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EDITORIAL

Is Law a social science? Yes! There is no doubt that there are complex connections between law, culture, society and the social structures created by the society. But conventionally speaking, law as a discipline has been considered in isolation as an autonomous and self-contained domain. It has often been conceived in abstract sense comprising enforceable norms, judicial precedents or legislation. It means that enormous structure of social control and other factors responsible to make law enforceable and effective are not taken into account.

Positivist idea of law has often been challenged over the years by many thoughts and movements. Social scientists emphasize that law and legal issues are intrinsically intertwined with social, political, historical, economic and cultural settings. The law and literature movement focuses on the inter-disciplinary relationship of law and literature. The emphasis is on *'law as literature'*, that is to understand legal texts by literary interpretation, analysis and critique; and also on *'law in literature'* when literature is studied to explore law. Both ways, literature provides a unique insight into application of law, in varied human conditions.

Contemporary scholars understand well and seek to explain law in social, anthropological, historical, and economic context. An attempt must be made to understand and study law as such. This opens another door, that we trace the history of components which inform law, and study the objects and principles of law in contemporary social set up. With an objective to develop sound learning foundation, Legal Education Committee of the Bar Council of India has also emphasized the need for comprehensive study of social science subjects for first three years of the five year law programme, because study of social sciences locates and informs law in the social milieu. A synchronized interdisciplinary approach in study and research in law would certainly prove to be relevant and meaningful to understand and solve vexed issues confronted by the present society.

The concerns to protect fundamental rights and liberties and mandate to uphold rule of law call for harmonious solutions. In view of the fast growth and development at the different levels, (viz., societal, national and international) law needs to be dynamic, progressive and sensitive to societal aspirations. Universally, law is supposed to respect basic human values and ensure equality and equal opportunities to all. Therefore, a synchronized interdisciplinary approach is surely an instrument for building a sound social structure.

Hence, the *RGNUL Law Review* offers a platform to the learned authors to share their views derived through comprehensive research on significant issues confronted in the contemporary society and contribute towards development of an egalitarian social order.

Tanya Mander

RGNUL Law Review (RLR)

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CHALLENGES TO GOOD GOVERNANCE : A CRITIQUE

Dr. Reddivari Revathi*

1.1 Introduction

The concept of governance is not new. It is as old as human civilization. It is a broader concept, which is defined as the exercise of authority through formal and informal traditions and institutions for the common good[1]. Government is one of the actors in governance. Good governance emerges through sincere and honest application of prevailing laws and principles, the respect for rule of law, ensuring human rights, public accountability, transparency and check on corruption. Circumventing the laws for self- interest does not qualify to be called as good governance. People look to be abiding by rule of law. Most of the poverty eradication programmes have failed in the country because of lack of good governance. Offences against women are committed due to deficient governance in the country.

Therefore, good governance encompasses all aspects of human life for an overall development of the people. It existed since ancient times and came into vogue in 1990's[2]. The traditional concept of governance was implying an exercise of control by a body of persons over the subjects. However, with the passage of time it began to be realized that people are not merely the subjects but are entitled to be governed consistent with rights. Lack of good governance has been identified as a root cause of many of the serious deficiencies in society. It robs the citizenry of their security, and their social and economic rights.

Governance is more than fighting corruption. Corruption is commonly defined as the abuse of public office for private gains. Corruption flourishes in our country because it is a low-risk high-profit activity. If we begin to check corruption in public life, it paves the way for checking criminalization of politics as well because it is corruption which is fueling the fire. Further, corruption of the State and its institutions hinders the full realization of human rights. As a result,

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1 For details see S.L. Goel, *Good Governance-An Integral Approach,* Deep & Deep Publications, New Delhi (2007).

2 The World Bank, in order to ensure that development assistance is effectively used, required the recipient countries to show effective performance and promote reforms. See Santiso. C, "Good Governance and Aid Effectiveness: the World Bank and Conditionality", *7 George Town Public Policy Review* (2001), pp. 1-22.

development is affected which is always human rights centred.[3] All over India criminal syndicates, mafia networks like land mafia, mining mafia have become a law unto themselves plundering natural resources. Criminalization of politics and corruption in public life remained unchecked. As a result, there is non performance and compromised governance in the country.

The question is what strategies lower corruption and strengthen quality of governance? There is no comprehensive law making public servants liable to make good the loss caused and in addition would be liable for damages. Anti corruption law has failed miserably in delivering the goods. The need for strict implementation of election law and electoral reforms need not be over emphasized. Therefore corruption, human rights violations, non application of law, absence of law, criminalization of politics, lack of transparency and accountability are some of the greatest challenges of good governance. The paper examines all the issues raised above from human rights dimensions.

1.2 Challenges on Good Governance – Some Instances

The Right to Information (RTI) Act, 2005 provides an effective tool to the citizens to have access to information vital for greater transparency in the performance of the system. On the basis of information obtained under the Act PIL is filed providing access to justice to common man. Unfortunately, RTI activists are killed and there is no free flow of information and openness in the governance. There is no safety for whistleblowers in the country when they tend to expose corruption in the system. For decades, the victims of communal and targeted violence have been denied protections of law that the rest of us taken for granted. India needs a law to protect its vulnerable citizens, minorities from mass violence[4]. Similarly, minorities are being persecuted on the charges of terrorist activities. A large number of minorities have been languished in prisons as under trails for years without trial.[5] Justice Katju laments that since 2001, a terrible maxim had seeped into the Indian mainstream: "All Muslims may not be terrorists, but all terrorists are Muslims". It is a terrible time and dangerous trend India is heading for.

The Supreme Court formed SIT on black money.[6] It is to bring back money stashed away abroad. It expressed its serious concern over the magnitude of the problem and the threat black money posed to the country's economy. The Supreme Court rejected centre's claim of absolute immunity and directed it to

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3 See C. Raj Kumar, *Corruption and Human Rights in India,* Oxford University Press (2011); See also V.N. Viswanathan, *Corruption and Human Rights,* Allied Publishers, Chennai (2012).

4 See SiddharthVaradarajan, "A Bill to Settle a Terrible Debt," *The Hindu,* Editorial 21 June 2011.

5 Justice Markandey Katju, "The Court of Last Resort", *The Hindu* Editorial, 9 April 2013.

6 *Ramjethmalani* v. *Union of India,* (2011) 8 SCC 1.

disclose the names of black money account holders. Depending upon the number of incidents through which such moneys are generated and secreted away it may very well reveal the degree of softness of the State. The unaccounted moneys are rough indicators of the weakness of the State in terms of crime prevention and also of tax collection. It clearly indicates a compromise of the abilities of the State to manage its affairs in consonance with the Constitution. If the State is soft to a large extent, especially in terms of its unholy nexus between law makers, law keepers and law breakers, the moral authority to exercise suitable control over the economy and society would vanish.

