members to use force in its behalf, indeed substituted "legitimization" for the actual collective world security mechanism. By so doing it has been strengthening the very mechanisms of security which it should have been balancing and controlling by its own. This makes the system of global governance extremely fragile.

It is suggestive that the reason has with its utmost struggle brought us very near to the religion, as is suggested in the above statement of Van Roijen, and now *it is up to the leadership of major world religions to bring the secularity of global governance to the spirituality of global governance that would in the true sense reflect the divine human dignity in reflecting human conscience in its pristine spirit.*

1.3 Human Dignity and the Irresponsible Divisions among the Major World Religions: But *We Are Not With Him*

The most befitting tribute ever paid to human dignity was by religion though, such as: (i) *"God made man in his own image,"* proclaim Indian Vedas, ancient Indian books;[22] (ii) *"This body is the temple of the Lord; and the jewel of knowledge is to be found therein"*[23] and (iii) *"Human body is the living temple of God,"* speaks the Christian Bible.

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22 This Indian Vedas' dictum is correlated by a massive doctrine of the Greek Fathers of the Catholic Church and also by Philo of Alexandria

23 Adi Granth, Mohalla 3, Parbhati, 1346-4. For the English translation see Singh, Hazur Maharaj Sawan, *Philosophy of the Masters*, Vol. V, Radha Soami Satsang Beas, 5th ed., 1997, p. 161.

The power of religion on the mind of the majority of mankind is inexplicably so great that even though history has witnessed more bloodshed in the name of religion than for any other cause yet several times more the blood may flow if the masses are forced to keep away from their religions. Such is the power of faith. It is this factual and psychological reality that has given birth to the right to freedom of religion. Why is that so? The answer depends on how do people perceive religion. The world religion is said to have been derived from the Latin word "*religare*" which means to bind with or to unite with. Every religion also professes two common facts: (i) every human has a soul; and (ii) the soul is of the essence of God. The word God is also said to have been derived from the English word "good". As God is often perceived as (i) God is love and love is God; and (ii) as an infinite power that has created everything finite in his creation and is itself active in everything, i.e., He is in everything and everything is in Him. In this sense man perceives God as something infinitely good and infinitely loving. Hence, the answer to why people get so easily ready to sacrifice their lives for the cause of religion is: because when people think that their religion is threatened, actually they feel that their entire existence of being potentially destined to develop into uniting with their own infinitely good and loving self is threatened. Life will always fight for life is the law so deeply ingrained in everything living; and, man that is considered as the top of the creation is no exception. Then another natural question comes to mind in a very natural way: if man is of the essence of so infinitely good and loving then why there is so much hatred and bloodshed by him in the very name of religion, its own very unity in the final analysis? Here is the hitch. Every confused man of religion himself or herself is desperate to know the right and sincere answer. The fallen religions give the fallen answers. It is the world of learning, the hard historical and divine researches by the people in academic circles that are morally duty bound to answer such questions.

The word God is a derivation from the word good, infinitely good though; it cannot be otherwise. The quest for God or an urge to merge back into Him is simply an urge to cultivate within oneself one's own unfathomable and infinite source of goodness. Those who deny God,

they simply deny to develop their own good self. They dare not digging deep into their own consciousness and conscience.

The world of today, ever so vulnerable to plunge into a global nuclear holocaust and witnessing daily the egregious violations of human right and human dignity all across the globe – is literally on fire and so is its fragile system of global governance. And, if there is any single secular institution that must hold the responsibility for this sorry state of affairs, it is the UN Security Council. And, if the responsibility of this failure has to be seen in the spiritual perspective, it is religion, the very fountain of human conscience indeed. Not one particular religion but all, mainly major world religions. Not for what they do, but for what they do not do, i.e., to earnestly unite to inspire mankind to undo what it has nationally as well internationally done because of the irresponsible divisions among the world religions since ages.

Globalization is as much a reality of life worldwide as the contemporary global concerns and the evolving system of global governance. If there is anything every world religion stands for it is to enhance human dignity by uniting its very life force with its pristine origin of infinite life force.

The five oldest major world religions,[24] as per their chronological order, are: (i) Hinduism: the oldest religion, dating to prehistoric times; (ii) Judaism: the Hebrew leader Abraham founded Judaism around 2000 B.C., the oldest of the monotheistic faiths (religions with one god); (iii) Christiany: founded by Jesus Christ who was crucified around A.D. 30 in Jerusalem; (iv) Buddhism: founded by Siddhartha Gautama, later called the Buddha, in the 4th or 5th century B.C. in India; and (v) Islam: founded in Arabia by Muhammad between A.D. 610 and A.D. 632.

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[24] Source of information: http://www.woodlands-junior.kent.sch.uk/Homework/Religion.html

Humanity at large is still religious at heart. The largest 6 main world religions in order of their approximate membership[25] are: (i) Christianity: 2.1 billion; (ii) Islam: 1.3 billion; (iii) Hinduism: 900 million; (iv) Buddhism: 376 million; (v) Sikhism: 23 million; and (vi) Judaism: 14 million. There has been an ongoing conflict, since ages, between various relgions.

The bloodshed between Christians and Mohammedans for 150 long years is the story of crusades. It was sometime in the 11th century that some Christian pilgrims journeyed to Jerusalem, their Holy City, at present the capital of Israel, still disputed between Arab Muslims and Jews of Israel. It is said that these pilgrims were ill-treated and harassed by Turks, the then ruling Muslims. They returned to Europe very angry and spread all the stories of their humiliation. One person among them, namely Peter the Hermit, appealed the Christian population to rescue their Holy City from Muslims. As a result, in 1095, the Pope and a great Church Council in Europe called upon Christian people to march on to Jerusalem and fight the so-called holy war against Muslims to recover the Holy City of Jerusalem from them. This was what we read in history the beginning of Crusades, the war between two great religions of the world, Christianity and Islam. The war lasted on and off for 150 years. Nothing was achieved by this long war. The last Crusade took place in 1249. Meanwhile, Arabs as well as Europeans went to their own divisions among themselves.

We all know that the nation state of today found its origin in the 1648 Treaty of Westphalia. "The Thirty Years' War that preceded the treaty had brought astonishing destruction, more destruction than the Black Death as Protestants and Catholics slaughtered each other by the millions."[26]

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25 *Ibid.*

26 *Id.*, Micklethwait, John and Wooldridge, pp. 300-301.

Genocide of the Jews by Christians in Germany during the Second World War is so fresh in history. Catholics and Protestants fighting with each other in the North Ireland and the on and off war between Muslims and Jews in the Palestinian territory are the current scenes of their religious divisions.

This is an insult to the principle of *universal brotherhood of man and the fatherhood of one God* which all the religions preach.

Some what similar to these three Abrahamic religions, the other three religions – Hinduism, Buddhism and Sikhism are also rooted in each other yet the divisions are more visible than the unity among them.

"Hinduism is a jungle of religions," said Hoens a Dutch professor of Hindu Studies at the University of Utrecht in Holland to me in a private conversation some 20 years ago. He was absolutely right as he perceived that every Hindu or many groups of Hindus, as Western called them, worshipped God as he/she or they liked to and they all welcomed each other's way in a loving spirit in the sense that all one way or another were seeking God, considered a noble deed by the society. This is what made Vivekananda, an Indian philosopher and a *sanyasi*, to address the World's Parliament of Religions, in Chicago (USA), on 11th September 1893.[27]

He characterized Hindu faith and conscience in the following principles of Hinduism: (i) the principle of tolerance; (ii) the principle of unity; (iii) the principle of co-existence; (iv) the principle of love; and (v) the principle of spirituality. From Vedas, Puranas and Upanishad to Gita, Ramayana, Quran and Adi Granth; all these books are holy and their followers are free to worship the way they like as long as they do not hinder the worship and the way of the others. Even when worshipping

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[27] Vivekananda, Swami, *The Complete Works of Vivekananda*, Volume 1, Sixteenth Edition, Calcutta, 1984, p. x.

millions of gods and reciting numerous books, at the core of Hindu way, called *Dharma* (the path of righteousness), were the two basic principles: (i) *the God is one and he can be worshipped in the spirit of love the way one likes*; (ii) and under the guidance of a perfect Guru (a spiritual adapt) every step in the direction of God will be a step further.

Buddhism in this spirit is an extension of Hinduism. It was the deterioration in Hinduism as far as the righteous living is concerned, hence, the prevailing social conditions that made Sidhartha Gautam Buddha to put great emphasis on the right way of living and right way of meditation. The Gautam Buddha (566 – 486 BC), founder of Buddhism preached four truths about the reality of man in this world: (1) *Dukh*: this world is full of suffering; (2) *Samudaya*: the root cause of all suffering is attachment, desires root in our ignorance; (3) *Nirodha*: Liberation from this suffering is possible; (4) *Maggo*: the Noble Eightfold Path, prescribing eight principles of righteousness (i) right view; (ii) right thought; (iii) right speech; (iv) right conduct; (v) right vocation; (vi) right effort; (vii) right attention; and (viii) right concentration comprising the path that leads to liberation of man from this world of suffering. Buddhism is more precise and practical in its approach. Principles (i) – (vii) refer to the right line of action in this world and the principle (viii) refers to doing meditation under a living master.

The eminent historian, H.G. Wells, depicts human conscience of an ancient Indian emperor, namely Asoka, and highlights human virtues of right aspiration, right effort, and right livelihood in the Eightfold Path of Budhism in the following words:

> "He is the only military monarch on record who abandoned warfare after victory....The expedition was successful, but he was disgusted by what he saw of the cruelties and horrors of war. He declared, in certain inscriptions that still exist, that he would no longer seek conquest by war, but by religion, and the rest of his life was devoted to the spreading of Budhism throughout the world.... How entirely compatible that way of living

> then was with the most useful and beneficent activities his life shows. Right Aspiration, Right Effort, and Right Livelihood distinguished his career"[28].

Sikhism, though the youngest of the world religions, reflects the continuation and modification of the oldest and all thereafter, presenting a synthesis of all religious principles, so much so that it includes the compositions of Hindus as well as Muslim saints in its holy book.

When Adi Granth, also known as Granth Sahib, the holy book of the Sikhs, was being compiled, its transcriber Bhai Gurdas is said to have requested the fifth Guru of the Sikhs, Guru Arjan, under whose leadership the book was compiled, that the book is so large in size, perhaps there must be added an introduction to it in the beginning. Guru Arjan answered: what can be a better introduction than Jap Ji Sahib, the composition of Guru Nanak, the first Guru of the Sikhs. And, it was so decided to start the Adi Granth by placing Jap Ji Sahib at the beginning, some seven pages. As a matter of fact, the first line of Jap Ji Sahib, called *Mool Mantra*, is considered as the gist of Jap Ji Sahib, hence the gist of the teachings enshrined in the entire Adi Granth.

The immensity of the intensity of conveying the core threefold, yet intertwined, spiritual principles stipulated by Guru Nanak's *Jap Ji Sahib*, hence of entire *Adi Granth* (i) God is One, the One in all and all in one; (ii) the pristine truth is the all pervading life current of His *Naam*; (iii) the latent power of *Naam* in every human can only be ignited and cultivated by Guru's Grace (a living teacher of spirituality), for the Guru is the living form of God as well as *Naam* -- depends how one interprets and understands its *Mool Mantra*. However, after the passing away of the tenth Guru, Guru Gobind Singh who did not appoint any successor before his departure from this world a new belief has been developed

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[28] Wells, H.G., *The Outline of History: Being a Plain History of Life and Mankind*, Garden City Publishing Co., New York, 1930, pp. 369-370.

that as from that time (i) that the Guru of the Sikhs is the holy book of Adi Granth, reverently called Granth Sahib; and (ii) that reading the holy book amounts to *reciting the Name* of the Lord. In short, Sikhism is what for someone *Mool Mantra* is. This is what Sikhism - essentially the union of two principles of (i) *meditate on God's Name (har ka Naam jap)*; and (ii) *perform good deeds(nirmal karam)* - has brought in line with other religions.

It is a fact that every interpretation of *Jap Ji's Mool Mantra* is descriptive whereas the *Mool Mantra* itself is neither in poetry nor in flowing prose but in one key digit, one key symbol, and eight pairs of key words.

Hence, to help grasp the message of *Jap Ji Sahib* better, the interpretation of its *Mool Mantra* may be presented in the perspective that would take into account the pictorial presentation of the symbol of open *"Oora,"* impressing upon the mind of the reader that we all are imprisoned in two circles of doing good or bad respectively, subject to the *karmic* law of *"every action has an equal and opposite reaction"* (Newton's third law of motion in physics). Whereas by exploiting our latent infinite power of *Naam*, to be attained with Guru's Grace, and gradually overpowering the clutching and clamping powers of vices and virtues, we have to break ourselves free from the confines of the circles of vices and virtues into the inner spiritual world of higher and infinite consciousness, exactly the way a space shuttle overpowers the gravitational power of the earth and breaks free into the outer space.

After the *Mool Mantra* comes only one word *"jap"*[29] standing alone as a heading for the rest of Jap Ji Sahib. The word *"Jap"* is seldom understood or given adequate interpretation. Literally, it means: remember, meditate, recite, etc. Being a one word sentence in itself, is so heavily laden with the connotation of a **spiritual and moral command** that not only it is the title of the entire composition of *Jap Ji Sahib* but it

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[29] Adi Granth, p. a

equally connotes that one *must* remember what is mentioned in all the following 38 *pauris* and one *slok*. Not to give the adequate thought and attention to this word would be contrary to the purpose of the composition. To comprehend it simply as to "meditate" would be depriving the seeker from understanding its practical, spiritual and moral value in the composition. In its spiritual and moral profundity of a steadfast tone the word is no less than a spiritual imperative in the sense of biblical Ten Commandments. Actually, it has the weight of command of the commands of 38 *pauris* and one *shalok*.

As the aim of all religions is to find the *Eternal Truth* about God and man in order to: (i) merge in it; and (ii) to live according to it while conforming our conscience with it in our interhuman contacts, Guru Nanak was very particular about human nature to find always the easy and substitute way of "thinking" about and indulging in intellectual gymnastics and disregard the core truth about the last words of *Mool Mantra*: *"Can only be attained by Guru's Grace"*. Hence, he did mention in the first line of the first Pauri of Jap Ji Sahib that: s*ochay soch na hova-ee jai sochay lakh vaar.*[30] Which may be translated as: *"No amount of thinking, even million times, can make us perceive His True form."*

The connotations of the word *"soch"* (thinking) leads one's mind to relate it with the sense conveyed by the words thinking, pondering, rationalizing, philosophizing, etc. Hence, the seeker is warned by Guru Nanak that (i) thinking alone would not bring one to the eternal truth but by practicing and living the teachings as explained by the Guru; and (ii) therefore, every single word of his *Jap Ji Sahib* is to be read in conformity with every word of its *Mool Mantra*.

In nutshell, the spiritual message of Sikhism may be summarized in three principles as follows: union beyond any division; freedom beyond

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30 *Ibid.*

any bondage; peace beyond any fear. The essence of the first principle applied to the world religions in their secularity is certainly an invitation to them to come, unite and do away with irresponsible divisions in the global interests of human dignity and global governance.

The teachings of Sikhism are simple, straightforward and extremely universal, reflecting the essence of truth in every religion. However, two deficits need to be rectified in order to do reflect the universal aspect of Guru Nanak's teachings for all the times and climes:

(1) The deficit of a living Guru: the liberal and universal nature of Sikhism has though already accepted two different versions the principle of by Guru's grace (i) the grace by a living Guru; and (ii) the grace by Granth Sahib as Guru – yet it has failed in emphasizing this reality as the continuation of the Hindu principle of worship of freedom as one likes with its corollary principle that every step is a step forward. In this sense, one would expect that reading of Granth Sahib would one day bring the seeker to the realization that the initiation by a living Guru is indispensable for merging into God as Guru Nanak has taught the principle of *Gurparsad* (with Guru's grace) with the added corollary of *aad sach jugad sach* (*true primordially and true through aeons*).

(2) When compiling the Granth Sahib at the beginning of the seventeenth century (1603 – 1604), Guru Arjan decided to include the compositions from Hindu as well as Muslim saints, as the teachings of Guru Nanak were meant for the peoples of the whole world. Respecting that spirit of Guru Nanak, and treating his teachings as sacred trust of humanity, the Sikh authorities will do the greatest honour to Guru Nanak and humanity as a whole by including at this time of 21st century the compositions of saints from other major religions as well – such as Christianity, Buddhism and Judaism. It may be recalled that the addition was made to the Adi Granth in 1678 when Guru Gobind Singh incorporated in it the compositions of Guru Teg

Bahadur, hence the tradition of making additions must further be upheld to keep the book universally update as the sacred trust of world spirituality.

These two steps may make the Granth Sahib as the secular and spiritual guide of entire mankind and Sikhism as the true universal religion, paving the way to breaking all the irresponsible divisions between major world religions and yet respecting their individual existence as fellow religions, as the nation States have done in the political form from the 1648 Treaty of Westphalia to the 1945 Charter of the United Nations. Jap Ji Sahib, the briefest possible description of the essence of truth in all major world religions, is in the true sense a *Charter of World Spirituality.*

It is highly deplorable though that despite such lofty teachings of all the major world religions – all advocating *universal fatherhood of God* as far as spiritual aspect of them is concerned and equally believing in the *universal brotherhood of man* as far as their social aspect is concerned – their irresponsible divisions provide the background for many of the wars going on in the world at present

1.4 Observations in the Final Analysis

Law as it stands in the Charter and the three instruments of the International Bill of Human Rights has given more dignity to religion as an institution than the religion has so far done to law in the post-modern era. The principle of religious freedom is at the core of any democratic rule of law when it comes to respect the dignity of any religion in the world. Religions must reciprocate in practice by earnestly asserting in all discourses that any behavior – such as terrorism and 9/11 that does not conform to the norms derived from the doctrine of human rights and human dignity are tantamount to be irreligious.

The crisis of all the crises of the day, locally as well as globally, is *the crisis of our perverted human conscience.* The word conscience is made from the combination of two English words: (i) con; and (ii) science.

The word "science" stands for the *true and tested eternal knowledge* of things; and the word "con" stands for *in conformity with*. How can a man be in conformity with something the eternal knowledge of things of which he is not even aware of.

It is the perception of the concept of religion that needs to be revived in the practical light of the three principles (i) living Word Masters- such as Moses, Mohammed, Jesus, or Nanak is as much the need of humanity today as it was centuries ago; (ii) *human body is the living temple of God*; and (iii) *if thine eye be single thy whole body shall be full of light* – the principles that are most fundamental to the code and philosophy of every religion which unfortunately are forgotten and thrown overboard by almost every major religion of the time. Putting into practice of these three fundamental principles would exalt human character and therewith generate good human conscience.

One of the global consequences of irresponsible divisions among major world religions is to be seen in the fact that the fighting of religion (Islam) against religion (Christianity and others) has already reached in the offices of global governance, the United Nations. This is evident from the recently passed resolution by the United Nations Human Rights Council, reported by Laura MacInnis of the Reuters news agency as follows: *"A United Nations forum on Thursday passed a resolution condemning "defamation of religion" as a human rights violation, despite wide concerns that it could be used to justify curbs on free speech in Muslim countries."*[31] The Washington Times was not very happy with such a move, hence, just on the day the voting was going to take place in the UN Human Rights Council, the paper issued an editorial stating: *"Will the United Nations soon be issuing fatwas? Today the U.N. Human Rights Council is expected to vote on a resolution introduced by Pakistan on behalf of the Organization of the Islamic Conference to combat defamation of religion, in particular Islam. This resolution is part of an*

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[31] Macinnis, Laura, "U.N. body adopts resolution on religious defamation," 26 March 2009; available at: http://www.reuters.com/article/idUSTRE52P60220090326

effort begun in 1999 to establish an international framework that would in practice legitimize religious oppression. It is an assault on the rights of the individual and freedom of conscience."[32]

Religions by no means are above law. Their incomes must be as much subject to income tax as that of any individual and institution. Every discourse of a religious speaker must strictly conform to all norms of human rights and human dignity. Every aspect of human life is as a matter of course inescapably getting into the process of globalization in accordance with codified global laws such as Charter of the United Nations and the International Bill of Human Rights *except the institution of religion.* Therefore, in the interest of a better global governance more capable of serving human dignity of "we, the peoples of the United Nations" it is an urgent need of the time that the United Nations Organization undertakes *to enact an international code*[33] *for world religions*, synthesis of teachings scattered in a jungle of religious literature. To raising this awareness is the moral duty of all, but particularly that of the academic world as this remains a field rather under-researched. It may also be prudent in the interest of strengthening the global governance and serving and addressing global concerns of human dignity *to establish an inter-religious tribunal* under the auspices of the United Nations to settle disputes involving religious issues.

The religion in its true sense of the term has in the long run much more to deliver to global governance in accordance with the principle of "we, the peoples of the United Nations" than the institutions, including that of major world religions, under this system has so far been able to deliver in dealing with global concerns. But first the institution of the religion

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32 The Washington Times, "Editorial: The U.N. Tackles Religion", 27 March 2009; available at: http://www.washingtontimes.com/news /2009/mar/27/the-un-tackles-religion/

33 Voices, for and against, have already been coming up in this regard; see the article *"United Nations plan to build a global religion;"* available at:http://www.tldm.org/News6/GlobalReligion.htm For the voices against the religion see the "United Nations to ban religion?," available at: http://able2know.org/topic/50801-1

itself needs to be awakened by mankind's two pillars of strength: (i) the United Nations; and (ii) the world of learning. It is "the power of faith" inherent in human dignity that needs to be channelized to its pristine source – of *Naam, Shabd, Word, Torah, Kalma*, etc.(*har ka naap jap*) – in practice and in order therewith to enhance human dignity and human conscience to performing good deeds. This interaction and communication between global governance and major world religions may go a long way (i) to address global concerns of human dignity; (ii) strengthen global governance in serving peace, justice and security to "we, the peoples of the United Nations; and finally (iii) to remove the barriers between irresponsible divisions of major world religions.

COURT - MARTIAL IN ARMED FORCES AND INDIAN JUDICIARY

Dr. Ved Pal Singh Deswal *

> You can never obtain the respect of your men unless you are absolutely just and impartial in your dealing with them; without the respect of your men you can never lead them. What is moral courage? It is the ability to distinguish right from wrong and having so distinguished it, be prepared to say so, irrespective of the views of your superiors or subordinates and of consequences to you.
>
> **Field Marshal Sam Manekshaw**[1]

A free democratic society wedded to the concept of the Rule of law[2] and accusatorial system of jurisprudence must ensure at least a minimum modicum of decency and fair play to the accused while prosecuting him for an alleged offence.

1.1 Introduction

As long as military justice remains consistent with the Army's paramount need to maintain a disciplined force responsive to military command under fire, both the military and the individuals serving it would benefit from the reform of Army procedures open to abuse, such procedural reforms will also not jeopardize military discipline.[3] The court-martial thus becomes simply an instrument of the executive for enforcing

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1 Maj. Gen Nilendra Kumar, *Military Law: Then, Now and Beyond*, 2008, p. 46.

2 *Kamlabai* v. *State of Maharashtra*, AIR 1962 SC 1189.

3 Editorial, Life, "Dissent and Discipline in the Thinking Man's Army", May 23, 1969, p. 23.

discipline at the will of the commander the answer is to constitute a court of military appeals which would be a body independent of the military organization. The law which the court-martial will then apply will be the law laid down by the superior court and not by the Government, Mr. Bishop said that the best guarantee of fundamental fairness in military trials, in all circumstances is the existence of a power wholly independent of the military organization, to enforce such fairness. This demand for a right of appeal to an independent court is based not primarily on the ground that every subject should be so entitled as part of his democratic heritage but that the administration of justice is incompetently handled by unqualified officials and that a legal check is necessary.[4] In the matters of legal safeguards citizens should be no worse off than in civil life merely because they had taken upon themselves the additional responsibility of joining the Armed Forces unless serious considerations of discipline require them to be placed under any such disadvantage. This court should have power and functions as possessed by the court of Military Appeals in the United States.[5] In the B.C. Chaturvedi case,[6] the Apex Court observed that Judicial review is not an appeal from a decision but a review of the manner in which the decision is made and the power of judicial review is meant to ensure that the individual receive the fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. It is the power of punishment alone, when exercised impartially in proportion to the guilt and irrespective of whether the person punished is the King's son or an enemy that protects this world and the next.[7] Substantive review has been always considered an anathema in judicial review proceedings.[8] Therefore justice assumed a significant role in the administration of a State and

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4 Griffith, "Justice and the Army", 1949, 10 M.L.R. 292.

5 Lewis Committee, Report of the Army and Air Force Courts-Martial Committee, 1949.

6 *B.C. Chaturvedi* v. *Union of India*, 1995 (5) SLR 778 (SC).

7 These lines were said by Kautilya, the famous writer of *Arthshastra.*

8 These lines were said by Lord Denning. See also Ashish Chugh, "Is the Supreme Court Disproportionately applying the Proportionality Principle", Supreme Court of India, New Delhi.

military is an organ of the State. Military discipline is a state of individual and group training that creates a mental attitude resulting in correct conduct and automatic obedience to military law under all conditions. Discipline must be a state of mind, a social institution based on the salient virtues and defects of the nation. It therefore follows that the type of discipline enforced must be suited to the character of the people to which it is applied. A well disciplined soldier generally has a high morale, a factor which plays vital role in winning a war or battle against the enemy. In the S.N. Mukherjee's case,[9] the Supreme Court recognized the inadequacies of the existing law and pointed out that insofar as the finding and sentence of the court martial is concerned the only remedy that is available to a person aggrieved under Sub Section 2 of Section 164 of the *Army Act*, 1950. The said remedy can be invoked only after the finding or sentence has been confirmed by the confirming authority and not before the confirmation of the same. In the case of Charanjit Singh Gill the Supreme Court reiterated its earlier observations:

Despite the lapse of about four decades neither Parliament nor the Central Government appears to have realized their constitutional obligation are expected by this court, except amending Rule 62 providing that after recording the finding in each charge the court shall give brief reasons in support thereof. The judge Advocate has been obliged to record or cause to be recorded brief reasons in the proceedings. Even today the law relating to Armed Forces remains static which requires to be changed keeping in view the observations made by the court in Prithi Pal Singh Bedi case, the constitutional mandate and the changes effected by other democratic countries. The time has come to allay the apprehension of all concerned that the system of trial by court-martial was not the archetype of summary and arbitrary proceedings.[10] In the absence of effective steps taken by Parliament and Central Government it is the constitutional obligation of the courts in the country to protect and safeguard the constitutional rights of all citizens including the persons enrolled in the

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9 *S.N. Mukherjee* v. *Union of India*, (1982) 3 SCC 140.
10 *Charanjit Singh Gill* v. *Union of India*, (1999) 4 SCC 521.

armed forces to the extent permissible under law by not forgetting the paramount deed of maintaining the discipline in the armed forces of the country."Justice being taken away, then what are kingdoms but great robberies? For what are robberies themselves, but little kingdom."[11]

No army can ever hope to accomplish its task unless its soldiers maintain a high standard of discipline. Military discipline by its very ethos demands implicit obedience by the subordinates and fair play and quick dispensation of justice by their commanders. Defence personnel these days are better aware of their rights and privileges. The laws governing them codified in the self contained *Army Act* and Army Rules have been subjected to legal scrutiny by the civil courts over the years.[12] Various High Courts and the Supreme Court of India have been approached for seeking interpretation of a number of provisions pertaining to the administration of justice in the Army relating to service conditions and disciplinary process. There have also been landmark judgments on the various facets of the service conditions of the Army personnel. The struggle for independence was over by 15th August, 1947. But the attainment of independence was not an end itself. It was only the beginning of a struggle, the struggle to live as an independent nation and at the same time establish a democracy based on the ideas of justice, liberty, equality and fraternity. The need of a new constitution forming the basic law of the land for the realization of these ideas was paramount. Therefore one of the first tasks undertaken by India was framing a new constitution. The position of the Armed forces in the Indian Constitution was that List I, Entry I provides for the defence of India and Entry II provides for Naval and Air Force. The President is the supreme commander of the Defence Forces and exercise of this command is to be regulated by Law.[13]

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11 These lines were said by St. Augustine.

12 These lines were written by Field Marshal S.H.F.J. Manekshaw, MC while writing a Forword to the book authored by Nilendera Kumar (Major General), *Law Relating to Armed Forces in India*, Universal Law Publication Delhi, 2005, p vii.

13 O.P. Sharma, "Military Law in India", 1984, p. 257.

1.2 Court-Martial is a Tribunal

In the Major VJ Kharod case,[14] the court held that the Court-Martial set up under the *Army Act*, *Air Force Act* and *Navy Act* are the Tribunals which would be amenable to the writs of mandamus, prohibition and certiorari under Article 226 of our Constitution. Neither the Parliament nor the State Legislature can take away the jurisdiction of the Supreme Court or the High Court to issue writs.[15]

1.3 Discipline and Good Conduct

Military justice is a system of law created to enforce certain standards of behaviors some of which are identical to standards enforced in civilian life. These standards have importance in maintaining discipline in the Armed Forces and public respect for those forces. Military justice is therefore necessary to ensure compliance with those new duties and responsibilities to which the civilian become soldier. Military Justice is needed to teach men to behave in certain ways under certain circumstances and this is necessary for the maintenance of military discipline which is the strict and exact observance by all servicemen of the order and rules established by laws and Acts.[16] Any person subject to this Act [17] who is guilty of any act or omission which though not specified in the Act, is prejudicial to good order and discipline shall on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as in this Act mentioned.[18] In the Ex-Naik Sardar Singh case,[19] the court held that if an offence is

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14 *Union of India* v. *Major V.J. Kharod*, Gujrat High Court, LPA No. 224 of 1985 in SCA No 497 of 1981.

15 Supreme Court and High Courts can issue writs under Article 32 and 226 respectively namely as *Habeas Corpus*, *Mandamus*, *Prohibitio*, *Quo-Warranto* and *Certiorari*.

16 Captain De Vico, "Evolution of Military Law", *JAG Journal* (December 1966 - January 1967) p. 67.

17 *Air Force Act* 1950, Sections 63. See also Rekha Chaturvedi, "*Manual of Military Law*", 2001, p. 39.

18 A.C.Mangla (Major General), *Commentary on Military Law*, 1994, p. 84.

19 *Ex-Naik Sardar Singh* v. *Union of India*, AIR 1992 SC 417.

covered under section 63 while awarding the punishment, the Court Martial has to keep in view the spirit behind Sec 72 of the Act and it has to give due regard to the nature and degree of the offence. In the Sher Singh case,[20] the petitioner was charged for disobedience of a lawful command as a gunner. He was tried and awarded 28 days rigorous imprisonment. While undergoing the punishment he became violent and removed the iron bars fitted in his cell. At his trial by Summary Court Martial he was afforded full opportunity to defend. He was awarded the sentence of dismissal. His appeal was rejected by the General Officer Commanding in Chief against which he filed the petition. The court held that the petitioner has not been able to prove that the Court Martial proceedings were not held in accordance with law. On the other hand misconduct and misdemeanors committed by the petitioner are serious enough to justify his dismissal from service. The petitioner was a member of Indian Army, which is supposed to be the most disciplined force of the country. His conduct does not behave of a disciplined army man. The delinquencies as well as insubordination committed or leniency. The petitioner has disobeyed the instructions of the departmental authorities on more than one occasion. In view of the seriousness of the established charges against him, the only legitimate punishment which could be meted out to the petitioner was to dismiss him from service. The order of punishment has been passed after giving reasonable opportunity of hearing to the petitioner. There does not appear to be any defect of procedure in the conduct of the departmental enquiry. The jurisdiction of this court is very limited in the disciplinary matters. If the procedure adopted is according to law and due opportunity has been afforded to the delinquent employee, in that event, this court would be loath to substitute its finding for those recorded by the disciplinary authority. The punishment of dismissal in the conspectus of the established facts cannot be said to be disproportionate or harsh.

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[20] *Sher Singh* v. *Union of India*, Allahabad Civil Misc WP No 35346 of 1997. See also Nilendra Kumar (Major General), *Law Relating to the Armed Forces*, 2002, p. 121.

However in the Prithi Pal Singh Bedi case,[21] the apex court held that absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment is a glaring lacuna in a country where a counterpart civilian can prefer appeal after appeal to hierarchy of court. Only review of finding and or sentence in confirmation proceeding under section 153 of *Army Act*, 1590 is provided for and the same is poor solace. A hierarchy of courts with powers each having its own power of judicial review has of course been found to be counterproductive but the converse is equally distressing in that there is not even a single judicial review, with the expanding horizons of fair play in action in administrative decision the universal Declaration of Human Rights and retributive justice being regarded to the uncivilsed days a time has come when a step is required to be taken for at least one review and it must truly be a judicial review as and by way of appeal to a body composed of non-military personnel or civil personnel. Army is always on alert for repelling external aggression and suppressing internal disorder so that the peace loving citizen enjoy a social order based on rule of law; the same cannot be denied to the protectors of this order and it must be realized that an appeal from Caesar to Caesar's wife confirmation proceeding under section 153 has been condemned as injudicious and merely a lip sympathy to form. The core question is whether at least there should be one appeal to a body composed of non-military personnel and who would enjoy the right of judicial review both on law and facts as also determine the adequacy of punishment being commensurate with gravity of the offence charged.[22] Law Commission of India had taken up the study *suo motu* in view of the observation of the Hon'ble Supreme Court in this case to review the existing laws of the Armed Forces. It examined the issues and recommended that the *Army Act*, 1950 be amended providing for the creation an armed forces appellate Tribunal, which shall entertain appeals against the sentence/ finding/ order of the courts martial under the *Army Act*. The *Navy* and *Air Force Act* may be so amended as

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21 *Prithi Pal Singh Bedi* v. *Union of India*, (1982) 3 SCC 140.