The Land Acquisition Act, 1894 has become an engine of oppression. Land acquisition is not taking place in a manner protecting the interests of land owners and marginal farmers whose livelihoods depend upon the land being acquired. The State became the biggest land grabber[7] and the land use is changed from industrial to residential. The land given for development is not inclusive and State is taking advantage of law against poor. If the poor protest, they are killed in police firing. The Supreme Court of India expressed concern over the misuse of the Act by all States to acquire land from farmers for the development in the guise of public purpose. Absence of national law to provide for the resettlement, rehabilitation and compensation for the loss of livelihoods is clearly felt. Hence, the National Land Acquisition Rehabilitation and Resettlement Bill is introduced in the Parliament.

Special Economic Zones (SEZs) have become Special Elimination Zones. In the name of development, land is acquired from the farmers forcibly under the SEZ Act depriving the livelihood of the farmers. They are committing suicide due to crop failure, distress and anti-farmer policies of the government. Farmers suicide rates soar above the rest due to agrarian crisis. The new Census 2011 data reveal a shrinking farmer population.[8] Tribals are displaced and deprived of their livelihood without proper rehabilitation and compensation in the pretext of development. They are killed when the clinical trials are conducted without prior informed consent as they are illiterates and vulnerable. This is a gross violation of human right. Mahatma Gandhi Rural National Employment Guarantee Act, 2005 providing security to the livelihood of rural masses is not properly implemented.[9] The most unfortunate thing is that there is no payment of minimum wages to the rural households and the State is responsible for this. It is submitted that when there is no payment of minimum wages it amounts to forced labour and hence it is a gross violation of human rights. MGNREGA is expected to be a major instrument of social change.

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7 For details see *India Today* (on-line issue), date 16 November 2011; See also http://IndiaToday.in/story/justice-s-h-kapadia-cji-supreme-court-corruption/1 /160 282.html (Accessed on 07.05.2012).

8 See P. Sainath, "Farmer's suicide rates soar above the rest", *The Hindu,* 18 May 2013, p. 1.

9 See *Centre for Environment and Food Security* v. *Union of India* (2011) 5 SCC 668.

1.3 Human Rights and Good Governance: Legal Response

Human rights and good governance are intimately related. Good governance promotes human rights while human rights are a source of good governance. The basic purpose of good governance is to promote the human dignity and status. Whenever human dignity is wounded civilization takes a backward. Good governance also requires that women should be given their due place through granting human rights so that they can contribute through their activities to good governance. Women rights are a mechanism to achieve an egalitarian society based on social justice and dignity. Gender equality is fundamental to achieve people centered development. India is one of the dangerous countries for women, because of its high levels of offences and atrocities committed on girl child and women. Gender equality has become a great farce and next to impossibility. Is it not amounting to violation of Human Rights?

Women empowerment laws are not effectively implemented leading to women de-empowerment. Protection of Women from Domestic Violence Act, 2005 can usher an era of peace, love and affection among all members of the family provided everyone in the family respects human rights provision of the Act. Similarly, Protection of Women from Sexual Harassment at Work Place Bill, 2012 and Protection of Children from Sexual Abuse, 2012 are in the direction of protecting rights of women and children respectively. Criminal Law Amendments, 2013 (Nirbhaya law) made on the basis of Justice Verma Committee recommendations provides stricter punishments for sexual assaults.[10]

The Supreme Court in *Nandhini Sundhar* v. *State of Chattisgarh*[11] declared *Salwa Judum*as illegal and unconstitutional in the fight against moist insurgency and ordered their immediate disarming. The State was strongly indicted for violating constitutional principles in arming the tribal youth and conferring on them the powers of police. This policy of the State violated Arts. 14 and 21 of the Constitution of those employed as SPOs. The primordial value is that it is the responsibility of the every organ of the State to function within the four corners of the constitutional responsibility. That is the ultimate rule of law. The Court questioned the Union Government for providing financial assistance to the State in the appointment of SPOs. Their lives are endangered and also in denigration of their dignity as human beings. It is submitted that State as well as Union Government were guilty of violating the fundamental rights of the citizens at large and SPOs themselves.

The Court order should be accepted for the sake of good governance and national interest. The creation of SPOs was synonymous with the creation of a private army of feudal elements to silence any struggle by the poor. The Court decision

10 It is the result of gruesome incident that took place in Delhi in December (2012).

11 (2011) 7 SCC 547.

would go a log way in protecting the tribals from State aided human right violations. *Salwa Judum*is not a spontaneous movement, but a State organized anti-insurgency campaign.[12] Arming citizens to fight Moists is like creating conditions of civil war in the country. The review petition filed by the State would necessarily strike at the core human values enshrined in the Constitution.

1.4 Criminalization of Politics and Corruption:

Indian democracy is the largest in the world. Democracy is a part of the basic structure of the Indian Constitution. Rule of Law and free and fair elections are the basic features of democracy. Unfortunately, purity of elections and healthy elections could not be maintained in the country due to corruption and criminalization of politics. Infact, criminalization of politics has become a political culture of our society inspite of recommendations of the Law Commission[13], the Election Commission,[14] Vohra Committee[15] categorically establishing links of criminal gangs with governmental functionaries and political leaders. It begins with money and muscle power available with the underworlds and mafia gangs of criminal record. The State is unable to regulate the flow of unaccounted funds into the coffers of political parties. Criminals are also allowed to contest elections by misusing flaws in election law.

Criminalization of politics derives its roots from the defects in the political system. It is a systematic act of subversion of the usual course of politics by illicit means intended to attain private gain. It gives rise to a kind of situation where there is a great deal of erosion of values, organized violations of norms, rules and principles, dearth of security of life, liberty and property, lack of transparency and accountability. There is dominance of muscle power and black money, plunder of resources, rampant corruption leading to the underworld to establish substantial control over the political process.[16] The **Vohra Committee** stated in strong terms that the nexus between crime syndicates and political personalities was very deep.

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12 Mahendra Karma, a powerful tribal leader who founded SalwaJudum to combat moists was killed along with other congress workers in a moist attack at Raipur- see *The Hindu,* May 2013, p. 1, 26.

13 The Law Commission in its 170th Report (1999) had drawn the attention of the concerned authorities to this said fact of the Indian political life. The Commission had suggested that the persons charged with serious offences be disqualified from contesting election.

14 The Election Commission has also been raising the issue for several years. It has expressed grave concern over criminalization of politics. The Commission has proposed several amendments in the *Representation of Peoples Act.*

15 The Committee was appointed by the Union of India on 9 July 1993 under the Chairmanship of the then Home Secretary N. N. Vohra to look into "Criminalization of Politics" and submit a report.

16 Avasthi & Avasthi, *Indian Administration* (2005) p. 415; see also Willoughby, W.F., *Principles of Public Administration* (1962).

According to the committee, Mafia network is virtually running a parallel Government pushing the State apparatus into irrelevance.[17]

Criminalization of politics and corruption in public life begins with money in elections. Our system of election is beset with money and muscle power which is already available with the underworlds and mafia gangs of criminal record. The source of some of the election funds are believed to be unaccounted criminal money. The huge money spent on election pushes up the cost of everything in the country. It also leads to unbridled corruption. As a result, the use of unaccounted money in elections has become a fact of life. Further, criminals are also allowed to contest elections by misusing flaws in election laws.[18] The limits of expenditure prescribed are meaningless and almost never adhered to. In the process, it becomes difficult for the good and honest to enter legislatures. It also creates a high degree of compulsion for corruption in the political arena. This has progressively polluted the entire system because corruption erodes performance. It becomes one of the leading reasons for non-performance and compromised governance in the country.