22 A.K. Upadhayay, "Appeal under Law of Armed Forces" *Journal of Indian Law Institute (JILI)*, Vol, 45 (2), 2003 (April-June), p. 284.

Section 153 of *Army Act*, 1950 provided is poor solace. A hierarchy of courts with powers each having its own power of judicial review has of course been found to be counterproductive but the converse is equally distressing in that there is not even a single judicial review. A time has come when a step is required to be taken for at least one review and it must truly be a judicial review as and by way of appeal to a body composed of non-military personnel or civil personnel. Army is always on alert for repelling external aggression and suppressing internal disorder so that the peace loving citizen enjoy a social order based on rule of law; the same cannot be denied to the protectors of this order and it must be realized that an appeal from Caesar to Caesar's wife- confirmation proceeding under Section 153 has been condemned as injudicious and merely a lip sympathy to form. The core question is whether at least there should be one appeal to a body composed of non-military personnel and who would enjoy the right of judicial review both on law and facts as also determine the adequacy of punishment being commensurate with gravity of the offence charged.[29]

Law Commission of India had taken up matter in view of the observation of the Hon'ble Supreme Court in this case to review the existing laws of the Armed Forces. It examined the issues and recommended that the *Army Act*, 1950 be suitably amended to provide for creation an armed forces appellate Tribunal, which shall entertain appeals against the sentence, finding and order of the court martial under the *Army Act*. The *Navy* and *Air Force Act* may be so amended as to adopt the appellate Tribunal created by the *Army Act* for their purpose as well. The appeals can be preferred against the final orders of the court martial. It shall be open to the person concerned either to file an appeal before the tribunal directly against the final order, finding and sentence of the court martial or to adopt the remedy under sub section (2) of Section 164 in the first instance and then approach the appellate tribunal. The choice should be left to the aggrieved person. Indeed it would be more appropriate to delete

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[29] A.K. Upadhayay, "Appeal Under Law of Armed Forces" *Journal of Indian Law Institute* (JILI), Vol, 45 (2), 2003 (April-June), p. 284.

sub-section (2) of section 164 of the *Army Act* and the corresponding provision in the Air Force Act; the provisions of Navy Act relating to judicial review by the judge advocate general too may be deleted. Such appellate tribunal may consist of (1) a retired judge of the Supreme Court or a retired Chief Justice of the High Court who shall preside over the tribunal, (2) a retired Officer of the Army of the rank of Major General or above or a retired officer of the Air Force of the rank of Air Vice Marshal or a retired officer of the Navy of the rank of Read Admiral and (3) a retired judge advocate general of the Army/ Air Force/ Navy as the case may be. The term of the President and members shall be four years. Against the order of the tribunal an appeal shall lie to the Supreme Court and subject to such appeal if any and the orders passed therein, the decision of the tribunal shall be final. The commission was also of the view that it would contribute to greater discipline and prompt disposal of service matters of the military personnel.[30] The *Army Act* does not provide any right of appeal against the verdict and sentence of courts-martial corresponding to the right of appeal possessed by a civilian who is convicted on a charge and sentenced by a civil court. An officer or a soldier convicted and sentenced by a court-martial may submit a petition against the finding or sentence or both; but has no right to be heard in person, when such petition is being examined. The proceedings of court-martial are reviewed by the Judge Advocate General or his deputies in order to ensure that no illegality or irregularity enters and miscarriage of justice takes place. But this too is done at the back of the convict.[31] In the Chaturvedi case,[32] the court observed that judicial review is not an appeal from a decision but a review of the manner in which the decision is made and the power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court.

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30 Law Commission of India one Hundred and Sixty Ninth Report, 1999 recommended amendments to Army, Air Force and Navy Acts.

31 Regulations (Army) Para 470.

32 *Chaturvedi* v. *Union of India*, (1995) 6 SCC 749.

In the C. Sanjeevarow Nayudu case,[33] it was pointed out that there is no right of appeal to a higher court against the conviction or sentence or both by a court-martial. It was also suggested that an appellate court should be provided wherein a person convicted by a court-martial could establish that the conviction is not valid or justified. The appellate court should consist of a presiding officer who is eligible to sit as a Judge of a High Court and two members, one of whom should be the Judge Advocate General provided he possesses the qualifications rendering him eligible to be a Judge of High Court and the other Judge of a High Court or a Senior Advocate of the Supreme Court. If the Judge Advocate General does not possess these qualification a senior advocate eligible for appointment as a Judge of a High Court should be appointed as a member in his place. Justice S.B. Malik and R.K. Mehta [34] have also pointed out drawbacks in the system of trial by Court-Martial. Under Civil Law, there is a right of appeal to a higher court against a sentence by a court. But, there is no provision of right of appeal in case of Court Martial judgments. The convicted person may submit a petition against the finding or sentence or against both without the right of being personally heard. At present there is no right of appeal to a higher court against conviction or sentence by a court-martial., corresponding to the right of appeal possessed by a civilian who is convicted on a charge and sentenced by a civil court.[35] In the Guru Villi Bhima Rao case, [36] Patna High Court held that there is no provision of appeal or review by judicial authority of punishment inflicted under the *Army Act*. It does not render it violative of Article 14 and 21 with regard to the ground that the finding of a General Court Martial was perverse. The petitioner did not contend that there was no evidence but he contended that finding recorded by General Court Martial was erroneous. Even assuming that to be correct, it does not exercise appellate power jurisdiction, therefore, it cannot correct it. In the RS Ghalawat case,[37] the

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33 C. Sanjeevarow Nayudu, *Hand Book of Military Law*, 1951, p. 268.
34 Justice S.B.Malik and R.K.Mehta, *Compendium of Law for Defence Services*, 1991.
35 OP Sharma, *Military Law in India*, 1973, p. 171.
36 *Guru Villi Bhima Rao* v. *Union of India*, 1987 Cri. LJ 504.
37 *R S Ghalawat* v. *Union of India*, AIR 1981, Cri. LJ 1646 (Delhi).

Delhi High Court has observed that court cannot sit as a court of appeal in all the matters of Defence. If, there was evidence available on which a finding could be given, the sufficiency or otherwise for the authority to decide the High Court cannot substitute its opinion for that Court-martial. In the Col. Aniltej Singh Dhaliwal case,[38] the respondent was an Army Officer of the rank of Lt. Col. and was posted as Commanding Officer under 116 Engineer Regiment. Nine charges were framed against him on 24.6.1995 and General Court Martial was held from 1.7.95 to 10.11.95. He filed Criminal Writ Petition No.1 of 1995 in the High Court of Sikkim on 11.12.95. Thereafter, on 2.3.1996, the order of the Court Martial was confirmed under Section 154 of the *Army Act.* By judgment dated 9.8.96, the High Court allowed the writ petition and quashed the order. The main contention of the appellant is that the High Court has exceeded its power of judicial review under Article 226 and acted as a court of appeal by discussing and appreciating the evidence. Reliance is placed on Nagendra Nath Bora v. Commissioner of Hills Diven 1958 SCR 1240 wherein this court held that the High Court had no power under Article 226 to issue a writ of certiorari in order to quash an error of fact, even though it may be apparent on face of the record unless there is an error of law which is apparent on the face of the record. The court observed that the jurisdiction of the High Court is limited to see that the judicial or quasi-judicial tribunals or administrative bodies exercising quasi-judicial powers do not exceed their statutory jurisdiction and correctly administer the law laid down by the Statute under which they act. In England too the right of appeal was opposed by Darling Committee in 1919 and by the Oliver Committee in 1938. No such experiment is necessary desirable or practicable and that the present system has fully justified itself the report of Oliver Committee. This committee had recommended a right of appeal.[39] Reason behind this recommendation was that in the matter of legal safeguards, citizens should be no worse off when they are in Armed Forces than in civil life subject to over-riding

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38 *Union of India* v. *Col. Aniltej Singh Dhaliwal*, (1998) 1 SCC 756.

39 Lewis Committee was constituted after Second World War in the year 1946.

considerations of discipline. Based on the recommendations of the Lewis Committee the *Court-Martial Act*, 1951 was passed which provided a right of appeal on the following grounds in England;

(i) Conviction involves a sentence of death.

(ii) Where the court of appeal thinks that the finding of the court-martial is unreasonable or cannot be supported by the evidence or involves a wrong decision on a question of law on any ground and there was a miscarriage of justice.

(iii) The opinion of the Judge Advocate General as to the question of fitness of appeal was to be given due weightage and regard by the Court of appeal.

A Government founded on anything except liberty and justice cannot stand. All the wrecks on either side of the stream of time, all the wrecks of the great cities, and all the nations that have passed away- all are a warning that no nation founded upon injustice can stand. From the san-enshrouded Egypt, from the marble wilderness of Athens and from every fallen crumbling stone of the once might Rome, comes a wail as it were, the cry that no nation founded on injustice can permanently stand.[40]

1.5 Provision of Special Leave Petition

Under Article 136 of the Constitution of India, the Supreme Court is authorized to grant in its discretion Special Leave to appeal. It would be open to the Supreme Court or High Court to exercise jurisdiction, if the Court-martial has exceeded the jurisdiction given to it under the law relating to the Armed Forces. Secondly, if, the court-martial was to give a finding without any evidence, then again it will be opened to the Supreme Court as well as High Court to examine the question whether the exercise of jurisdiction is within the ambit of the Law which creates or Constitutes this Court or tribunal. Secondly, if the Court-martial was to give a finding

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[40] Robert Ingersoll quoted these lines from the article, "Law versus Justice" by V R Krishna Iyer (Former Judge Supreme Court of India).

without any evidence, then again it will be open to the Supreme Court as well as High Court to entertain an appeal in order to find out whether there is evidence. Similarly, it would be open for a member of the Armed Forces to appeal to the Court for the purpose of issuing prerogative writs in order to examine whether the proceedings of the Court-Martial against him are carried out under any law made by the Parliament or whether they were arbitrary in character. This Article is a very important for the enforcement of constitutional rights of Armed Forces. It really does not do anything more but give a statutory recognition to a rule that is prevalent and which is recognized by all Superior Courts. [41] A Special Leave Petition (SLP) can be filed against;

(i) Any judgment, decree, sentence or order.

(ii) In any case or matter where there is substantial question of law.

The only exception to this power of the Supreme Court is with regard to any judgment of any Tribunal or Court constituted under law relating to Armed Forces. In the Major SC Sarkar case [42] it was held that the High Court would be able to interfere, if, it finds that the Court-Martial has acted without jurisdiction or in excess of jurisdiction or has flouted the principles of natural justice which would revolt against judicial conscience or commits an error apparent on the face of the record. A Court-Martial can in no sense be considered to be a tribunal subordinate to the High Court or for the purposes of Article 136 of the Constitution, subordinate to the Supreme Court. This is evident from Article 227 clause (4) of the Constitution which excludes Court-Martial from the operation of the Article. The said bar does not find place in Article 32 or 226 of the Constitution and Court-Martial are thus amendable to the writ jurisdiction of the High Court under Article 226 and under Article 32 to the Supreme Court of India in the matter of exercise of fundamental rights only and

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41 Dr. B.R. Ambedkar, *Constituent Assembly Debates*, Vol. 10, p. 376. See also, Article 112 Clause (2), *the Constitution of India.*

42 *Major S C Sarkar* v. *Union of India*, AIR 1973 MP 191.

not as appeal. In the Hirdesh Kumar case, [43] the petitioner was Army personnel. He absented himself without leave several times. Finally, he was tried by Summary Court Martial at Gangtok. He was discharged and also deprived of his terminal benefits. He challenged the action taken against him in a writ petition which was dismissed on the grounds of lack of territorial jurisdiction. He, then, filed a special appeal. The court held that the no sympathy with the persons like the appellant who absented themselves from duty without leave. The Army is a disciplined organization and strict discipline has to be maintained therein. It is, therefore, not a fit case for interference at all.

1.6 Judicial Review vis-à-vis judgment of Court-Martial

Laws enacted by our Parliament are always subject to judicial review. The provisions of the Act or laws have to be in touch stone with our Constitution. In case, any provision of any Act is not in consonance with Constitution, that provision will be declared null and void up to that extent of contravention. The courts-martial set up under the *Army Act*, *Air Force* and *Navy Act* is the tribunals which would be amenable to the writs under Article 32 and 226. [44] In the Sushil Kumar Jha case,[45] two charges were leveled against the petitioner. The disciplinary authority found both the charges to be proved beyond doubt. Penalty of reduction in pay at minimum stage of Rs. 750/- in the time scale for a period of one year with cumulative effect was imposed. An appeal against the award was rejected which led to this petition. The court laid down the following principles of judicial review of disciplinary proceedings;

(i) The High Court under Article 226 of the Constitution should not interfere with the findings recorded at the departmental enquiry by the disciplinary authority of the enquiry officer as a matter of course.

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43 *Ex Sepoy Hirdesh Kumar* v. *Union of India*, S.A. No 506 of 2000, Allahabad High Court.

44 *Union of India* v. *Major VJ Kharod*, SCA No 497 of 1981, Gujrat High Court.

45 *Sushil Kumar Jha* v. *Union of India*, 1999 (8) SLR 708 (Raj.).

(ii) The High Court cannot sit in appeal over those findings and assume role of appellate authority, but where the findings is utterly perverse the High Court can always interfere with the same.

(iii) The findings may be said utterly perverse, where there was no evidence to support the findings or the findings recorded were such as could not have been reached by an ordinary prudent man.

(iv) The findings can also be interfered with where punishment is shockingly disproportionate.

Extreme penalty of removal of service imposed in one case is shockingly disproportionate. The matter was remitted back to the appellate authority for imposing appropriate punishment. There have been very few cases in which the question of applicability of fundamental rights guaranteed under Part III of the Constitution to Armed Forces personnel have been directly raised. Shri V.K. Krishna Menon, then Defence Minister, speaking on the Navy Bill in Parliament observed in regard to the applicability of fundamental rights to the members of the Armed Forces; "A common feature of the Army, Navy and Air-Force Acts is that these have to bring about the abrogation of some of the fundamental rights of the citizen. In the Armed Forces, it is essential and discipline could only be enforced in that way. They are the kind of provisions that appear in the rules governing all armies. There are provisions which constitute an abrogation of the fundamental rights given by the Constitution, not abrogation in the sense of cancellation of the Constitution but in the sense that an able man accepting the service accepts certain conditions with it. For example, a defence personnel cannot join organizations which are there in the Armed Forces. There are limitations on his movements and his freedom to leave the service".[46] The Delhi High Court has also observed that powers of termination of service of Army personnel are subject to judicial review and they cannot be dismissed without an

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[46] V.K. Krishna Menon, then Defence Minister made this statement when the Navy Bill, 1957 was under discussion in Parliament and observed in context of applicability of fundamental rights to the members of the Armed Forces.

enquiry or trial. The court has observed that Section 18 of *Army Act*, 1950 to be treated as a holy Cow by the judiciary is subject of judicial review. This Section provides that every person subjected to the Act shall held office during the pleasure of the President. Undoubtly, this section doesn't provide procedure to be followed while passing an order. However, it doesn't permit for passing an order under this section which is arbitrary, malafide and illegal. The petitioners, who were dismissed, alleged before the court that they were sacked under Section 18 without giving them an opportunity of hearing. They alleged before the court that they were victims of their senior's whims and fancies "Camouflage". The court said that it is frequently used in the field of service law in cases where action by way of punishment is taken without enquiry under guise if an order made innocuous so as to pass must under the clock of simple termination of service. The court can always pierce the veil and determine the real nature of action. An order under Section 18 of the *Army Act* read with Article 310 of the Constitution of India involving the doctrine of pleasure is subject to judicial review to ascertain whether the same is exercised duly and not vitiated for malafide or based on extraneous consideration. In the Baleshwar Ram case,[47] the respondent was convicted by Court Martial on a charge of theft and sentenced to imprisonment for one year and dismissed from service. The decision of the court martial was set aside by the High Court when challenged in a writ petition. The judgment of the High Court reversed by the Supreme Court and the order of the General Court Martial restored. In the meanwhile, the respondent had already been dismissed from service and had undergone more than nine months of imprisonment out of one year awarded. There had been a gap of several years since he had been released from jail, initially on bail and later on the basis of the judgment of the High Court. It was held that the respondent need not be taken into custody for suffering the balance period of sentence. The Court further held that under Article 32 and 226 of the Constitution of India, the Supreme Court and High Courts of the nation are vested with the power for passing any direction or order in case of

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47 *Union of India* v. *Baleshwar Ram*, AIR 1990 SC 65 P & H.

violation of Fundamental Rights.[48] Army personnel ought to be subjected to strictest form of discipline and Article 33 of the Constitution has conferred powers on the Parliament to abridge the rights conferred under Part III of the Constitution in respect of the members of the Armed Forces, but does that mean and imply that the Army Personnel would be denuded of the Constitutional privileges as guaranteed under the Constitution. Can it be said that the Army personnel form a class of citizens not entitled to the Constitution's benefits and are outside the purview of the Constitution? To answer above in the affirmative would be a violent departure to the basic tenets of the Constitution. An Army Personnel is as much a citizen as any other individual or citizen of this country. Incidentally, the provisions as contained in Article 33 do not by itself abrogate any rights and its applicability is dependent on Parliamentary legislation. The language used by the framers is unambiguous and categorical and it is in this perspective that Article 33 may be noticed at this juncture. The said Article 33 reads as power of Parliament to modify the rights conferred by this Part in their application to Forces, etc. - Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to, -

(a) The members of the Armed Forces; or

(b) The members of the Forces charged with the maintenance of public order; or

(c) Persons employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence; or

(d) Persons employed in the telecommunication system set up for the purposes of any Force, bureau or organization referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

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[48] Nilendra Kumar (Major General), *Law Relating to the Armed Forces*, 2002, p. 330.

There appears to be a wide spread belief in the minds that the members of the Armed Forces by virtue of Article 33 of the constitution of India do not have any fundamental rights. Such a belief is totally misplaced and misconceived.[49] It is thus quite clear that the privilege of Parliament to restrict the fundamental rights of the members of the Armed Forces is unqualified in respect of the proper discharge of their duties and the maintenance of discipline among them. However, encroachments on fundamental rights in the matters which do not relate to or are not covered by discharge of their duties or maintenance of discipline among them is not permissible. The object of this restriction under this Article is to ensure the proper discharge of their duties and maintenance of discipline among them.

1.7 Principle of Equality

In the Bhagat Ram case,[50] the Hon'ble Court held that "It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution. The point to note and emphasize is that all powers have legal limits. In our democratic polity, any decision could be taken only in accordance with law. Taking a final decision and issuing show-cause notice is an arbitrary exercise of power and is violative of Article 14 of the Constitution of India. The view taken by the respondents is a view which would not be taken by a person properly instructed in law. The respondents had completely accepted case of the complainant without any basis and that is wholly illegal. Accordingly, the writ petition is allowed.[51] In the Ram Saru case,[52] petitioner was a sepoy in 131 Platoon DSC, attached to the

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49 Parliament may be law determines to what extent any of the rights, conferred by this part in their application to the members of the Armed Forces or the forces charged with the maintenance of public order be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

50 *Bhagat Ram* v. *State of Himachal Pradesh*, AIR 1983 SC 454.

51 *Havaldar Avimanyu Panda* v. *Union of India* (1999) SLR 3 (Delhi).

52 *Ram Sarup* v.*Union of India*, AIR 1965 SC 247.

Ordnance Depot, Shakurbasti. As a sepoy, he is subject to the *Army Act*, 1950. On June 13, 1962 he shot dead two sepoys, Sheotaj Singh and Ad Ram and one Havildar Pala Ram. He was charged on three counts under Section 69 of the Act read with sec 302 I.P.C. and was tried by the General Court Martial. On January 12, 1963 the General Court Martial found him guilty on the three charges and sentenced him to death. The Central Government confirmed the findings and sentence awarded by the General Court Martial to the petitioner. Thereafter, the petitioner has filed this writ petition praying for the issue of a writ in the nature of a writ of habeas corpus and a writ of certiorari setting aside the order dated January 12, 1963 of the General Court Martial and the order of the Central Government confirming the said findings and sentence and for his release from the Central Jail, Tehar, New Delhi, where he is detained pending execution of the sentence awarded to him. The petitioner filed writs of habeas corpus and certiorari for setting aside the orders of the Court Martial and the Central Government and for his release. It is clear, therefore, that the discretion to be exercised by the military officer specified in the Act as to the trial of accused by Court Martial or by an ordinary court, cannot be said to be unguided by any policy laid down by the Act or uncontrolled by any other authority. Section 125 of the Act therefore cannot, even on merits, be said to infringe the provisions of Article 14 of the Constitution. In Sadacharan's case[53] nineteen persons of the Assam Rifles were tried by summary Court-martial for various offences and awarded punishments. They filed separate writ petitions before the Guwahati High Court and challenged the proceedings of the summary Court martial. All the writ petitions were disposed by the high Court.

1.8 Conclusion

No army can ever hope to accomplish its task unless its soldiers maintain a high standard of discipline. Military discipline by its very ethos demands implicit obedience by the subordinates and fair play and quick

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53 *Sadacharan* v. *Union of India*, 1988 Cri., 1381/88.

dispensation of justice by their commanders. These days the Defence personnel are better aware of their rights and privileges. The laws governing them codified in the self contained *Army Act* and Army Rules have been subjected to legal scrutiny by the civil courts. Various High Courts and the Supreme Court of India have been approached for seeking interpretation of a number of provisions pertaining to the administration of justice in the Army relating to service conditions and disciplinary process. There have also been landmark judgments on the various facets of the service conditions of the Army personnel. Hence, we can say that after all our Constitution is supreme and we are the followers of the provisions of it as a law abiding citizens of the Nation.

HUMAN RIGHTS AND WOMEN PRISONERS IN INDIA

Dr. Viney Kapoor*

1.1 Introduction

Human rights are those claims in life, which are available to every human being equally, irrespective of caste, creed, sex and nationality. The human rights of women are an integral part of universal human rights. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights lay down standards of general application at all times and in all circumstances setting the standards for advancement of human rights.[1] These basic rights have been incorporated in the Indian Constitution. Part III and Part IV dealing with Fundamental Rights and Directive Principles of State Policy, cover almost the entire field of the Universal Declaration of Human Rights. The Human Rights enshrined in Part III of the Constitution have been made non-derogable under Article 13.[2] But it is a matter of great regret that Indian women have not been benefited by these rights despite of the fact that these rights have been incorporated in Indian Constitution.

Plight of Indian Women is quite miserable and it is more shocking when we analyse their human rights while in prison. Relegated in general to the status of second class citizens, women invariably bear the shock of the harshness of society, when convicted or detained. A learned scholar in his empirical study has found that about 25% women prisoners in India are innocent and are implicated in false cases. They have been forced by male members of their family to own the crime. Furthermore once in jail, most of them, rarely received a visitor from their relations. Their husbands, usually developed relations with other women and went for second marriage. They are

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1 A. H, Robertson, *Human Rights in the World*, Manchester University Press, 1972 , p.175 quoted in Gaur, K.D., *Law & Society*, Deep and Deep Publication, 1989, p. 71

2 Article 13(2) reads as follows:
"The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall to the extent of the contravention be void."

completely cut off from their families economically, socially & emotionally. Misery of women prisoners do not stop here. Even after release, their human rights are jeopardized. Once she carried the stigma of imprisonment, she is looked down upon. She becomes unacceptable by her own family, her in-laws, community and / or society. So they have no place/home after release from the jail. Thus, even after release they are unable to resume life, even if they want to. Long back in 1919, the Indian Jails Committee after investigations tried to address these problems and recommended certain reforms, especially setting up separate institutions for women prisoners, but till date, even after sixty years of independence, substantial progress has not been made.

A prisoner or detainee has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration. Some of the basic human rights are available to all the persons whether convict or not. Women prisoners are entitled to these basic rights like men. The relevant International and National laws protecting and ensuring the human rights of prisoners can be discussed as such:

1.2 International Mandates

The journey of human rights in general starts with Universal Declaration of Human Rights in the year 1948. The Declaration grants equal rights to all human-beings irrespective of their caste, creed, sex and nationality.[3]

1.2.1 Covenant for the Protection of Human Rights & Fundamental Rights, 1950

The concrete effort to protect human rights of prisoners and under trials has been made through Covenant in 1950. It provides for various basic human rights of the prisoners, viz. - Right to Life (Article 2), Prohibition of Torture (Article 3), Right to Liberty and Security (Article 5), Right to Fair Trial (Article 6), Presumed innocent until proved guilty [Article6(2)], To have

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[3] Universal Declaration of Human Rights, 1948, Article 1.

adequate time and facilities for the preparation of her defense [Article 6(3)(b)], Right to defend himself and Free legal- Aid [Article 6(3)(c)][4].

1.2.2 International Covenant on Civil & Political Rights, 1966

Article 10(1) of the Covenant provides that person deprived of liberty should be treated with humanity and with respect for inherent dignity of the human being. Article 10(2)(a) provides for segregation of accused from convicted and for their proper treatment as unconvicted persons. Article 10(2) (b) lays down those juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

1.2.3 Seventh Protocol, 1984

This instrument provides compensation for wrongful confinement to the victim[5] and equality between spouses[6]. The signatory to this instrument are mainly European countries, but the general principles are followed by almost all countries.

1.2.4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

This Convention prohibits any type of torture by police, security forces and jail authority upon accused or convicted. The word 'torture' encompasses all acts of ill-treatment, cruel, inhuman and degrading punishment that results in severe physical or mental pain or suffering.[7]

1.3 National Safeguards

Since India is signatory to most of the International Conventions and the treaties relating to protection of human rights of the individual including

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4 See, Malcolm D. Evans, *Blackstone's International Law Documents*, (ed.) Universal Law Publishing Co., New Delhi, 2000.

5 Seventh Protocol, 1984, Article 3.

6 *Id.*, Article 5.

7 Convention against Torture, 1984, Article 1.

prisoners, the provisions have been made in the Constitution to ensure the enjoyment of these rights. Article 20 provides various rights to prisoners, which can not be taken away such as; no one can be punished unless proved guilty by the law, no one can be detained in prison for longer period than he or she is sentenced, no one can be forced to be witness against himself or herself, no one can be punished twice for the offence, no prisoner should be subjected to inhuman treatment. Besides, every prisoner has right to communicate, right to read and write, write to cleanliness, right against torture, right to legal process, right to recreation, right to religion, right to medical treatment, right to rehabilitation, right to parole, right to free legal aid. Along with these rights a women prisoner is entitled to keep her young child, who needs natural care and right to medical examination during pregnancy. Despite these legal safeguards, violation of the human rights of the prisoners is a common fact and thousands of complaints are received by National Human Rights Commission pertaining to hand-cuffing without just cause, inhuman treatment, detention in Jails beyond period of imprisonment, inadequate supply of food, lack of proper sanitation and cleanliness facilities, lack of basic amenities to the prisoner, non-availability of proper bedding according to climate, lack of Free Legal Aid , restrictions to meet relatives, friends and advocate .

1.4 Role of Judiciary

A prisoner wears the armour of basic freedom even behind bars and that on breach thereof by lawless officials, the law will respond to his distress signals through 'writ aid'. Justice Krishna Iyre in *Sunil Batra's case*[8] has categorically observed:

> "In our constitutional order it is axiomatic that the prison laws do not swallow on the fundamental rights of the legally unfree, and, as, sentinels on the qui vive, courts will guard freedom behind bars tampered of course, by environmental realism but intolent of torture by executive echelons. The policy of the law and the paramountcy

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[8] AIR 1980 SC 1579.

> of the constitution are beyond purchase by authoritarians glibly invoking 'dangerousness' of inmates and peace in prisons."[9]

Supreme Court has taken notice of Human Rights' violation in criminal justice system in *Hussainara Khatoon*[10]. There were quite a few women prisoners who were in Jail without being accused of any offence, merely because they happened to be victims of an offence or they were required for the purpose of giving evidence. They were in the language used by Bihar Police, in protective custody'. The court pointed out that the expression 'protective custody' is a euphemism calculated to disguise what is really and in truth nothing but imprisonment and the so called protective custody is nothing short of blatant violation of personal liberty guaranteed under Article 21.[11] The court immediately gave the following direction:

> "All women and children who are in the Jails in the State of Bihar under protective custody or who are in Jail because their presence is required for giving evidence or who are victims of offence should be related and taken forthwith to welfare homes or rescue homes and should be kept there and properly looked after.''

They also reprimanded the administration as well as the judiciary in the state of Bihar for the violation of rights of under trials who have been rotting for years without trial having commenced. Similarly in another case, Supreme Court gave direction regarding improvement of conditions in lockup for women prisoners and for providing adequate protection, particularly, to women confined in the police lockup. It is to be noted here that in this case the court treated the letter of complainant as writ petition. The cases of violation of human rights of women are not only reported in developing country like India, but also in developed states. In 1995, the U.S. Department of Justice wrote the Governor of Michigan:

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9 *Ibid.*
10 AIR 1979 SC 1377.
11 *Ibid.*

> "The sexual abuse of women prisoners by guards, including rape, the lack of adequate medical care, including mental health services, grossly deficient sanitation, crowding and other threats to the physical safety and well-being of prisoners, violates their constitutional rights--- nearly every woman interviewed reported various sexually aggressive acts of guards."[12]

1.5 Constitution of Committees

The Indian government has established various committees to study the violation of human rights of prisoners and to suggest measures. These Committees can be discussed under the following headings:

1.5.1 Committee on Jail Reforms, 1983

This committee known as 'Mulla Committee' suggested that Women's Non-Official Organisation, at the national level, be set up to look into the issues like revision of legislation in respect of women prisoners, Establishment of homes for released women prisoners, Action in cases of atrocities committed against women's in prison ,Re-integration of ex-women prisoners into the family and community ,Free legal aid to women prisoners ,Welfare of women prisoners' family.

1.5.2 Justice Krishna Iyer Committee, 1988

The committee headed by Justice Krishna Iyer submitted a report to the Government of India in February, 1988. It recommended recruitment of more women in Police Force to handle the women and child offenders. The committee for formation of new rules and regulations for the women prisoners, coordination between Police, Law and Prison for providing justice to women prisoners, provision of Legal aid to women prisoners, construction of separate/more jails for women prisoners, protection of Human Rights of pregnant prisoners and their babies.

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[12] See, , "All Too Familiar- Sexual Abuse of Women in U.S. State Prisons", Human Rights Watch, 1996, p. 236.

1.5.3 Parliamentary Committee on Empowerment of Women

The Parliamentary Committee on Empowerment of Women in its report on 'Women in Detention' has also made recommendations for various concrete measures to be taken in India to protect Human Rights of Women prisoners, such as, to establish minimum standard uniform practices, to form NGOs to help in rehabilitation of women prisoners, to provide parental care to the children of in-mates, to ensure medical facilities.

1.6 Present Scenario in the Jails

The number of women jails is less in India, which makes their lives miserable in the jails because their demands remain unattended. At present, there are 1280 prisons in the country. Of these only six are exclusively for women with a total capacity of 975 and the annual average female prisoners' population is about 4000. In Punjab, for example, out of seven central jails, five district jails, two open air and ten-sub jails, there is only one women jail at Ludhiana. This is a clear-cut violation of human rights of women prisoners.

However, the Eighth Finance Commission has recommended Rs. 1231 Lacs for the creation of separate jails for women with a capacity of 2343.The rationale for establishment of separate institutions for women is not new. The provision of separate jails for men and women was in existence even during the ancient period. Kautilya has prescribed that a jail should be constructed in the capital providing separate accommodation for men and women. At International level, first reformatory for women was established in 1873 in India and then, in Massachusetts after four years. Hardly any progress has been made in this regard in India, despite recommendations made for time to time, including of V.R. Krishna Committee report in 1996.

1.7 Conclusion and Suggestions

The number of female offenders is, generally, meager and the problem of security is also not acute in their case. As a result, no

meaningful efforts were so far made to improve their conditions in custody or after their release. To establish a separate institution for such a number of women prisons has often been ignored by legislatures.[13] The following measures have been suggested to improve the conditions of women prisoners and to guarantee their basic human rights:

1.7.1 Classification and Segregation of Female Prisoners

All Indian Committee on Jail Reforms 1980-83 highlighted in its report that "Segregation of offenders on the basis of sex, age, criminal record, social background and sequence of criminal behaviour is an essential feature of modem. It is submitted that the classification system should be introduced compulsorily in all prisons and custodial institutions. It should be used as a continuous programming and monitoring device rather than as a one time activity.[14]

1.7.2 Healthy Physical Condition and Sanitation

In Punjab, jails have the capacity to accommodate 336 women, whereas they presently house 800.[15] The large number of prisoners not only contribute to serious problems of congestion, owing to insufficient space, but also creates inhuman and unhygienic conditions causing serious health problems endangering human lives. There are also several cases of death due to tuberculosis in Tihar Jail.[16] To avoid overcrowding due to large number of under trials, it is suggested that firstly, the under- trial prisoners must be provided with legal aid at the cost of the state, because many a times due to shortage of funds and ignorance, they could not avail this

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13 A.M. Brodsky and M. Rosenzweig, *Research on Female Offenders, Centre For Correctional Psychology,* University of Albania, 1074.

14 S.K. Bhattacharya *Social Problems in India: Issues and Perspectives*, 1994, p. 102.

15 Aditi Tondon, *The Tribune*, 2007, p.1.

16 Leena Gonsalves, *Women and Human Rights*, 2001, p. 168.

opportunity.[17]Secondly, denial of bail to women prisoners should be in rare cases.