In the same manner where the public servant has caused a loss to the public exchequer the Court has allowed the Government to recover such loss personally from the erring officer.[19] The principle of accountability through payment of compensation was further reinforced in several cases.[20] The establishment of Central Human Rights Commission under the Human Rights Act, 1993 is also a step in the direction of making the State accountable for the violation of human rights of the people. The Central Bureau of Investigation (CBI) is the prime instrumentality within the area of enforcing accountability. The Supreme Court separated the CBI from the executive by vesting its superintendence in the Central Vigilance Commission (CVC) and directed a fixed tenure of alteast two years for its director.[21] Unfortunately, CBI is like a 'caged parrot' speaking his master's voice.[22] It is to be made a free bird.

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17 See the Report of the National Commission to Revise the Working of the Constitution, Vol. I (2003) p. 89.

18 Dubhashi, P.R. *Criminalization of politics – Beyond Vohra Committee Report,* Vol. I (2003), 89.

19 *State of Kerala* v. *Thressia,* 1995 Supp. (2) SCC 441.

20 *Rylands* v. *Fletcher,* (1968) LR 3 HL 330; *Ratlam Municipal Corporation* v. *Vardhichand,* AIR 1980 SC 1622; *Rudal Shah* v. *State of Bihar, AIR* (1983) SC 1086; *Nilabati Behera* v. *Orissa* (1993) 2 *SCC* 746; *D.K. Basu* v. *State of W.B.* 1997 1 SCC 416; The Supreme Court speaking through Lodha J. pulled up the CBI for allowing the heart of the status report on the investigation in the coal blocks allocation scam to be changed on the suggestions from the Government. For details, see *The Hindu*, 09 May 2013, p.1.

21 *Vineet Narain* v. *Union of India,* AIR 1998 SC 889.

22 The Supreme Court speaking through Lodha J. pulled up the CBI for allowing the heart of the status report on the investigation in the coal blocks allocation scam to be changed on the suggestions from the Government. For details, see *The Hindu*, 09 May 2013, p. 1.

The Apex Court also held that Members of Parliament, Ministers and Members of Legislative Assemblies are Public Servants under the Prevention of Corruption Act by fixing accountability and providing for transparency in administration.[23] Hence every public servant is a trustee of the society.[24] No court can stay the proceedings under the Prevention of Corruption Act.[25] In majority of these cases the PIL has proved to be a strong and potent weapon in the hands of the Court enabling it to unearth many scams and corruption cases in public life and punish the guilty involved.

Globalization advances the demand for new institutional arrangements, clearly with new opportunities for improvements in State capability and governance.[26] According to N. Vittal, "good governance will be the engine for development in a liberalized economy. The ability to use governance as an effective tool for economic development will depend upon our success to effectively check the corruption."[27] Corruption is the single factor that has practically eaten the whole process of planned economic development. It is mostly, the common man who is the victim of corruption. The need for checking corruption is supreme in the process of economic development.

If we were to improve our system, we have to begin with the process of checking political corruption, then bureaucratic corruption which incidentally will also help to check business corruption and criminalization of politics. The major step taken in 2003 was the enactment of law to liberalize political contributions by companies. It removes restrictions on the contribution of funds to political parties. In the matured democracies like USA and UK, there is transparent system of fund raising. In our country there is no transparency at all till 2003 in the manner in which political parties collect funds. More significant is the law passed in 2003 which makes the Anti-Defection Act tighter, by making the defectors face election. This will pave the way for greater transparency and probity in public life. These reasons may be useful in checking corruption at political level. But when it comes to bureaucracy, the enactment of the Central Vigilance Commission (CVC) Act, 2003 is to check bureaucratic corruption.[28]

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23 *JMM Bribery case (P.V. Narasimha Rao* v. *State)* 1998 4 *SCC* 626

24 *Shiv Sagar Tiwari* v. *Union of India,* AIR 1997 SC 83

25 *Satyanarayana Sharma* v. *Rajasthan,* AIR 2001 SC 2856

26 R.B. Jain, "Good Governance for Sustainable Development: Challenges and Strategies in India" pp. 50-71.

27 See N. Vittal, "Governance for Development", pp. 30 -38.

28 An Act to provide for the Constitution of a Central Vigilance Commission to inquire or cause inquiries to be conducted into offences alleged to have been committed under the *Prevention of Corruption Act*, 1988 by certain categories of public servants of the Central Government, corporation established by or under any *Central Act*, Government Companies, Societies and local authorities owned or controlled by the Central Government.

1.5 Law to Fight Corruption: Need for Legislative Action

There are three sources of corruption; the structural inequalities of the Indian society, huge concentration of wealth and power, class, caste and gender embedded discrimination. The whole edifice of economic policy has deepened, driven and legitimized those inequalities. That has made corporations far more important than citizens mocking the Constitution. The State stands to a tool of corporate enrichment. It is to facilitate private investment. Each budget is written for the corporate world. The neo-liberal economic framework assigns the State, the role of wet nursing the corporate sector at public cost. It is the State's mission to handover scarce national resources of all kinds such as land, water, and spectrum to further blot corporate profits. The process of peddling a nation's resource to private agents on preferential terms has become the main source of corruption. There is no law governing natural resources and their allocation. The scams are the symptoms, a State that serves corporations not citizens is the disease. Is it possible to dismantle sources of corruption?[29]

The Supreme Court in *2G spectrum* case[30] cancelled all 122 telecom licenses as the allocation of the UPA Government is illegal and arbitrary. It has held that spectrum is a natural resource and natural resources are vested with the Government as a matter of trust in the name of the people of India. Therefore, it is the solemn duty of the State to protect the national interest, and natural resources must always be used in the interests of the country and not private interests. The verdict is a welcome show of judicial muscle. The first irrefutable principle of the judgment is on the issue of ownership and control of natural resources provided under Art 39 (b) of the Indian Constitution. Highlighting the doctrine of public trust, the verdict shatters the Government's stand that allocation of natural resources is its sole preserve and such policy decisions should not be opened to public or legal scrutiny.[31]

It is submitted that the way the scarce spectrum was allocated by the Government is testimony for deficit governance. Again the Supreme Court invoking the doctrine of equality gave hardest blow to the opaque allocation procedures for natural resources that are in use for award of Central and State Government contracts. The judgment states that the doctrine of equality which emerges from the concept of justice and fairness must guide the State in determining the actual mechanism of distribution of natural resources. This considerably debilitates the Government's line in applying subjective criteria such as first come, first served or beauty parades when allocating natural resources in the future. Further, it is submitted that the judgment specifically tears apart the first come first served system, firmly re-establishing auctions as a

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29 P. Sainath, "The Gang that Could not Shoot Straight", *The Hindu* –Editorial, 08 August 2011, p. 12.

30 *Centre for Public Interest Litigation* v. *Union of India* 2012 SCC 117.

31 *M.C.Mehtha*v. *Kamal Nath*(1997), 1*SCC* 388*;* for details see Shalini Singh, "Welcome Show of Judicial Muscle", *The Hindu, OP-Ed.* 10 February 2012, p.15.

preferred options. It strikes a blow against corruption by empowering all those-NGO's, enlightened citizens and activists and carries the potential of fast-tracking the pace of administrative reforms and governance in India in a manner not witnessed in the past.

It is most unfortunate that the Government rather than using the Supreme Court's judgment to improve governance and reduce discretionary powers, the Government is making desperate attempt to restore false prestige by seeking to review of 2G verdict. Government is opposed to judicial scrutiny of its policy when the powers of the Supreme Court in entering and adjudicating on the Government's implementation of policy are indisputable, especially when the implementation is secretive, arbitrary, illegal, malicious, discriminatory and violative of the provisions of the Indian Constitution.[32]

Corruption scandals in India foul the trade and investment climate for foreigners. One of the key factors in explaining the health of investment environment is how much transparency there is and how effective are safeguards against corruption. This necessitates for anti corruption measures, sound anti money laundering policies and counter terrorism financing. There is no independent, autonomous and comprehensive anti-graft institution to investigate public corruption cases. The Lokpal Bill represents an effort to check corruption may not succeed in eradicating corruption unless the PM and higher judiciary is brought within the purview of the Bill.[33] When the basic structure of the Indian Constitution denies the Prime Minister immunity from prosecution, how could it be argued that the office should not be brought under the scrutiny of the Lokpal.

A series of legislative measures are needed to check corruption so that it does not come in the way of development. In order to increase the risk in corruption, there is a need to pass the law called, Corrupt Public Servant (Forfeiture of Property) Act. Equally important is to encourage whistle blowers who can expose corruption in the system. The Law Commission also agreed on the initiative taken by the CVC that there should be the Public Disclosure (Protection of Whistleblowers) Act.[34] There is need to pass this Act urgently. These measures will help in the process of checking bureaucratic corruption.[35] The Nolan Committee Report[36] applauded the role of whistleblowers in ensuring high standards of morality in public life, and there part in upholding the seven principles of public life: selfishness, integrity, objectivity, accountability, openness, honesty and leadership.

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32 See Shalini Singh, "High on Retoric Law on Substance", *The Hindu,* Editorial, 10 March 2012, p.12.

33 Anil Divan, "Lokpal Bill and the Prime Minister", *The Hindu,* Editorial 01 July 2011.

34 DO No. 6(3) (72)/2001-LC(LC), December 2001, p. 32.

35 See Abhinav Chandrachud, "Protection for Whistleblowers: Analysing the Need for Legislation in India" 2004 (6) SCC 91 (104)

36 Nolan Committee's First Report on Standards in Public Life, 1995, resulting in enactment of the *Public Interest Disclosures Act*, 1998 (U.K.).

The Prevention of Money Laundering Act, 2002 is to prevent money-laundering and to provide for confiscation of property derived from or involved in money laundering.[37] The Act is to implement the aforesaid resolution and the declaration. Money is generated in a very large scale due to crimes. These cover trade in narcotics, smuggling, trade in banned/prohibited articles, antics, corruption, counterfeiting currency, gambling, trade in prohibited arms/ammunition, selling national secrets etc. This money is required to be converted into untainted money so that it can be used. (In common terminology it is called converting black money or Number Two money into white currency or Number One money). In brief, the converting tainted money into untainted is called "money laundering." One way to prevent crime is to make it difficult to covert black money into white money. The menace is at international level at a much larger scale.

The Government should examine the proposal for enacting a comprehensive law to provide that where public servants cause loss to the State by their *mala fide* actions or omissions, they would be made liable to make good the loss caused and, in addition, would be liable for damages. The Union Government should frame rules, without further loss of time, under section 8 of the Benami Transactions (Prohibition) Act, 1988 for acquiring benami property. Further, a law should be enacted to provide for forfeiture of benami property of corrupt public servants as well as non-public servants.

The Government should also examine enacting a law for confiscation of illegally acquired assets on the lines suggested by the Supreme Court in *Delhi Development Authority* v. *Skipper Construction Co. (P) Ltd.*[38] There is no need to set up an additional independent Authority to determine this issue of confiscation. The Tribunal constituted under the smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, (SAFEMA) 1976, which could deal with similar situation arising out of other statutes may be conferred additional jurisdiction to determine cases of confiscation arising out of the Benami Transactions (Prohibition) Act, 1988 and the Prevention of Corruption Act, 1988, (as may be amended) and other legislations which empower confiscation of illegally acquired assets. Tribunal will exercise distinct and separate jurisdictions under separate statutes.

The Prevention of Corruption Act, 1988 should be amended suitably to provide for confiscation of the property of a public servant who is found to be in possession of property disproportionate to his/her known sources of income and is convicted for the said offence. In this case, the law should shift the burden of proof to the public servant who was convicted. In other words, the presumption should be that he acquired the disproportionate assets found in possession of the convicted by corrupt

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37 The Political Declaration and Global Programme of Action adopted by the General Assembly of the UN calls upon the member states to adopt national money-laundering legislation and programme in June 1998.

38 AIR 1996 SC 2005.

or illegal means. A proof of preponderance of probability shall be sufficient for confiscation of the property. The law should lay down that the standard of proof in determining whether a person has been benefited from an offence and for determining the amount in which a confiscation order is to be made, is that which is applicable to civil cases, i.e., a mere preponderance of probability only. A useful analogy may be seen in Section 2(8) of the Drug Trafficking Act, 1994 in United Kingdom.

1.6 Conclusion and Suggestions

From the above it is concluded that the judicial response to good governance is positive. It strengthens the governance of the country. However, the legislative action is not encouraging.

- The Second Administrative Reforms Commission laid down a code of ethics for all civil servants and politicians. It favoured amendment to Representation of People's Act, 1951 to disqualify all persons facing charges for grave and heinous crimes and corruption with modification suggested by the Election Commission.[39] These reforms should be implemented at once.
- The electoral laws should be further strengthened so as to disallow criminals from contesting elections. Reforms to political parties laying down broad norms for composition and functioning of political parties in the country should be carried on immediately. An on-line election in the place of the existing system is recommended to root out impersonation and other electoral malpractices.
- The citizen's charter initiative is a response for solving the problems that a citizen faces while dealing with the organizations providing public services.[40] It paves the way for good governance in the country.
- It is high time that the Lokpal Bill is enacted without any further delay.
- The CBI is to be insulated from external influence by enacting legislation.
- A legislation on natural resources and its allocation is the need of the hour.

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39 In its Fourth Report on "Ethics in Governance", the Commission recommended steps to bring about greater transparency and accountability in governance at all levels and root out corruption.

40 Citizens Charter was first implemented in India in 1994. It was drafted by consumer rights activists for health service providers at a meeting of the Central Consumer Protection Council in New Delhi.