1.7.3 Medical Facilities

As regards medical facilities, female prisoners face problems because male doctors are generally posted in almost all prisons. Recently, a women prisoner died in the Jalandhar jail due to delay in providing medical facilities, since in house doctor was absent.[18] Medical, diagnostic and care facility must be available to inmates routinely and, by a female doctor. There should be a separate ward for women in prison hospitals. If this facility is not available, then female prisoners should be treated in their own barracks by a lady doctor and attended to by female staff.[19] So far as pregnant female prisoners are concerned, gynecological examination needs to be conducted and prenatal & post natal care be taken according to the requirements of each case. They should be given special diet.

1.7.4 Educational and Vocational Training

At present, facilities for educational, vocational training and other skills are greatly restricted. Lack of vocational engagements and the leisure time leads to indiscipline. Effectively managing the time of prison inmates remains the key to good prison management. Women prisoners should be provided training in tailoring, doll-making, toy making, poultry farming, embroidery, painting etc. at the pattern of Ludhiana and Amritsar Jails.

1.7.5 Rehabilitation

The main purpose of punishment is to protect society from crime and to reform the criminal, so that he can lead normal life after release.The women face more problems in rehabilitation after being released from the prisons

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17 61 percent women prisoners belong to poor strata of society, quoted in 'Status of Women in India'.

18 *The Tribune*, July 9, 2007, p. 20.

19 See recommendations of All India Committee on Jail Reform.

since they are completely cut off from their families. Neither the family members accept them nor do they take advantage of rehabilitation scheme due to illiteracy and ignorance.[20]It is submitted that the process of rehabilitation should start as soon as female offender enters the prison and should continue till the ex-prisoner is fully absorbed into society. It is suggested that welfare officer should make the women prisoners aware of the Government Rehabilitation Assistance Scheme and help the deserving ones to secure it.

1.7.6 Attitude of Jail Authorities

It is observed that the general attitude of Jail officials and workers is not proper. The female warders have no sympathy even towards their children, who are neither the criminals nor share their mother's crime. Such a treatment at the hands of jail authorities, results in violation of Article 10 of International Covenant of Civil and Political Rights (ICCPR) which requires that all persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person.[21] It is submitted that role of authorities should Jail be like a doctor treating patient. It is, therefore, suggested that deviant Jail official should be punished and a welfare officer be appointed in every Jail to assist female prisoners in availing legal facilities.

1.7.7 Recreation and Other Facilities

Since women are emotionally very weak, they are completely shattered when they are separated from their family especially children. In order to divert their attention and to provide emotional support, it is essential that entertainment activities should be arranged for them occasionally. Physical exercise and yoga should be given due importance and their time should be utilized more in productive and creative activities, which keep their mind engrossed.

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20 *Supra note* 4, p.104.

21 K.D. Gaur, *Human Rights of Detainees and Prisoners: Suggestions for Prisoners Reforms*, Law and Society in Modern India, 1989, p. 686.

1.7.8 Communication and Visit Regulations

The women prisoners should be treated more generously and allowed to meet their children frequently. Correspondence with family members and close friends be allowed, because it is necessary to boost their morale and may form the basis for both present and future good adjustment. The rules pertaining to the scrutiny of postal mail should be liberalized. Since the inmates lack funds, postage is paid by the government. It is submitted that these steps bring the prisoner closer to society and also pave the way for rehabilitation.

1.7.9 Role of NGOs and Government Agencies

Female prisoners require counseling and guidance on various issues. Various voluntary organizations, NGO's and government agencies should be involved. For instances, at Amritsar Central Jail various non-government and government agencies are working with jail. Organizations like India Vision Foundation, Red Cross Society, Punjab State Social Welfare Board, Patanjali Yogpeeth etc. These agencies assist Jail administration to provide educational, vocational and recreational facilities.

1.7.10 Redressal of Grievances

There should be timely redressal of the grievances of the prisoners. It is suggested that following methods be adopted to redress the grievances of inmates:

(a) Grievance Deposit Box be kept in all Jails & access to it should be allowed to all prisoners.[22]

(b) Selected Law students under the guidance of a teacher not only for their criminal education but as Prisoner Grievance Gathering Agency be allowed to visit Jails in there respective areas & meet the prisoners and do needful in the matter.

(c) A Board of visitors with sufficient powers be constituted for every Jail to look into the grievances of the prisoners. This system would

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[22] *Ibid.*

be an alternative or be considered as functional substitute for a prison ombudsmen operating in the United States.[23]

(d) District Magistrate and Sessions Judges should visit Jails periodically within their respective court jurisdiction and afford effective opportunities for ventilating grievances and take suitable rewarded measures.

1.7.11 Rescue Homes, Asylums and Shelter Homes

Besides, it is also suggested that government should open Rescue homes, Asylums and Shelter homes with boarding, lodging and training facilities. Special care be taken about juvenile delinquents, females and unmarried female prisoners and detainees. It is also suggested that separate women Jail with female staff be established.

1.7.12 After Care Services

Moreover, after-care service is of great importance in case of female offenders. Prior to release of females, the welfare officer should visit home towns and study the situation for rehabilitating them. He should convince the concerned people to accept and treat them properly. It is the duty of the government to see that these women are not groping in darkness, but are leading a new life with bright future and also contribute to the development of the Nation.

To sum up, it has been submitted that prisons have constructive role to play for the larger interest of the society by reforming the in-mates. But in this process, the basic human rights should not be infringed or curtailed and basic prison decency should be maintained. The prisoners are also human beings and be treated like human-beings and not like animals or chattels. At the same time, the precautions have to be taken that prisons are not converted into luxury-homes to attract more and more people. It is time to frame 'Model Jail Manual'.

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[23] *Id.*, p. 689.

RIGHT TO INFORMATION AND THE JUDICIAL DILEMMA*

Shruti Bedi**

Be you ever so high, the law is above you.

-Thomas Fuller[1]

The *Indian Right to Information Act*, 2005 is an Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. As per the Act 'information' means material in the form of documents, memos, e-mails, press release, circulars, orders, contracts, reports, data materials.[2] The Act covers central, state and local governments, and all bodies owned, controlled or substantially financed by the government or any non-government organization substantially financed, directly or indirectly by the appropriate Government.[3] Under the Act information, which affects the sovereignty and integrity of India is not to be disclosed.[4] Information, which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which, would cause unwarranted invasion of the privacy of the individual is also not supposed to be disclosed.[5] The

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1 A 17th century English historian Thomas Fuller (1608-1661) became famous for his immortal words — 'Be ye ever so high, still the law is above you'. Celebrated English judge Lord Alfred Thompson Denning, in the case *Goriet* v. *Union of Postal Workers* in 1977, used these words with slight modification — 'Be you ever so high, the law is above you'.

2 *Right to Information Act*, 2005, Section 2(f).

3 *Id.*, Section 2(a)

4 *Id.*, Section 8(1) (a)

5 *Id.*, Section 8(1) (d)

objective of the Act is to hold government and their instrumentalities accountable to the governed and to contain corruption.

The Supreme Court in its judgment in *Peoples Union for Civil Liberties v. Union of India*[6] upheld the high moral principle that the rule of law should operate uniformly; that the Constitution is above every one; that rights of citizens guaranteed under Article 19(1)(a) of the Constitution of India, i.e., right of expression, should outweigh the personal difficulties and hardships that can be pleaded by persons occupying high positions and serving as public servants.

The extent of applicability of the provisions of the *RTI Act* and persons or officers brought within the scope of the provisions of this Act naturally can be a matter for judicial determination. It is possible to have a divergence of opinions concerning the interpretation of the meaning and extent of applicability of the relevant provisions of the *RTI Act*. The article examines the issue of holding members of the judiciary accountable to the people via the medium of asset and income disclosure under the *RTI Act*.

Over the last several years, the disclosure of assets and incomes of public officers has emerged as a global anti-corruption issue, although many have quickly discovered that disclosure alone, without public access or oversight or fair and effective enforcement, will likely have limited impact. Indeed, from a human rights and business perspective, disclosure laws in systemically corrupt environments may be premature or too risky if approached in a piece-meal fashion. Initially, these disclosure obligations were directed primarily at elected officials, such as legislators and executive branch officials.[7] However today there is an

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6 AIR 2002 SC 2112

7 Keith E. Henderson, "Asset and Income Disclosure for Judges: A Summary Overview and Checklist", *available at* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/IncomeAssetDisclosure.pdf (last accessed on 17 November 2009).

increasing pressure to include all the arms of governance within its ambit.

Corruption in the courts is perceived as a major problem worldwide: the recent Corruption Barometer published by Transparency International (TI 2009)[8] indicates that nearly half of the respondents across the world consider the judiciary to be corrupt, and petty bribes paid in connection with a legal process seem to be on the rise. The consequences of judicial corruption are as diverse as its forms: the most obvious impact, of course, is the corrosion of the rule of law.[9]

In the days of British Empire, the specture of a corrupt judge or magistrate was so horrible that it could largely be dismissed as impossible. The judicial traditions had a strong ethos of honesty and integrity. A judge on the take was unthinkable. The problems of the judiciary were different: laziness, bad temper, dilatoriness, ignorance of the law, prejudice. Financial corruption was out of the question, although it was not unknown for judges sometimes to be corrupted intellectually by ambition, the hope of promotion or the prayer for a title.[10]

In December 2003, the UN adopted the first International Convention against Corruption.[11] The Convention which is now open for ratification

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8 Visit website of Transparency International, *available at* http://www.transparency.org/ (last accessed 20 November 2009).

9 The UNCAC and Judicial Corruption: Requirements and Avenues for Reform, *available at* http://www.cmi.no/publications/file/?3457=the-uncac-and-judicial-corruption (last accessed 19 November 2009).

10 Michael Kirby, "Tackling Judicial Corruption-Globally", *St. James's Ethics Centre*, *available at* http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_stjames.htm (last accessed 17 November 2009).

11 The *United Nations Convention against Corruption* (UNCAC) is the first legally binding international anti-corruption instrument. In its 8 Chapters and 71 Articles, the UNCAC obliges its States Parties to implement a wide and detailed range of anti-corruption measures affecting their laws, institutions and practices. These measures aim to promote the prevention, criminalization and law enforcement, international cooperation, asset recovery, technical assistance and information exchange, and mechanisms for implementation. The UNCAC was adopted by the

is the first global instrument to address a wide range of corruption issues, both in the public and private sector, including bribery, money laundering, accounting offences, anticorruption agencies, preventive actions, sanctions and international cooperation. This Convention is an important addition to the international legal framework regulating financial transparency and anticorruption in all spheres of society, including in the judiciary.

The UN Convention Against Corruption, states that: "Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials."[12]

The Convention calls for the creation of "effective financial disclosure systems for the appropriate public officials" and defines the notion of "public officials" to include judges. Moreover, it recommends the adoption and implementation of effective sanctions against judges who would not comply with disclosure requirements.

1.1 Case in Point - Assets Disclosure of Judges

A recent issue to confront the Indian judiciary arose when Mr. S.C. Agarwal, sought information from the Supreme Court whether any declarations of assets have been made by the judges of the Supreme

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United Nations General Assembly in Merida, Mexico, on 31 October 2003 by Resolution 58/4. As of 8 September 2009, there were 140 signatories and the Convention had been ratified, accepted, approved or acceded by 137 countries (States Parties). *At* http://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf (last accessed 18 November 2009).

12 *United Nations Convention Against Corruption*, Article 8.5 (adopted on 31 October 2003 by Resolution 58/4 and entered into force on 14 December 2005), *available at* http://www.unodc. org/pdf/crime/convention_corruption/signing/Convention-e.pdf (last accessed 19 November 2009).

Court and the High Courts to their respective Chief Justices, as expected under the resolution passed by the All India Judges Conference in May 1997.[13] The Supreme Court declined to provide this information, arguing instead that the May 1997 resolution was an 'in-house mechanism'. Moreover, the court took the view that assets declared by judges to their respective chiefs, were given 'voluntarily', and received in the 'personal capacity' of the Chief Justices (implying, therefore, that they were not official documents subject to RTI).[14]

Even an order by the full bench of the Central Information Commission delivered in January 2009 could not change the Supreme Court's mind on this - instead, the SC filed a writ petition in the Delhi High Court, and obtained a stay on the order.[15]

This case centres around a key legal issue, namely, whether the 'Office of Chief Justice of India, in his capacity as Chief Justice not sitting in a Court" is subject to the application of *Right to Information Act*, 2005. The Information Commission's view was that the Chief Justice is a custodian of the information available with him, and that it is available for perusal and inspection to every succeeding office-holder. Therefore the information cannot be categorized as "personal information" even if the CJI holds it in his personal capacity.[16]

The Delhi High Court admitted the appeal filed by the Supreme Court Central Public Information Officer (CPIO) against the single judge's order holding that information on assets declared by Supreme Court judges in the possession of the Chief Justice of India would

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13 Pradeep Baisakhi, "Why Judges Should Declare their Assets to the Public", *available at* http://pradeepbaisakh.blogspot.com/ (last accessed 16 November 2009).

14 Pradeep Baisakhi, "Judges Under Scrutiny", 25th Sept., 2009, *available at* http://www.indiatogether .org/2009/sep/rti-judges.htm (last accessed 16 November 2009).

15 *Ibid.*

16 *Ibid.*

come within the ambit of the *Right to Information Act*. The appeal said: "The single judge failed to appreciate that the declaration of assets, if any, given by a judge of the Supreme Court is purely voluntary and is not required to be given under any legal provision and there is no sanction for non-furnishing of such information." Also involved was the question as to whether the office of the Chief Justice of India is a 'public authority' as defined in Section 2(h) of the *Right to Information Act* or not. It was also contended that disclosure of information on personal assets by judges will affect the independence of the judicial system.

The Delhi High Court in the appeal of *CPIO, Supreme Court vs. Subash Chandra*[17] upheld the right of the applicant and stated:

I. The *RTI Act* is an important legislation to effectuate democracy. It is a powerful beacon which illuminates unlit corners of state activity, and those of public authorities which impact citizens' daily lives, to which they previously had no access. It mandates disclosure of all manner of information. No justification for seeking the information is necessary. Parliamentary intention in enacting this law was to arm citizens with the mechanism to scrutinize government and public processes, and ensure transparency subject to limits;

II. The CJI is a "public authority" and the argument that the asset declarations are held by him in a capacity other than that of CJI is incongruous. Though the CJI performs various functions, all of them are traceable to his position as CJI;

III. The argument that the declarations were voluntarily filed by the judges, on a "moral" basis, without mandate of law and consequently not "information" u/s 2 (f) cannot be accepted. The declarations were filed pursuant to the 1997 Resolution.

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[17] *The CPIO, Supreme Court of India* v. *Mr. Subhash Chandra Agarwal* W.P. (C) 288/2009, *available at* http://cic.gov.in/HC-Rulings/SupremeCourt-Vs-Subhash AndAnr.pdf (last accessed 16 November 2009).

The said Resolution reflects the best practices to be followed and form the standards of ethical behaviour of judges. It codifies "core" judicial values which are an inalienable part of what a judge is and how he is expected to behave. It binds the judges and forms a set of conventions of the Constitution. To conclude otherwise would endanger credibility of the institution, which prides by its adherence to the doctrines of precedent, and stare decisis;

IV. The argument that the confidential asset declarations cannot be disclosed as it would entail breach of a fiduciary duty by the CJI is also not acceptable. A fiduciary relationship is one whereby a person places complete confidence in another in regard to his affairs. From this perspective, the CJI is not in a fiduciary capacity vis-à-vis judges of the Supreme Court. The asset information is not held by the CJI in a fiduciary capacity. The mere fact that the declaration is marked "confidential" is of no relevance;

V. However, the right to information has to be reconciled with the fundamental right to privacy. S. 8 (1) (j) bars the disclosure of personal information which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless if the PIO is satisfied that disclosure is in public interest. Pursuant to this, the contents of the asset declarations are entitled to be treated as personal information and may be accessed only in accordance with the procedure prescribed u/s 8(1)(j); they are not otherwise subject to disclosure;[18]

The Delhi High Court's judgement throws open an important issue i.e. of reconciling judicial accountability with judicial independence. The

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[18] Note: The Full Court of the Supreme Court has now resolved to place the information in the Court website, after modalities are duly worked out. Some High Courts, including the Bombay & Delhi High Courts have resolved similarly to make the information public.

standing of judges and lawyers of a country marks that Nation's position in history. A correlated condition is that they must be free to exercise their sacred and profoundly important public duty.[19] The abstract principal of judicial independence ranks high on the scale of democratic values. Without an independent judiciary, many of our rights and liberties would amount to little more than hollow promises.

Judiciary being one among the three organs of the state as envisaged in the scheme of our Constitution has a unique role to play in comparison to the executive and the legislature. The judiciary is assigned the role of acting as an arbitrator of disputes not only in respect of the disputes arising between citizens and citizens and persons and persons, but also in respect of disputes arising between the state and the citizens. For this purpose, the judges of the superior courts have been conferred with the power and jurisdiction to review both the executive actions and the legislative actions of the state on the touchstone of the constitutional provisions and relevant statutory provisions.