ALTERNATIVE DISPUTES RESOLUTIONSYSTEM IN INDIA : UTILITY AND EFFICACY

Dr. Shekhar Dhawan*

It is known fact that a man is a social animal. Due to the inherent desire to communicate and express his thoughts, man invented language. Though he did not perceive that this language would be the instrument of misunderstanding, it did help bring out his desire to complain. It is not surprising when we say that every person has his own way of doing things. This is due to the fact that people have different levels of understanding. Due to this different level of understanding their wants and needs are different, excluding the basic needs which are similar to everyone. This different level of understanding and way of doing things has made man to invent the word 'CONFLICT'.

There are conflicts in each and every home. A conflict is just an assertion of different views of people. The question which now arises is how to resolve this conflict. In earlier times no one knew how conflicts were resolved. But our ancient scriptures do 'throw light as to how these conflicts were resolved. These scriptures showcase the mentality of people, as to how they intended to reach to an amicable settlement.

1.1 Settlement of Disputes - During Vedic Period

In Roman law, there was no struggle to establish the jurisdiction of ordinary courts as against rival tribunal's. Accordingly, contracts for submissions of disputes to the decision of persons were recognized, and there were rules as to their effect and enforcement.[1]

Disputes were settled by the method of arbitration in Greece during the sixth century B.C. The disputes included boundary fixation, title to colonies and land, assessment of damages that occurred due to hostile invasion monetary claims between states and religious matters.[2]

Even in India during the **'Vedic period', Yajnavalkya and Narad** have referred to various grades of arbitrators in ancient India, such as.

a. **Puga**: a board of persons belonging to different sects and tribes, but residents of the same locality.

b. **Sreni**, belonging to different sects and tribes or assemblies and

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1 Roscoe Pound, *Jurisprudence*, 1959 Edition, Vol. 5, p. 360.

2 P.C. Rao, "Alternative to Litigation in India", in *Alternative Dispute Resolution*, edited by P.C. Rao and William Sheffield, *ICADR*, Universal Law Publication (2004), p. 35

meetings of tradesmen and artisans belonging to different. tribes, but having some kind of connection with one another through the profession practiced by them.

c. The **Kula** or meetings of kinsmen or assemblages of relations. There was hierarchy in appeals also. From the decision rendered by Kula, an appeal lay to Sreni and from the decision rendered by Sreni to Puga and from the decision of Puga to the king's judge and also to the king himself.[3]

d. In the 'Ramayana' Angadha son of Vali approached Ravana and delivered the message of Lord Rama to opt the path of peaceful settlement. Even in Mahabharata, Lord Krishna endeavored to mediate between the Pandavas and Kauravas.

Therefore it can rightly be said that the process of dispute settlement was not adversarial as it exists in the present time, but it was oriented towards the amicable resolution of the dispute.

This paper will divulge into the intricacies of conflicts and the ways which have been formulated to resolve such disputes. Effort has been made to evaluate the application of ADR in terms of both quantatively and qualitatively. Human conflicts are inevitable. Disputes are equally inevitable. It is difficult to imagine our human society without conflict of interests. Disputes must be resolved at minimum possible costs both in terms of money and time, SO that more time and more resources are spared for constructive pursuits.

For resolution of disputes there is a legal system in every civilized society, every injured person is supposed to go to courts for his redressal. All the legal systems are trying to attain a legal ideal that whenever there is a wrong, there must be a remedy, so that nobody shall have to take law into his own hands.

The Judicial system developed by the Britishers was very expensive and time consuming and due to these reasons the people's faith on such legal system was being diminished. After the independence it was realized that there is need to have such an alternative means of dispute resolving system or machinery which may be economical and less time consuming.[4]

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3 P.V. Kane, *History of Dharamshastra*, Vol. III, (1946), p. 242.

4 V.G. Ranganath, "Need for Amalgamation of Alternative Dispute Resolution with Civil Procedure Code" http//www.legalindia.in/need-for-amalgamation-of-alternative-dispute-resolution-with-civil-procedure-code.

The quest for the ideal dispute resolution system is endless. This is more so in the Indian context, where delays in the system are endemic, costs are stupendous. The wilful defaulter almost always drags litigation on endlessly and the genuine promoter is usually saddled with debts he cannot liquidate easily. As the system is unlikely to change overnight, all effort must be directed towards finding solutions before resorting to litigation.

To ensure the maintaining of the rule of law, two things are necessary i.e. public confidence in the justice system and accessibility of the system to the general public. People should be able to make informed decisions about the best way of resolving their disputes. However, accessible justice does not mean that everyone with a grievance should be encouraged to go to courts; courts are a valuable and limited resource. Moreover, not all disputes are suited to resolution in the courts. Achieving access, therefore, means ensuring that members of the community have access to legal advice about how best to manage their dispute.

Courts or formal justice system have its own limitations like mystification, delays expenses and costs, geographical location and hence is a limited resource. These problems have been the main driving force behind the zeal for exploring the remedial measures. Recent trend, all over the world, is to shift from litigation towards Alternative Dispute Resolution (hereinafter referred as ADR). ADR encompasses arbitration, mediation, conciliation, and other methods for resolving disputes. Alternative Dispute Resolution offers several advantages over a lawsuit. It is less adversarial and in some cases can be faster and less expensive. It can also reduce court workload and for these reasons its use is being promoted by court reformers in many developing countries.

1.2 Constitutional Requirements and ADR

The Indian Constitution guarantees justice to all. All Indian citizens are guaranteed equal rights of life and personal liberty, besides many other fundamental rights. There are various other legal rights conferred by different social welfare legislations, such as, The Contract Labour (Regulation and Abolition) Act, 1970,[5] The Equal Remuneration Act, 1976[6], The Minimum Wages Act, 1948.[7] But, these rights are of no avail if an individual has no means to get them enforced. Rule of law envisages that all men are equal before law. All have equal rights, but, unfortunately, all cannot enjoy the rights equally.

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5 Act No. 37 of 1970 received assent of the President on 5 September 1970; Published in Gazette of India on 7 September 1970.

6 Act No.25 of 1976 (Amended by Act 49 of 1987).

7 Act No. 11 of 1948.

Enforcement of the rights has to be through courts, but the judicial procedure is very complex, costly -and. dilatory putting the poor persons at a distance.

The Constitution of India through Article 14[8] guarantees equality before the taw and the equal protection of the laws. Article 39A of the Constitution[9] mandates the State to secure that the operation of the legal system promotes justice on a basis of equal opportunity, and ensure that the same is not denied to any citizen by reason of economic or other disabilities, Equal Opportunity must be afforded for access to justice. it is not sufficient that the law treats all persons -equally, irrespective of prevalent inequalities. But the law must function in such a way that all the people have access to justice in spite of economic disparities. The expression "access to justice" focuses on the following two basic purposes of the legal system:

1. The system must be equally accessible to all,

2. It must lead to results that are individually and socially just.

Traditional concept of "access to justice" as understood by common man is access to courts of law. For a common man a court is the place where justice is meted out to him/her. But the courts have 'become inaccessible due to various barriers such as poverty, social and political backwardness, illiteracy, ignorance, procedural formalities and the like.