The architects of our Constitution were conscious of the very significant and special role assigned to the judiciary in the scheme of the Constitution. It was envisaged as the organ for protecting the rights of the citizens, guaranteed under the Constitution. There was the recognition that judges, particularly the judges of the superior courts, who have the power of judicial review of administrative and legislative actions, should function without fear or favour and that the judiciary should remain totally independent and fully insulated from any external interference.

An independent judiciary is most essential to the protection of democracy and of individual liberty especially "in dangerous times" when, as Judge William Cranch wrote, it "becomes the duty of the Judiciary calmly to poise the scales of justice, unmoved by the armed

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[19] Thomas W. Shelton, "The Struggle for Judicial Independence", *Virginia Law Review*, Vol. 10, No. 3 January 1924, 214 at p. 216.

power, undisturbed by the clamor of the multitude."[20] However this independence is fragile as the least dangerous branch has often been the most vulnerable.

1.2 Self-Restraints

No institution, of course-and least of all one composed of unelected officials can hope to resolve issues of significance without frequently incurring the wrath of many members of the society. Displeasure with the outcome or trend of decisions provokes cries for replacing objectionable judges with others less irritating and more pliable. It is hardly surprising that the increased prominence of our courts in nearly every aspect of human endeavor coincides with a period of renewed agitation to place constraints on judges.[21]

A demanding critic will never be wholly satisfied with the ethical performance of any segment of any society. Our judiciary provides no exception. In the area of judicial ethics, we can find, as one would expect, a very broad spectrum of both good and bad. At one end of this spectrum, there are judges of unusual competence, devotion, and integrity, who more than meet our highest aspirations for judicial performance. At the opposite end, there have been some instances of judicial corruption or dishonesty. In between, as most informed observers will agree, we will find for the vast majority of judges a relatively high over-all level of integrity and ethical standards, especially when compared with the situation in so many other areas of Indian life. Public satisfaction with judicial performance depends on judicial competence as well as judicial honesty and ethics. Both are essential ingredients for an effective and respected judiciary. There

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20 See, C. Warren, *The Supreme Court in United States History* 303 (1926) (quoting dissenting opinion of Cranch, J., in unnamed case).

21 Irving R. Kaufman, "Chilling Judicial Independence", *The Yale Law Journal*, Vol. 88, No. 4, March 1979,. 681 at p. 681.

have always been, and still are, a great many thoroughly honourable and honest men on the bench throughout the country.[22]

The ethical obligations of the judiciary obviously extend far beyond the basic essentials of honesty, impartiality, and fairness. It is not enough that judges avoid evil. They must also so regulate their conduct, both on and off the bench, as to avoid any appearance of evil or impropriety. Our courts would be rapidly brought into disrepute if either the legal profession or the general public should fail to have confidence in the integrity and impartiality of those who hold judicial office. Such confidence can only be earned and maintained if the conduct and reputation of our judges are beyond reproach. Suspicion of judicial impropriety can like-wise seriously undermine public confidence in our courts and judges. Thus, conduct which tends to give rise to such suspicions must also be avoided.[23]

It has always been the endeavour to put some kind of restrictions on the judges who in the public eye are presumed to be untouchable whether it is due to political or legal considerations. The judiciary in its own effort to confront the issue and to increase the accountability within its own system has laid certain moral and ethical codes of conduct. Two resolutions were adopted in the Full Court Meeting of the Supreme Court of India on May 7, 1997[24] wherein it was resolved that an in-house procedure should be devised by the Hon'ble Chief Justice of India to take suitable remedial action against Judges who by their acts of omission or commission do not follow the universally accepted values of judicial life including those indicated in the "Restatement of Values of Judicial Life." It was further resolved that

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22 Gray Thoron, "A Report on Judicial Ethics", *Annals of the American Academy of Political and Social Science*, Vol. 363, January 1966, p. 36.

23 *Id.*, p. 39.

24 *Two Resolutions have been adopted in the Full Court Meeting of the Supreme Court of India on May 7, 1997, available* at http://indialawyers.wordpress.com/2009/09/02/1997-resolution-on-judges-assets/ (last accessed on 17 November 2009).

every Judge should make a declaration of all his/her assets in the form of real estate or investments (held by him/her in his/her own name or in the name of his/her spouse or any person dependent on him/her) within a reasonable time of assuming office and in the case of sitting Judges within a reasonable time of adoption of this Resolution and thereafter whenever any acquisition of a substantial nature is made, it shall be disclosed within a reasonable time. The declaration so made should be to the Chief Justice of the Court. The Chief Justice should make a similar declaration for the purpose of the record. The declaration made by the Judges or the Chief Justice, as the case may be, shall be confidential."

In the Chief Justices' Conference held in December 1999 the "Restatement of Values of Judicial Life (Code of Conduct)"[25] was adopted by them to serve as a guide to be observed by Judges, essential for an independent, strong and respected judiciary, indispensable in the impartial administration of justice. The code lays down 16 specific rules of conduct, illustrative of what is expected of a judge. The very first code suggested that the behaviour and conduct of members of the higher judiciary must reaffirm people's faith in the impartiality of the judiciary. Accordingly, it advised the judges to avoid any act, whether in official or personal capacity, that can lead to the erosion of this faith.

The question which arises is why should judges be "accountable" and for what? The broad categories of misconduct on the part of the judge would include misuse of office, undignified behaviour, bias or prejudgment, harmful or offensive conduct, dereliction of duty, or disrespect for the law (including, of course, lawbreaking). [26] Also is the application of the *Right to Information Act*, 2005 going to bring

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25 *Restatement of Values of Judicial Life (Code of Conduct), available at* http://www.arablegalportal.org/criminal-laws/Images/CodeLink/21.pdf (last accessed 17 November 2009).

26 Steven Lubet, "Judicial Discipline and Judicial Independence", *Law and Contemporary Problems*, Vol. 61, No. 3, summer, 1998, 59 at p. 61.

about more accountability in the judicial system? Is the declaration of assets an instrument to stop judicial dishonesty?

1.3 Disclosure Laws

Most countries now have laws or are in the process of adopting laws that obligate "public officials" to disclose their assets. This disclosure of financial assets of a person is stressed upon with a view to bring about more transparency. While most include all senior executive branch officials in the definition of the notion of "public official", the scope of the notion beyond the executive branch has been interpreted very differently depending on the country. However, it appears that a majority now tends to interpret the term broadly and include judges within the coverage of the notion for purposes of financial disclosure requirements.

The current trend is that judges should disclose not only their own property but also that of their spouses and minor children. The rationale for including family members is to avert the divestment of income and assets by a judge to family members to avoid disclosure.[27] Members of the family may disclose their income and assets individually or as a group.[28]

Several conventions have been drafted to prevent and combat corruption, such as the Council of Europe Criminal Law Convention on Corruption (COE Convention), which specifically includes judges as public officials[29], the Organization for Economic Cooperation and

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27 Gerald Carney, 1998, *Conflict of Interest: Legislators, Ministers and Public Officials.* Prepared for Transparency International, *available at* http://www.transparency.org/working_papers/carney/ index.html (last accessed 17 November 2009).

28 Sandra Elena, Procop Buruiana, Violaine Autheman; Keith Henderson ed., "Global Best Practices: Income and Asset Disclosure Requirements for Judges", *IFES Rule of Law White Paper Series. At* http://www.ifes.org/publication/f03a550c53b59ef2cb9970d9672c78da/WhitePaper_3_FINAL.pdf (last accessed 18 November 2009).

29 *International Covenant on Civil and Political Rights* (1966), *European Convention on Human Rights* (1951), *Inter-American Convention on Human Rights* (1978), *African Charter on Human and People's Rights* (1986), *UN Basic Principles on the*

Development Anti-Corruption Convention (OECD Convention)[30] and the Inter-American Convention against Corruption (OAS Convention).[31] Only the OAS Convention[32] expressly places the burden of proving that income and assets were derived legitimately on public officials under the principle of unjust enrichment and requires public officials to file income and asset disclosure statements.

Even though the OAS Convention created the legal basis for income and asset disclosure of public officials, the legal question as to whether judges are deemed to be public officials remains unclear or is being debated on in a number of countries. In some countries, judges have raised issues of constitutional separation of powers and have taken the position that the judicial branch itself must pass and enforce its own disclosure laws and rules. Other unresolved issues relate to how to effectively and fairly implement and enforce disclosure laws (few countries have had significant experience or success) and how much of this personal information should be publicly available and in what form. Moreover, in countries where corruption is systemic, the enforcement, privacy and security issues require careful balancing and human rights consideration.[33]

Under the *Indian Right to Information Act*, 2005 public authorities, is defined by section 2(h) as- "meaning any authority or body or institution of self – government established or constituted- (a) by or under the

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Independence of the Judiciary (1985), the *Universal Charter of the Judge (1999), the European Charter on the Status of the Judge* (1998), the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (1995).

30 *UN Basic Principles on the Independence of Judiciary*, 1985, (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985), *available at* http://www.abanet.org/rol/docs/ judicial_reform_un_ principles_independence_judiciary_english.pdf (last accessed 20 November 2009).

31 *Code of Judicial Conduct – The Bangalore Draft* (2001) a judge shall make such financial disclosures and pay all such taxes as required by law [rule 1.23]. Other relevant provisions include rules 1.15, 1.16, 1.20, 1.21 and 1.22.

32 *OAS, Inter-American Convention against Corruption* (1996), reprinted in 35 I.L.M. 724.

33 *Supra note* 27.

Constitution of India." It is said that the parliamentary intention in enacting this law was to arm citizens with the mechanism to scrutinize government and public processes, and ensure transparency. At the same time, however, the needs of society at large, and governments as well as individuals in particular, to ensure that sensitive information is kept out of bounds, have also been accommodated, under the Act. This has been addressed at two levels: one, by taking a number of security and intelligence related organizations out of purview of the Act, and two, by enacting specified exemptions – from disclosure, on grounds of public interest.

In the recent judgment delivered by the Delhi High Court[34], judges have been included within the purview of the *Right to Information Act.* Since the Supreme Court of India is an authority established by or under the Constitution of India, the court was of opinion that the office of the Chief Justice of India is a public authority. Therefore as per this interpretation the judges have to disclose their financial acquisitions. It is true that this decision of the Delhi High Court would bring about more accountability of judges who till now were beyond public reach. However, the consequences of this decision cannot be taken lightly as information of such a nature can be misused.

1.4 Misuse of information

Justice Kannan of the Punjab & Haryana High Court is absolutely right when he questions the legitimacy of the disclosure of assets. After all should a judge be answering everyone how he has got the wealth that he has declared? He says, "Imagine a judge enquiring into allegations of disproportionate wealth case of a bureaucrat. In the course of the proceedings, what if the litigant asks the judge, 'how did you obtain your wealth, before asking me to explain my riches?' It may not be a daily occurrence, but consider the mischief that the right to demand the assets statement of a judge could entail. Judges are not in the same

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[34] *Supra note* 16.

league as politicians... Politicians are elected by people who have a right to know the financial antecedents".[35] A judge keeps himself away from the public eye due to ethical considerations. He is not in a position to explain his conduct. Even the Delhi High Court, while upholding the CIC order, expressed the fear of misusing the information. "Judgments of courts are to be based on reason, and discuss fairly what is argued. Judges, unlike other sections of members of the public, cannot meet unjustified personal attacks or tirades carried out against them, or anyone from their fraternity, no clarifications can be issued, no justification is given as propriety and canons of judicial ethics require them to maintain silence." "The judge is thus unable to go and explain his position to the people," Justice Bhat observed.[36]

In India we have a special procedure to tackle dishonesty in the judicial system which has been specially devised as a means to protect the judicial independence of the country. The flaw occurs in the implementation of the scheme. It is therefore advisable to strengthen the existing scheme rather than make inroads into the arena of judicial independence.

The fallout of the High Court's finding that the CJI is a public authority who is bound to give information relating to the work, documents and records of the Supreme Court will have far-reaching implications for the Supreme Court and the High Courts. Would it mean that there is a right to obtain notings made by the CJI and the collegium of judges in the selection and rejection of judges of the Supreme Court and the High Courts which they are obliged to make in accordance with the Supreme Court's judgment in the *Second Judges Appointment case*[37]? The question then arises is that if such notings are made public, will the collegium of judges candidly express their views on the merits of

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35 K. Kannan (Justice), "Declaration of Assets by Judges", *available at* http://mnkkannan.blogspot.com /2009/04/declaration-of-assets-by-judges.html (last accessed 19 November 2009).

36 *Supra note* 27.

37 *SC Advocates-on-Record Association* v. *Union of India* AIR 1994 SC 268.

individual judges in their notings? Is there a right to obtain the notes of judges, drafts of judgments and minutes of discussion before a judgment is pronounced? Is there a right to the communications between the CJI and Chief Justices of High Courts or with the Prime Minister or the President? These are troublesome problems and there are no exceptions to these demands for information under the *RTI Act*.[38]

Further protecting privacy of financial information is particularly important in countries where wealthy individuals may be targeted for bribes or for kidnapping. Any promise to keep certain disclosed information secret must be evaluated according to the integrity of the monitoring agency. In some countries, information given in unsecured financial disclosures may be used as a tool of intimidation, either by the government or by criminal groups, to apply pressure to particular judges (and their families) or to extort money from them. Financial disclosures must be well protected to guard against such abuse and to accomplish the purpose behind the disclosure - judicial integrity - rather than furthering other forms of corruption.[39]

In some countries in which the physical safety of the judges and their families could be at risk, it would make sense to restrict access to some aspects of the financial disclosure and only disclose sensitive information pursuant to a judicial order during a trial. For example, numbers of banks accounts and the physical location of the residence of the judges' family may be restricted information.[40]

When addressing the issue of assets disclosure, it is fundamental to find a balance between the kind of information that must be available to the public and the rights to privacy and security of the official or judge.

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38 T.R. Andhyarujina, "Issues of Judicial Independence", *The Hindu*, Sept., 10, 2009. *At* http://www.thehindu.com/opinion/op-ed/article17743.ece (last accessed 16June 2009).

39 Sandra Day O' Connor (Justice), "Judicial Independence and Financial Disclosure", *INPROL Consolidated Response. At*: http://www.inprol.org/files/CR07003.pdf (last accessed on 17 November 2009).

40 *Supra note* 16.

Corrupt "information keepers" or weak information systems and institutions can result in serious information leaks that could have serious human rights implications, particularly in transition countries.[41]

1.5 Law on Declaration of Assets

The Parliament had recently proposed legislation titled "The Judges (Declaration of Assets and Liabilities) Bill, 2009".[42] The bill apparently was aimed at brining transparency to the functioning of the higher judiciary by providing for declaration of assets and liabilities by the judges. Under it the judges of Supreme Court would declare their assets to the Chief Justice of India (CJI) and judges of High Courts to the concerned Chief Justice, the CJI would be required to declare assets to the President. Judges failing to declare their assets (in 30 days time) or providing a false declaration would be deemed to be misconduct and misconduct is a ground for removal of a judge.

But clause 6 of the draft bill prohibits such declaration from being made public.[43] This exclusion was vehemently opposed by most political parties, as well as some legislators from the ruling Congress. Due to this clause the passing of the bill was brought to a halt.[44] In this regard we have a lot to learn from the experiences of other countries for the enactment of a good disclosure law. A good assets disclosure law must have 10 basic components given below:

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41 *Supra note* 6.

42 *The Judges (Declaration of Assets and Liabilities) Bill*, 2009. *At* http://www.judicialreforms.org/files/Judges%20%28Declaration%20of%20Assets%20and%20Liabilities%29%20Bill%202009.pdf (last accessed on 17 November 2009).

43 Clause 6 of the *The Judges (Declaration of Assets and Liabilities) Bill*, 2009 reads as, "notwithstanding anything contained in any other law for the time being in force, a declaration made by a Judge to a competent authority shall not be made public or disclosed, and, shall not be called for, or, put into question by any citizen, court or authority, and, save as provided by sub-section 2, no Judge shall be subjected to any enquiry or query in relation to the contents of the declaration by any person."

44 "Govt. drops introduction of bill on Judge's assets", *ZEENEWS.COM*. *At* http://www. zeenews.com/news552379.html (last accessed on 21 November 2009).

I. Obligation of Disclosure: The law must specify the nature of information that must be declared by a 'judge'. The coverage of the term 'judge' must be specified in the law. It must also clearly state whether the declarations should contain similar asset-related information for this/her spouse and dependents also. Good practice requires that the declarations contain assets-related information for the spouse and dependents also.

II. Periodicity of Disclosure: The law must clearly state the periodicity of the declarations to be made. In many countries a declaration is made soon upon entering judicial service and thereafter every year until retirement from service.

III. Disclosure to whom made: The law must clearly specify the authority competent to receive the assets declaration.

IV. Depository of Disclosure: The law must clearly specify the depository or the custodian of such declarations. The details could be maintained in a register. The authority competent to receive the declarations need not necessarily be the custodian of those documents.