To get justice through courts one has to go through the complex and costly procedures involved in litigation. One has to bear the costs of litigation, including court fee and, of course, the lawyer's fee. A poor litigant who is barely able to feed himself will not be able to afford justice or obtain legal redressal for a wrong done to him, through courts. Further a large part of the population in India is illiterate and live in abject poverty. Therefore, they are totally ignorant about the court-procedures, are terrified and confused when faced with the judicial machinery. Thus, most of the citizens of India are not in a position to enforce their rights, constitutional or legal, which in effect generates inequality.

Article 39A, as noted above, provides for equal justice and free legal aid. The said article obligates the State to in particular provide free legal aid, by suitable legislation or schemes or in any other way, to promote justice on

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8 Constitution of India, Article 14 –Equality before law - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

9 *Id.*, Article 39A. Equal justice and free legal aid - The State shall secure that the operation of legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing.

the basis of equal opportunity. Article 39A puts stress upon legal justice. The directive requires the State to provide free legal aid to deserving people so that justice is not denied to anyone merely because of economic disability. The Supreme Court of India, in *Sheela Barse v. State of Maharashtra*[10] has emphasized that legal assistance to a poor or indigent accused arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by article 39A but also by articles 14 and 21 of the Constitution. In the absence of legal assistance, injustice may result. Every act of injustice erodes the foundation of democracy and rule of law. Article 39A makes it clear that the social objective of equal justice and free legal aid has to be implemented by suitable legislation or by formulating schemes for free legal aid.

Earlier, in India, disputes were settled by a council of village elders, known as a Panchayat. This was an accepted method of conflict resolution. Since the Vedic times, India has been held as a pioneer in the achievement of social goal of speedy and effective justice through informal but culminating resolution systems. ADR methods are not new to India and have been in existence in some form or the other in the days before the modern justice delivery system was introduced by the colonial British rulers.

There were various types of arbitral bodies, which led to the emergence of the celebrated Panchayati Raj system in India, especially in the rural locales. The decisions of the Panchayat were accepted and treated as binding. In 1982, in Junagarh in the State of Gujarat, a forum for Alternative Dispute Resolution was created in the form of Lok Adalat (People's Court). Keeping in view the usefulness of Lok Adalats, the Government of India also set up a Committee in 1980 under the chairmanship of Mr. P.N. Bhagwati, a former Chief Justice of India, and later, the Parliament enacted the Legal Services Authorities Act, 1987[11] in view of the mandate of article 39A of the Constitution. The Legal Services Authorities Act, 1987 implemented in its true spirit has created popularity for and utility of Lok Adalats for speedy resolution of disputes.

The philosophy behind setting up of permanent and continuous Lok Adalats is that in our country, the litigant public has not so far been provided any statutory forum for counselling and as such, these Lok Adalats may take upon themselves the 'role of counsellors as well as conciliators'. Experiment of Lok Adalat as an ADR mode has come to be accepted in India as a viable, economic, efficient and informal one. The provisions relating to Lok Adalat are contained in sections 19 to 22 of the Legal Services Authorities Act 1987.

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10 AIR 1983 SC 378.

11 Act 39 of 1987.

1.3 Modes of ADR In India

1. **Arbitration** is one of the oldest forms of ADR. Arbitration involves a formal adversarial hearing before a neutral, called the arbitrator, with a relaxed evidentiary standard. The arbitrator is usually a subject matter expert. An arbitrator or an arbitration panel of two or more arbitrators serves as a 'private judge' to render a decision based on the merits of the dispute. Arbitration decisions can be binding or non-binding.

2. **Lok Adatat**: The Lok Adalats decide the dispute with utmost expedition to arrive at a compromise or settlement on the basis of principles of justice, equity, fair play and other legal principles. When Lok Adalat is not able to arrive at a compromise or settlement, the record of the case is returned to the court, which referred the case to the Lok Adalats. The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker.

3. **Mediation**: In this case a third party, known as a mediator tries to facilitate the resolution process but he cannot impose the resolution. Parties are to decide according to their convenience and terms.

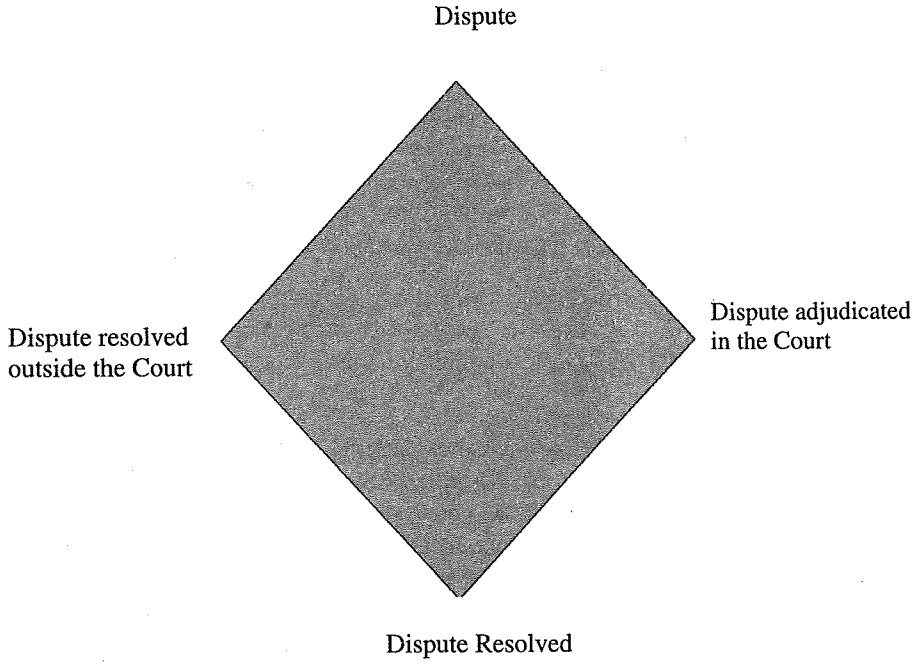
4. **Conciliation** is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions. The conciliator may or may not be totally neutral to the interests of the parties. Successful conciliation reduces inflammatory rhetoric and tension, opens channels of communication and facilitates continued negotiations. Frequently, conciliation is used to restore the parties to a pre-dispute status quo, after which other ADR techniques may be applied. Conciliation is also used when parties are unwilling, unable, or unprepared to come to the bargaining table.

1.4 Application of ADR : On Road to Success

The disputes can be mere difference of opinion of no consequence. The disputes can take the shape of arguments of scholarly nature: The dispute can also be of the proportions and scale, which may continue to exist for a long period of time without any end in sight, like the disputes of political nature. The disputes, which we are talking about here, are the disputes, which flow from the legal rights and obligation of the parties, the disputes, which can be agitated in a court of law or enforced by a court of law. In

other words, at the moment we are only concerned with legal disputes per se or the disputes, which revolve around legal rights.

No civil society wants disputes within. The disputes not only disrupt peace in the society but also hinder its progress. We desire that the disputes in a society should be resolved as early as possible. The disputes can be resolved in a court of law or outside the court of law.