V. Auditing the Disclosure and Sanctions against Wrongful Disclosure: The law must provide for an independent authority obligated to audit the declarations. Where discrepancies are found, there must be a specific course of corrective action to be taken against the declarants and the agency responsible for taking such action must be specified in the law. Sanctions must be specified in the law for wrongful disclosure that is mala fide in nature.

VI. Extent of Public Disclosure: The law must clearly state which portions of the assets declarations will be made public. Some countries do not permit disclosure of personal information such as tax identity number or other personal information regards debtors and creditors.

VII. Manner of Public Disclosure: The law must clearly indicate the manner in which the contents of the assets declarations will be made accessible to the people. Some countries like Mongolia

publish the names of declarants and the contents of the declaration in their Official Gazette. In some countries written applications stating the reasons for seeking assets-related disclosure must be made for obtaining access.

VIII. Manner of Use and Sanctions against Unlawful use: The law must clearly state what use of the information is permissible and what is not permissible. The law must prescribe sanctions for unlawful use of the information contained in the assets declarations. For example some countries allow publishing of the information through the media but it cannot be used for commercial purposes or any unlawful activities. Unlawful use is made punishable.

IX. Sanctions against Unlawful Disclosure of Confidential Information: The law must prescribe sanctions against disclosure of information contained in the assets declaration which according to the law must be kept confidential.

X. Power of courts/tribunals to require production: The law must empower the appropriate courts/tribunals to require production of the entire content of the declaration when required in any litigation.[45]

1.6 Conclusion

Due to the unique position of the judiciary as the principal guardian of the rights conferred by the Constitution, encroachments upon its protected sphere must be weighed with acute sensitivity. The Framers of the Constitution went far in their elevation of the judiciary to a co-equal branch of government. If we are to remain true to the Framers' plan for a government bound at all levels by the rule of law, we must resist even

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[45] Venkatesh Nayak, "Transparency in the Disclosure of Assets by Judges - Basic components of a disclosure law and what we can learn from other countries". *At* http://www.humanrightsinitiative.org/programs/ai/rti/india/national/2009/email_alerts/transparency_in_the_disclosure_of_assets_by_judges_basic_components_of_a_disclosure_law_&_what_we_can_learn_from_other_countries_aug_10_2009.pdf (last accessed on 18 November 2009).

well-intentioned legislation that would chill the capacity of the judge to render impartial justice. Judicial independence is not a cliché conjured up by those who seek to prevent encroachments by the other branches of government. The term is one of art, defined to achieve the essential objective of the separation of powers that justice be rendered without fear or bias, and free of prejudice.[46]

Financial declarations contain highly sensitive and personal information, which mandates some protection of privacy for those submitting financial declarations. The disclosure law should ensure restricted access and safeguards to guarantee that information disclosed will not be misused. For example, access to information about income and assets of family members may be restricted only to the enforcement authority. Moreover, financial declarations can be redacted so that strictly private information is not available to the public.[47]

Also, when addressing the issue of asset disclosure, a fine balance between the right to information and a judge's right to privacy and security must be found.[48] In this public clamour for transparency and accountability of judges, there is a real danger of undermining the independence and efficient functioning of the higher judiciary.

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46 Irving R. Kaufman, "The Essence of Judicial Independence", *Columbia Law Review*, Vol. 80, No. 4 (May, 1980), 671 at p. 700.

47 *Supra note* 27.

48 *Ibid.*

TRIGGERING MECHANISM OF THE INTERNATIONAL CRIMINAL COURT : SECURITY COUNCIL POWER UNDER THE ROME STATUTE

Sangeeta Taak*

1.1 Introductory

The ICC was created to bring perpetrators of international crimes to justice. The Preamble of the Rome Statute of the International Criminal Court states that, "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscious of humanity[1]." The Preamble goes on to state that these crimes threaten the peace, security, and well-being of the world and must not go unpunished[2]. The International Criminal Court can normally exercise its jurisdiction over the States which became a party to the Rome Statute[3].

The International Criminal Court has four distinct organs: the three Trial Divisions, the Presidency, the Office of the Prosecutor, and the Registry. The ICC divides its eighteen judges among three Trial Divisions: the Pre-Trial Chambers, the Trial Chambers, and the Appeals Chamber[4]. Each Pre-Trial Chamber admits evidence, issues warrants,

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1 At the end of World War I, momentum for a permanent international criminal court slowly began to build. The Treaty of Versailles called for the establishment of an international criminal tribunal to try the German Emperor, Kaiser Wilhelm, for "a supreme offense against morality and the sanctity of treaties," but he never actually stood trial. More importantly, a treaty providing for an international criminal tribunal to try Turkish leaders accused of slaughtering millions of Armenians was never ratified, and the alleged perpetrators were granted amnesty.

2 Joshua B. Bevitz, "Flawed Foreign Policy: Hypocritical U.S. Attitudes Towards International Criminal Forums," *Hastings Law Journal*, Vol. 53, April, 2002, pp. 931 at p. 940.

3 Yusuf Aksar, "The UN Security Council and the Enforcement of Individual Criminal Responsibility: The Dafur," *African Journal of International and Comparative Law*, Vol. 14, No. 1, 2006, 104, at p. 118.

4 The Rome Statute, Article 36.

and determines if a crime falls under the ICC's jurisdiction[5]. The two Trial Chambers conduct trials and sentence the convicted[6]. The Appeals Chamber hears appeals and has the power to reverse or amend a decision or sentence or arrange for a new trial before a different Trial Chamber[7]. One of the eighteen judges serves as the President and two serve as Vice-Presidents[8]. These individuals are responsible for administrative matters, such as assigning cases to the Pre-Trial Chambers[9].

The ICC has subject matter jurisdiction over genocide, crimes against humanity, war crimes, and crimes of aggression[10]. The trigger mechanisms for jurisdiction are 1) referral to the prosecutor by a party to the Rome Statute, 2) referral by the Security Council acting under Chapter VII of the UN Charter, and 3) referral by the Prosecutor himself in accordance with Article 15 of the Rome Statute[11]. The ICC is not an organ of the UN.

1.2 Historical Background

The ad hoc tribunal created in Nuremberg after World War II set a precedent for the international community to hold individuals responsible for grave crimes, even though state responsibility still maintained a role at Nuremberg[12]. The ad hoc criminal Tribunals established to address the crises in the former Yugoslavia and in Rwanda

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5 The Rome Statute, Article 57.
6 *Id.*, Article 76.
7 *Id.*, Article 83 (2).
8 *Id.*, Article 38.
9 Elizabeth C. Minogue, "Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court," *Vanderbilt Law Review*, Vol. 61, March 2008, pp. 647-680, at p. 653.
10 *Supra note* 4, Article 5.
11 http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Referals+and +communications, visited on 10 September, 2010.
12 Nuremberg dictum stating "crimes against international law are committed by men, not by abstract entities" has been used to affirm individual criminal responsibility for international crimes. (citing The Trial of German Major War Criminals Sitting at Nuremberg, Judgment, 1946, p. 41.

continued the pattern of holding individuals responsible for serious breaches of human rights law such as genocide, crimes against humanity, and war crimes[13]. The international community recognized, however, the need for a permanent court for the trial of these transgressions, rather than the continual establishment of ad hoc tribunals in response to each period of serious human rights violations[14].

In response to this demonstrated need, the international community agreed on the idea of the ICC. The ICC was to be the first court established in advance of, rather than in response to, international human rights violations[15]. In constructing the definitions of crimes that would fall within the Court's jurisdiction, the international community relied upon the statutes for the two regional criminal courts: the International

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13 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, arts. 1-5, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]. Article 1 states, "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." See also Article 1 (emphasis added). Articles 2-5 contain definitions for crimes within the jurisdiction, such as genocide, crimes against humanity, and war crimes. Id. arts. 2-5; see also Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 Jan. 1994 and 31 December, 1994, U.N. Doc. S/RES/955 (8 November, 1994) [hereinafter ICTR Statute]. Article 1 states:
The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

14 *Ibid.*

15 Previous ad hoc tribunals at Nuremberg and Tokyo, may be called ex post tribunals, in that they are established after the acute and violent situation in which the alleged crimes occurred....[E]x ante tribunals...are established before an international security problem has been resolved or even manifested itself....The ICC is the archetypal ex ante tribunal.

Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)[16].

In July of 1998, the Rome Statute was adopted at the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, also known as the Rome Conference[17]. On July 1, 2002, the Rome Statute entered into force after ratification by sixty State Parties[18].

The ICC is an exception to the earlier principles of the Nuremberg and the Yugoslavia tribunal due to its jurisdiction. The ICC will be having jurisdiction under the ICC in those cases from the date it has been established. The Principles of the *Nullem Crimen Sine Lege* under Article 23 of the Rome Statute makes it distinguished from the earlier tribunals. The triggering mechanism of the jurisdiction is also a

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16 For example, Article 6 of the Rome Statute, defining genocide, contains text identical to that of Article 4(2) of the ICTY Statute. Compare Rome Statute, supra note 1, art. 6 ("Genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such [listing relevant acts][.]") with ICTY Statute, *Supra note* 11, Article 4 (Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, racial, ethnical, or religious group, as such [listing relevant acts identical to ones listed in Article 6 of the Rome Statute.). Also the text of Article 7 of the Rome Statute, defining crimes against humanity, parallels the text of Article 5 of the ICTY Statute defining the same crime, with the exception of further defined sex crimes in Section 1(g) of Article 7 of the Rome Statute and the inclusion of the crime of apartheid in Section 1(j) of Article 7 of the Rome Statute. Compare Rome Statute, supra note 1, art. 7, with ICTY Statute, supra note 11, Article 5. Furthermore, Article 8 of the Rome Statute incorporates grave breaches of the Geneva Conventions of 1949 into its definition of war crimes. Rome Statute, supra note 1, art. 8. Similarly, the ICTR and ICTY Statutes also criminalize grave breaches of the Geneva Conventions. ICTR Statute, supra note 11, Article 4 (Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II).

17 The Rome Statute is an international treaty. However, because it is a treaty that establishes an institution, it is referred to as a statute.

18 Christopher D. Totten and Nicholas Tyler, "Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementary, Enforcement, and Related Issues in the International Criminal Court," *Journal of Criminal Law and Criminology*, Vol. 98, Spring, 2008, 1069 at p. 1079.

challenge. I shall be discussing the Triggering Mechanism under the Jurisdiction of the Rome Statute.

1.3 Triggering Mechanism

There are three trigger mechanisms ways in which the ICC assumes jurisdiction over the specified crimes are provided for under the Statute. These are Referral by a State Party (including self–referral, as

- in the case of Uganda, the Central African Republic and the DRC)
- Referral by the Security Council in exercise of its powers under Chapter VII of the UN Charter (for example, Darfur, Sudan)
- Investigation initiated by the Prosecutor of the ICC of his own accord

The fourth possibility is where a state that is not a party to the Rome Statute makes a declaration allowing the Court jurisdiction over acts committed on its territory[19].

The recent release of the ICC Prosecutor's Report on his investigations of the Darfur situation indicates that little progress has been made towards the Court's first prosecutions[20]. Although evidence has been collected and catalogued and a staff has been hired, it is unclear when the first prosecutions will begin, much less be completed. Furthermore, there is no indication yet of whether the Court is sufficiently developed to handle the complexity of the Darfur situation investigated by the Special Commission and ultimately referred to it by the Security Council[21].

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19 George P. Fletcher, "The ICC- Two Courts in One?", *Journal of International Criminal Justice*, Vol. 4, July, 2006, 428 at p. 428.

20 Second Report of the Prosecutor of the International Criminal Court, Mr Luis Morenv Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005), 13 December 2005.

21 *Ibid.*

1.3.1 Role of the Security Council under the ICC

On 26 May 2004, in a presidential statement, the Security Council expressed 'its grave concern over the deteriorating humanitarian and human rights situation in the Darfur region[22]. It reported to the Secretary-General on 25 January 2005. On 31 March 2005 the Security Council made its first referral to the International Criminal Council ('the ICC'). The Council referred the situation in Darfur to the Prosecutor of the ICC. Given the USA's stated opposition to the ICC, that there was a referral at all could be seen as a triumph for the Court's supporters. The International Commission of Inquiry on Darfur began its work on 25 October 2005. However, Security Council Resolution 1593 has a number of problematic features. Its genesis was long and convoluted, and it has been seen by some as a substitute for effective action by the United Nations to end the humanitarian crisis and systematic atrocities being committed in Darfur[23]. The Commission concluded that the Government of Sudan and the janjaweed were responsible for serious violations of international human rights and humanitarian law. Government forces and militias had killed civilians; engaged in torture, forced disappearances, sexual violence and forced displacement; destroyed villages, and pillaged. Such acts amounted to war crimes and (given that they had been committed on a widespread and systematic basis) crimes against humanity[24]. The Commission, however, concluded

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22 Statement of the President of the Security Council (26 May 2004) UN Doc S/PRST/2004/18a1. The statement followed a report of the UN High Commission for Human Rights 'Situation of Human Rights in the Darfur Region of the Sudan', UN Doc. E/CN.4/2005/3, 7 May 2004, in which the High Commissioner reported that massive and gross human rights violations were being committed in Darfur, possibly amounting to war crimes and crimes against humanity.

23 Mathew Happold, "Darfur, The Security Council, and the International Criminal Court," *International and Comparative Law Quarterly*, Vol. 55, No. 1, 2006, 226 at p. 226.

24 A treaty appears to be the most appropriate procedure to establish a permanent international criminal court, although the Security Council may be competent to establish such a court itself. However, this would require that the competence of the court be limited to specific situations, since a Security Council decision would be taken *ex post* and not *ex ante*. As an enforcement measure under Chapter VII, the Tribunals will therefore be terminated upon the determination by the Security

that the government of Sudan had not pursued a policy of genocide, although it considered that some individuals might have acted with genocidal intent.

Acting under Chapter VII of the United Nations Charter, the Council decided to 'refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court' and ordered the Government of Sudan and all other parties to the conflict in Darfur to 'cooperate fully with and provide any necessary assistance to the Court and the Prosecutor' pursuant to the resolution. All this was in accordance with the power given to the Security Council under Article 13 of the Rome Statute of the International Criminal Court to trigger the Court's jurisdiction by acting under Chapter VII of the UN Charter to refer 'a situation in which one or more crimes appear to have been committed' to the Prosecutor. However, the Resolution also contained some rather more problematic provisions as a result of the compromises necessary to ensure its adoption[25].

The Darfur Resolution places states that are both members of the UN and members of the ICC in a difficult position. Article 25 of the UN Charter requires member states to "accept and carry out" decisions of the Security Council that are "in accordance" with the UN Charter[26]. However, if the peacekeeping exemption is determined to be counter to the powers granted to the Security Council, and thus not in accordance with the UN Charter, then UN member states would not be bound by it[27]. On the other hand, if the peacekeeping exemption is

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Council that international peace and security has been restored in the former Yugoslavia and in Rwanda. For further see, Catherine Cisse, "The International Tribunals for the Former Yougoslavia and Rwanda: Some Elements of Comparison," *Transnational Law Contemporary Problems*, Vol. 7, Spring, 1997, 103 at p. 110.

25 Resolution 1593 was adopted by 11 votes to none, with four abstentions (Algeria, Brazil, China, and the USA).

26 U.N. Charter Article 25.

27 Heather Cash, "Security Council Resolution 1593 and Conflicting Principles of International Law: How the Future of the International Criminal Court is at Stake," *Brandeis Law Journal*, Vol. 45, Spring 2007, 573 at p. 589.

deemed to be within the powers of the Security, then Article 103 of the UN Charter obligates UN member states to fulfil their obligations under the Charter over any obligations present in contradictory international instruments, which would include the Rome Statute[28].

1.3.2 Security Council Power under Article 16 of the Rome Statute

Article 16 requires the Court to defer any investigation or prosecution for a period of up to 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter, has requested the Court to that effect[29]. The Article is intended to give the Security Council the possibility to suspend investigations or prosecutions by the Court, with respect to a certain case or a situation, when the Court's action threatens to disrupt the efforts of the Security Council to achieve peace. In particular, this danger is said to be present when the participation of a suspect in peace negotiations appears necessary or the prospect of prosecution may hold the parties to a conflict from reaching a peaceful solution. Article 16 allow the Security Council, at least for a limited period of time, to lend international validity to a national amnesty or to prevent prosecution by the Court even without an amnesty having been granted at the national level[30]. Initially, this provision had been expected not to have great practical impact, as, under Article 27 of the Charter, are quest to the Court requires the consensus of at least nine members of the Council, including the five permanent members, two of which are also States Parties to the Statute. However, Resolutions 1422 (2002) and 1487 (2003)[31] on the exemption of non State Party personnel of UN established or authorized operations from the Court's jurisdiction even

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28 *Ibid.*

29 Helmut Gropengieber, "Amnesties and the Rome Statute of the International Criminal Court," *International Criminal Law Review*, Vol. 5, 2005, 267 at p. 270.