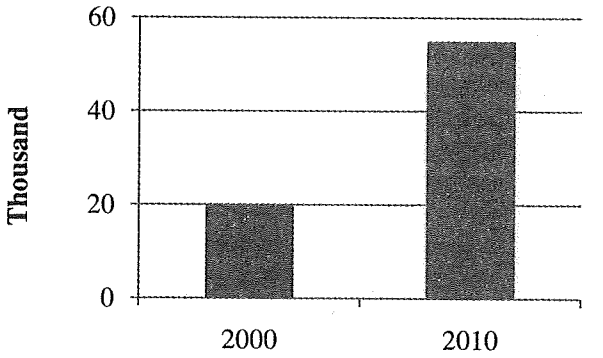
These two channels of dispute resolution exist independent of each other. They can be followed independent of each other. They do not stand as alternative to each other. The dispute resolution outside the court of law is the main dispute resolution process.

This research paper will divulge into the intricacies of conflicts and the ways which have been formulated to resolve such disputes. It would be pertinent to quote **Eminent Jurist Nana Palkiwala** in the context of this project.

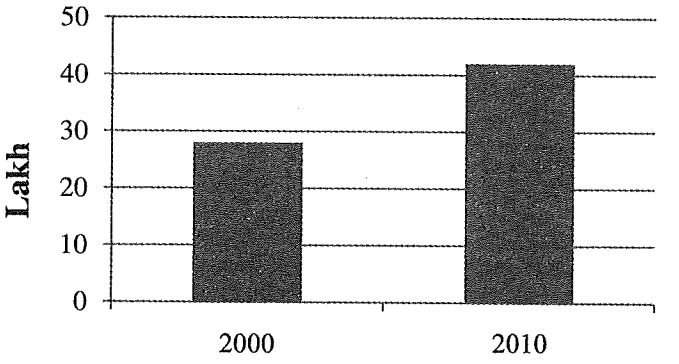
'If longevity of litigation is made an item in Olympics, no doubt the Gold will come to India'.[12]

PENDENCY OF CASES ACROSS INDIAN COURTS

Pendency before Hon'ble Supreme Court[13]



Pendency before Different Hon'ble High Courts[14]

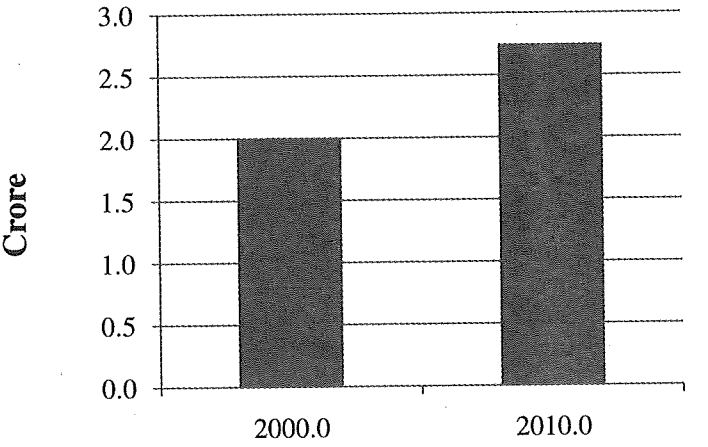


12 *Chotanagpur Law Journal* Vol. 1 No.1, 2008-2009, p. 102. http://www.cnlawcollege.org/wp-content/uploads/2012/06/Chotanagpur-Law-Journal-2008-09.pdf.

13 Text of Speech – Union Law Minister on the programme to reduce pendency in courts (1 July 2011), http://Pib.nic.in/newsite/erelease.aspx?relid=72970.

14 Text of Speech – Union Law Minister on the programme to reduce pendency in courts (1 July 2011), http://Pib.nic.in/newsite/erelease.aspx?relid=72970.

Pendency Before Subordinate Courts[15]
Subordinate Courts



FILING AND RESOLUTION OF CASES[16]

Category	Supreme Court (Thousand)	High Court (Lakh)	Subordinate Courts (Crore)
Pending (start of year)	56	40	2.7
Fresh eases filed	78	19	1.8
Cases resolved	79	17	1.7
Pending (end of year)	55	42	2.8

15 Text of Speech – Union Law Minister on the programme to reduce pendency in courts (1 July 2011), http://Pib.nic.in/newsite/erelease.aspx?relid – 72970.

16 Text of Speech – Addressed by the Chief Justice of India at the joint conferences of Chief Ministers and Chief Justices, 2006, 2007 and 2009. www.prsindia.org

CONSOLIDATED INSTITUTION, DISPOSAL AND PENDENCY OF CASES BEFORE HON'BLE HIGH COURTS[17]

(2002-2008)

YEAR	TOTAL INSTITUTION	TOTAL DISPOSAL	PENDENCY AT THE END OF THE YEAR
2002	13,34,202	11,86,546	30,87,048
2003	13,85,318	13,49,723	31,2.2,643
2004	14,48,726	12,39,203	34.24,4591
2005	15,42,890	13,38,245	15,21,2831
2006	15,89,979	1.4,50,602	36,54,853
2007	15,,90,816	15,05,073	37,43,060
2008	16,47,250	15,17,299	38,74,096

- About 55,000 cases are currently pending with the Supreme Court, 42 lakh with High Courts and 2.8 crore with subordinate courts.
- Pendency has increased by 148% in the Supreme Court, 53% in High Courts and 36% in subordinate courts in the last 10 years.
- Increase in backlog over the past few years, some measures have been taken by the government to facilitate expeditious disposal of cases. These include schemes for computerisation, infrastructural augmentation, promotion of Alternate Dispute Resolution mechanisms, LokAdalats etc.[18]
- Despite these initiatives, the rate of case disposal has not kept pace with the rate of case institution. As a result, the total number of pending cases has increased.[19]
- Between October 2009 and October 2010, subordinate courts settled 1.73 crore cases as compared to 1.24 crore in 1999, an increase of 49

17 Law Commission of India Report (2009).
18 Rajya Sabha Unstarred Question No. 1173 (07 March 2011).
19 Text of Speech - Addresses by the Chief Justice of India at the Joint Conference of Chief Ministers and Chief Justices, 2006, 2007 and 2009.

lakh. During the same period, the fresh cases filed increased by 52 lakh.[20]

1.5 Pendency of Cases in Various Courts and Need for ADRs

As per statistics available, the pendency of cases in various subordinate courts as on 30.9.2010, 2.8 crore cases were pending in subordinate courts and 42 lakh cases in various High Courts. Approximately 9% of these cases have been pending for over 10 years and a further 24% cases have been pending for more than 5 years.[21]

The Union Law Minister recently launched the 'Mission Mode Programme for Reduction of Pendency of Arrears in Courts'. According to media reports, the programme aims to dispose of 40 per cent of the cases pending in subordinate courts across the country, in the coming six months.[22]

The above figures would show that arrears are increasing almost every year on account of institution because institution in almost every year being more than the disposal.