30 *Id.*, at p. 272

31 Security Council Resolutions 1422 (2002), 1487 (2003) and 1497 (2003), excluding the jurisdiction of the ICC, give rise to the fundamental issue of whether the legitimacy of an international institution such as the International Criminal Court may be eroded by an act of the Security Council, the political organ of the United Nations.

though not renewed in 2004 as well as Resolution 1497 (2003)[32] on the conflict in Liberia have made clear that the Security Council can and will be used to try to limit the Court's range of action[33].

The Security Council unanimously approved both Resolutions 1373 and 1540, reflecting approbation of counter proliferation and counterterrorism goals. Resolutions 1422, 1487, and 1497, however, are instances where the Council[34] used its new legislative authority for unabashedly partisan purposes--to narrow the jurisdiction of the International Criminal court, as set forth in the Rome Treaty, for the benefit of states that opposed that tribunal. The history of these resolutions proves that Council legislative authority can be abused to actively annul the will of the international community as expressed in treaties[35].

1.3.2.1 Discretionary Powers of the Security Council

It is widely accepted that the maintenance of international peace and security is the principal objective of the UN, and that this objective assumes precedence over all other commitments of the Organization. According to the scheme of the UN Charter, the Security Council is the primary organ entrusted with the responsibility of fulfilling this objective[36]. The Council is thus required to act in situations that necessitate swift and urgent action on its part. It is therefore only natural that the Security Council should enjoy broad

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32 Resolutions 1422, 1487, 1497 and the International Criminal Court: Annulments of the Treaty Process.

33 *Ibid.*

34 Also See, Inger Osterdahl, "Max Hilaire: United Nations Law and the Security Council," *European Journal of International Law*, Vol. 17, November, 2006, 1043 at p. 1045.

35 Sumon Dantiki, "Power Through Process: An Administrative Law Framework or United Nations Legislative Resolutions," *Georgetown Journal of International Law*, Vol. 40, Winter, 2009, 655 at p. 668. Also see, Philippe Kirsch, "The Role of the International Criminal Court in Enforcing International Criminal Law", *American University of International Law Review*, Vol. 22, 2007, 539 at p. 541.

36 The UN Charter, Article 24.

powers in the discharge of its functions with a view to maintaining international peace.

The drafting history of the UN Charter indicates that unsuccessful attempts were made during the San Francisco Conference to qualify the words 'maintenance of international peace and security' in Article 1, with the words 'in conformity with the principles of justice and international law'. Such attempts failed due to apprehensions that such qualification would unduly limit the powers of the Council and prejudice effective action on its part. The wide measure of discretion thus accorded to the Council is particularly true of enforcement measures taken by the Council acting under Chapter VII. Under Article 39, the Council's powers to decide which situations constitute a threat to international peace and security, as well as what kind of responsive measures should be taken to quell a threat, are almost plenary[37]. It would scarcely be compatible with the functions of the Council to allege otherwise[38]. Decisions of the Security Council while acting under Chapter VII are essentially political decisions and unless the Council can exercise a wide measure of discretion, its functioning would be paralysed. The Security Council has therefore in the past exercised a wide array of powers while acting under Chapter VII including the establishment of international tribunals with primary jurisdiction over national courts and the settlement of border disputes between nations[39].

Nevertheless, while the Security Council may enjoy an extensive range of powers under the UN Charter, it cannot act *legibus solutus* (unbound by law). While any decision of the Security Council while acting under Chapter VII must necessarily be a political decision that does not automatically imply that the Council can act without any deference to the principles of international law. The Security Council is a creature

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37 McDougal and Reisman, "Rhodesia and the United Nations: The Lawfulness of International Concern", *American Journal of the International Law*, Vol. 62, No. 1, 1968, 1 at 9.

38 The Rome Statute, Article 39.

39 *Id* at p.11

of treaty, and may not overstep the bounds of that treaty. Further, the Security Council is a delegate of the discretionary powers of its Member States. Under Article 24, while discharging its function of maintaining international peace, the Security Council acts as an agent of the Member States of the UN. It is thus unlikely that the Council can act in a manner that is unconstrained by any norms of international law.

Several restraints have thus been implied on the powers of the Security Council and these operate regardless of whether the Council acts under Chapter VII or any other part of the UN Charter. Article 24, itself sets out one limitation - the Council must act in accordance with the purposes and principles of the UN. Secondly, since the UN Charter cannot be in derogation of any norm of jus cogens, the Council that has been set up by that treaty cannot be conferred the power to act in violation of any jus cogens norm. Aside from these obvious limitations on the Council's powers, certain other restraints on its discretion have also been implied. It has been argued that the Council may not violate certain fundamental institutional principles, such as the principle of *aut dedere aut judicare*, and essential elements of sovereignty. The Council must also discharge its functions in good faith, and not act on the basis of ulterior motives.

Since these limitations on the powers of the Security Council would apply equally to resolutions passed under Chapter VII, the validity of resolutions excluding the jurisdiction of the ICC must be analysed within this framework[40]. There are certain areas where the deferral of the powers under the Security Council can be proved harmful instead of maintaining Peace and Security. There are certain reasons given by the United States for not signing the Rome Statute mentioned as under:

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40 Neha Jain, "A Separate law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court," *European Journal of International Law*, Vol. 16, April, 2005, 239 at p. 244.

1.3.2.2 Deferral would harm the Peace and Security

Using deferral as a bargaining chip with perpetrators of serious crimes harms the deterrent effect of the International Criminal Court. Deferring prosecution of Al Bashir at this point would be succumbing to the threats of criminals, not promoting international peace and security. Deferral could open the ICC to blackmail by the government of Sudan and future defendants. It could also send a message that those committing serious crimes are free to proceed without a true risk of being held accountable by the ICC[41].

1.3.2.3 Fear of the United States

The United States most serious concern regarding the ICC is the possibility that American citizens (primarily, American soldiers) could be brought before it[42]. As stated previously, the ICC has jurisdiction over individuals who are nationals of States Parties and individuals who commit crimes in the territory of States Parties[43]. So if an American allegedly committed a crime in the territory of a State Party, or in the territory of a non-State Party that accepted the jurisdiction of the ICC, then the ICC could bring that person before it. The Rome Statute provides an escape clause through the complementarity process[44]. But the United States has reservations about the ICC making the determination of whether a state is able to carry out the investigation or prosecution impartially and fears that a decision of the ICC could be influenced by outside political forces instead of a thorough review of a state's judicial system.

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41 Jennifer Falligant, "The Prosecution of Sudanese President al Bashir: Why A Security Council Deferral Would Harm the Legitimacy of the International Criminal Court," *Wisconsin International Law Journal*, Vol. 27, Winter, 2010, 727 at p. 753.

42 Elizabeth C. Minogue, "Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court," *Vanderbilt Law Review*, Vol. 61, March, 2008, pp. 647-680, at p. 675.

43 *Ibid*

44 *Id.*, at p. 676.

1.4 Conclusion

The Security Council referral of the Darfur case violated the funding scheme suggested by the Rome Statute. As a price for US acquiescence in the Security referral, the Security Council insisted that no UN funds could be used for the Darfur prosecutions. Setting aside, for the moment, that this violates the spirit of the Rome Statute, it leaves only two options for funding the case: assessed contributions from state parties and voluntary contributions from 'governments, international organizations, individuals, corporations and other entities', as if the ICC prosecutor and president are meant to grovel before international philanthropists to pay their salary. The result of this compromise was, in essence, an unfunded mandate. The ICC prosecutor was required by the UN to take up the case but the ICC would have to find a way to pay the bill itself. And failure to find funding would not, it seems, provide a legal justification for ignoring the Security Council directive.

This funding scheme was an attempt by the Security Council to blur the line between the two courts of the ICC. The Security Council wanted the authority and power inherent in the ICC as a 'security court', but it balked at the financial commitments these would impose. So the Council borrowed the funding scheme for the ICC as an independent criminal court in an attempt to have its cake and eat it too. On a practical level, of course, the Security Council ceded some control over the case when it refused to pay. The two courts of the ICC are conceptually distinct and an attempt to conflate them only hurts the interests of the Security Council. The result is a deep confusion over who will control the Court during the Darfur case. The Security Council has demanded that the case be heard but will not pay for it. What if the Assembly of State Parties refuses to pay or threatens to withdraw funding? In such a situation it would appear as if the Assembly, not the Council, would gain increased leverage over the Court's operations[45].

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[45] George P. Fletcher, "The ICC- Two Courts in One?", *Journal of International Criminal Justice*, Vol. 4, July, 2006, 428 at p. 429.

By creating the ICC and then by referring the violence in Darfur to that Court's jurisdiction, the international community dealt the ICC a hand of cards to play. In turn, the Court placed its chips on the table. All that now remains to be seen is how the other players will react[46].

Under the current structure of the ICC and in the current political climate, Security Council referrals to the ICC have no more enforcement behind them than State Party referrals or investigations initiated by the ICC Prosecutor, even though the Security Council theoretically can back up its referrals with Chapter VII authority[47]. This is the case because the Security Council has not chosen to exercise its Chapter VII powers outside of the referral itself. However, the ICC could choose to modify its structure and jurisdiction in the hope of gaining the support of the United States. If the United States reversed its position on the ICC, then the United States could influence the Security Council to issue more effective resolutions that would raise the chances of states assisting the ICC in its investigations and enforcing ICC arrest warrants. The ICC has to make a choice. If it elects to stay the course, the potential effectiveness of the Court is constrained. However, if the ICC decides to significantly change its structure in response to U.S. objections, then its mandate to punish "the most serious crimes of concern to the international community" could be limited to punishing only those "most serious" crimes committed by individuals outside of the permanent five members of the Security Council[48]. This puts the ICC in a difficult position in its developing years.

This whole line of thinking raises deep conceptual concerns about what it means to be a criminal court and how basic norms of criminal law are

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46 Lucas Buzzard, "Holding an Arsonist's Feet to the Fire?- The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir," *American University International Law Review*, Vol. 24, 2009, 897 at p. 939.

47 Elizabeth C. Minogue, 2008, at p. 680.

48 Rome Statute of the International Criminal Court, Article 5.1, U.N. Doc. A/CONF.183.9 (1998), available at http://untreaty.un.org/cod/icc/statute/romefra.htm (hereinafter Rome Statute).

consistent with an international body such as the ICC[49]. The adoption of the Rome Statute and the development of the ICC is, of course, a great development in international criminal justice. No one doubts this. But we worry about a court that is required by law to take a case from an international organ concerned solely with security matters. The Security Council is so powerful, apparently, that it can order a referral and even refuse to pay for it, snubbing its nose at the Rome Statute and its funding provisions. The very idea, in fact, that a criminal court should have anything to do with issues of peace and security is rather strange. Of course, one can always justify the existence of a criminal justice system with the thought that, without it, there would be mayhem. However, to allow the selection of cases to be so dependent on issues of collective security, and to be overseen by a political body concerned with it, is at odds with the fundamental goal and unique focus of all criminal courts to adjudicate the culpability of individual suspects. This dichotomy lies at the heart of international criminal justice: prosecuting individual suspects yet receiving cases when collective security demands it[50].

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49 The ICC is truly two courts in one. Now, with the Darfur case at a critical stage with questions of funding and jurisdiction hanging in the balance, this conceptual difficulty has sparked concrete challenges for the ICC Prosecutor.

50 George P. Fletcher and Jens David Ohlin, "The ICC-Two Courts in One," *Journal of International Criminal Justice*, Vol. 4, July, 2006, 428 at p. 434.

THE BOOK REVIEW

Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era*, Orient Longman, New Delhi, 2008.

Rachna Sharma*

Human rights are rights held by individuals simply because they are part of the human species. They are the rights shared equally by everyone regardless of caste, creed, sex, race, nationality, and economic background. They are universal in content. Across the centuries, conflicting political traditions have elaborated different components of human rights or differed over which elements had priority. When embarking on a history of human rights, the first question that one confronts is: where does that history begin? As a matter of fact, it is a politically charged question, as difficult to answer as the one addressing the end of history. And the question of the end of history has always suggested the triumph of one particular worldview over another: Friedrich Hegel' vision of history ending with the birth of the Prussian state celebrated the German liberal and cultural views of his time over others; Karl Marx' prediction that history would end with the withering of the state and the birth of a classless society emerged from a deepening struggle against the abuses of early industrialization; and Francis Fukuyama's declaration of the end of history exemplified liberal euphoria in the immediate aftermath of the Soviet collapse. Similarly, the question of the beginning of history tends to privilege a specific status quo or value system against the possible challengers or to legitimize the claims of the neglected agents of history. It is in this context that one can understand the fight between the religious creations and evolutionary Darwinists in the American schools, and the clash between some defenders of the Western canon and some advocates of the African and the Third World studies.

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The book under review is a definitive account of the history of human rights told from the perspective of those struggling for them. The introduction to the book offers an analytical perspective on the various layers of the human rights debate: between globalists and anti-globalists, between unilateralists and multilateralists, and between market ideology and religious fundamentalism, suggesting in all three cases that human rights progress will require moving beyond Manichean divisions.

The book documents various connections between ancient values and modern human rights. Notwithstanding the different rituals and moral priorities associated with each of these traditions, all share basic views of a common good. This of course should not imply that all individuals were perceived as equal under any ancient religious or secular aegis. From Hammurabi's Code to the New Testament to the Quran, one can identify a common disdain toward indentured servants or slaves. While emphasizing a universal moral embrace, all great civilizations have thus tended to rationalize unequal settlements for the weak or the "inferior". Yet while such similarities are noteworthy, they should not overshadow one of history's most consequential realities: it has been the influence of the West, including the influence of the Western concept of universal rights, that has prevailed.

The book has indeed been written in a systematic manner, for each of the chapters is divided into four corresponding parts: a historical background focusing on select critical events that helped launched the most important human rights campaigns; the main human rights themes of each period, broken down into several sub-sections; a review of the debate, within each period, over acceptable ways to promote human rights; and a discussion of the inclusiveness of the prevailing views of human rights during each period, that is, a chapter-by-chapter response to the question, human rights for whom?

In sum, the book attempts to provide a useful path for navigating through the main historical events, speeches and legal documents that led upto the ratification of the Universal Declaration of Human Rights, 1948. I would like to conclude by stating that for the scholars, students,

activists, and the wider community concerned with human rights, the history depicted in this book can help illuminate the controversies and commonly held misconceptions that continue to beset the human rights debate.

The author Micheline Ishay needs to be credited for having recounted the dramatic struggle for human rights across the ages in a book that brilliantly synthesizes historical as well as intellectual developments from the Mesopotamian Code of Hammurabi to today's era of globalization. It is a definitive account of the history of human rights told from the perspective of those struggling for them. The present edition includes a new preface by Ishay herself and it also contains an insightful Afterword by an Indian scholar Anupama Roy.

THE BOOK REVIEW

Paul Raffield and Gary Watt (eds.), *Shakespeare and the Law*, First Indian Reprint 2010 Mohan Law House, New Delhi, under Special Arrangment by Hart Publishing Limited, U.K., Price Rs. 695.00

Dr. Tanya Mander *

Shakespeare and the Law is an edited compilation by Paul Raffield and Gary Watt. The papers in the collective were presented at the conference on 'Shakespeare and the Law' held at the University of Warwick in summer of 2007. The objective of the conference and the book is clearly stated that it's the first step on the long path to discoursing the potential for studies in law and the humanities. The book, substantiates the belief that the art of the actor and the advocate have much in common – the stage and the court offer performance spaces. It is beautifully stated in Foreword of the book, "But the stage, like the courtroom, also debated the culture's biggest ideas: treason and betrayal, both state and domestic; issues of equity and liability; the relationship between the rigorous enforcement of statutory law and mercy; false witness and corrupt justice; the legal duties of parents to children, husbands and wives, the rich to the poor, the dead to the living".

The Book is divided into five parts, each parts deals with specific themes and a specific play. Part I 'Shakespeare, Money and the Law of Contract' has two papers which deal with opposing and connected concerns: things we bargain for and the people we bargain with. Part II titled 'Shakespeare, Women and the Law' deals specifically within the content of the marriage contract. The plays explored are *All's Well That Ends Well* and *Measure for Measure*. Part II titled 'Shakespeare and the Law of Love' explores the pairing of law and lust. The papers explore *Merchant of Venice* and *Romeo and Juliet.* Part IV. 'Justice and Royal Prerogative', looks at the sovereign seizure of the treasures of the earth

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in *Hamlet* and *King Lear*. Part V 'Violence, the State and the Citizen' examines the Punishment theory in the Renaissance explaining the play *Titus Androniws* and final Part VI '*The Merchant of Venice*' and Infinite Meanings of "Law" is devoted to the play that explores the most legal angles. The papers in the section explore the merchant contracts, marriage contracts, offence and excessive retaliation.

The papers reveal not only the legal themes of Shakespeare's works but also demonstrate Elizabethan jurisprudence.

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