Sanctioned strength of the High Court Judges was 886 and working strength was 606 as on 1st of January, 2009 leaving 280 vacancies. Sanctioned strength of Subordinate Judges was 16685 and working strength was 13556 leaving 3129 vacancies as on 31stDecember, 2008.

The average disposal per Judge comes to 2504 cases in High Courts and 1138 cases in subordinate Courts, if calculated on the basis of disposal in the year 2008 and working strength of Judges as on 31stDecember, 2008. Applying this average, we require 1547 High Court Judges and 23207 subordinate Court Judges, only to clear backlog in one year. The requirement would come down to 774 High Court Judges and 11604 Subordinate Judges if the arrears alone have to be cleared in the next two years. The existing strength being inadequate even to dispose of the fresh institution, the backlog cannot be reduced without additional strength, particularly, when the institution of cases is likely to increase in coming years.

This is also known fact that the Courts do not possess a magic wand by which they can wave to wipe out the huge pendency of cases nor can they afford to ignore the instances of injustices and illegalities only because of

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20 Court News, Supreme Court of India, http://supremecourtofindia.nic.in/courtnews.htm

21 Text of Speech – Union Law Minister on the programme to reduce pendency in courts (July 1, 2011), http://pib.nic.in/newsite/erelease.aspx?relid=72970.

22 'Nationwide Programme to Reduce Pending Court Cases', The Hindu (2 July 2010),http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/article2152615.ece

the huge arrears of the cases already pending with them. If the courts start doing that, it would be endangering the credibility of the Courts and the tremendous confidence reposed in them by the common man. However, the heartening factor is that people's faith in our judicial system continues to remain firm inspite of huge backlogs and delays. It is high time we make a scientific and rational analysis of the factors behind accumulation of arrears and devise specific plan to at least bring them within acceptable limit, within a reasonable timeframe. Time has now come for us to put our heads together and find out ways and means to deal with the problem, so as to retain the confidence of our people in the credibility and ability of the system.

1.6 Conclusion

Analysis of cases before subordinate courts in India reveals that there was total pendency of 2.8 crore cases in the year 2010. As per data available with National Legal Services Authority, LokAdalats in various states disposed of 1,64,86,348 cases up to 31.5.2012. Disposal of pending cases before Subordinate Courts during the year 2008, reveals that there was institution of 1,63,55,535 cases and disposal of 1,54,32,810, whereas pendency at the end of the year was 2,64,09,011. Similarly, the trend of institution and disposal during the year 2002-2007, shows that Subordinate Courts have been able to dispose of almost same number of pending cases as instituted during the year, except marginal increase.[23] Here role of ADR systems become more relevant. If ADR systems are able to dispose of 15% to 25% of pending cases, then there would be substantial decrease in total pendency of cases.

By now LokAdalats have been able to dispose of 1,64,86,348 cases up to 31.5.2012. If Mediation and Arbitration are also able to dispose of 5% of pending cases each, then there will be decrease in total pendency and the litigants can expect speedy disposal of pending cases.

The data available with the researcher reveals that during the period 2002-2008, pendency at the end of the year was 2,24,40,376 to 2,64,09,011. Out of the total pendency, total institution is ranging from 1,45,45,711 to 1,63,55,535 i.e. about 1.5 crore cases on average basis. Similarly, pendency at the end of the year can be taken as 2.5 crore. Meaning thereby, the backlog of pending cases before Subordinate Courts in India is about one crore cases because about 1.5 crores cares are instituted during the year and same are to remain pending at every stage. Even litigants do not expect that their cases should be decided at the time of filing itself. Average period of

[23] Court News, Supreme Court of India, http://supremecourtofindia.nic.in/courtnews.htm and Law commission of India in its report Agenda 2009.

disposal of a case can be taken to be eighteen months before the trial court. Similarly, average disposal period before First Appellate Court can be taken to be six months. ADR systems like LokAdalats are also contributing by way of disposing 1,64,86,348 cases up to 31.5.2012. Apart from that Mediation Centres have also started giving results although the same have been setup recently. Process of Arbitration is giving much support to the judicial system by settling disputes of commercial transactions.

Significantly ADR systems have been able to settle the disputes to the complete satisfaction of the litigants. The decision of LokAdalat and Mediation Centres are taken on the basis of mutual consent and that give complete satisfaction to the litigating parties. They do not prefer to go for appeal. Costs involved in settlement of cases through LokAdalats is bare minimum. This aspect is most suitable to the Indian society because India is mainly Agro based economy with high rate if illiteracy and poverty in comparison to advanced countries. Litigant public is not aware of their legal rights and they do not have financial resources to get justice because of technicalities of law. Settlement of disputes on the basis of compromise through LokAdalat, Mediation or Conciliation gives complete satisfaction to Indian litigating public in most of the cases.

To conclude Alternative Disputes Resolution Systems have been able to strengthen the judicial system by way of support system. ADR systems have come in our judicial system to stay because same have relevance in our social and judicial system.

RIGHTS OF TRIBAL COMMUNITIES OVER NATURAL RESOURCES IN INDIA : AN ARGUMENT AGAINST DISPLACEMENT*

Dr. Shilpa Jain**

1.1 Introduction

> Being forcibly ousted from one's land and habitat by a dam, reservoir or highwayis not only immediately disruptive and painful, it is also fraught with serious long term risks of becoming poorer than before displacement, more vulnerable economically, and disintegrated socially.[1]

The tribal communities also known as the aboriginals include those groups of people who still observe their old tribal ways, traditional lifestyle and have their own peculiar customs and cultural norms.[2] A description of the various tribes in India can be found in the epics Ramayana and Mahabharata. References are also there in the Manusmiriti[3].The popular terms used for them in the various scriptures are Adivasis, Kabile or Vanvasi. The exact definition of the term 'tribal' is not possible and scholars have only suggested functional definitions. Most of these definitions have a dimension of cultural or racial discrimination and point to the lack of integration of these tribals into the nation's predominant economic and political life. They are repositories of myriad cultural traditions and their knowledge of environment and natural resources is a part of the rich heritage of the country. They live in the remote and inaccessible forests and hilly areas. It is recognized that they live in harmony with nature and in fact have great reverence for nature. They do not exploit the natural resources unnecessarily and cause least damage to the natural resources. Since ancient times these tribal people have been considered as the friends and protectors of the forests and natural resources and have enjoyed certain variety of rights over the natural resources including the forest resources. The relationship of tribals

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* A Paper presented at the International Conference on Tribal Rights at Pacific Institute, Udaipur.

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

2 Dr. M.P. Jain has mentioned that the Scheduled Tribes also known as the aboriginals are those backward sections of the Indian population who still observe their tribal ways, their own peculiar customs and cultural norms. See, M.P. Jain, *The Constitution of India*, Wadhawa Publications, Nagpur (2004), p. 1638.

3 The Manusmiriti is a Code of conduct given by Manu and is about 300- 400 B.C. old.

with the forests has undergone changes with the changing time which can be best explained by the following lines:

> Tribal's looked upon forests, the nature's gifts, as their own property and they had unfettered freedom to do as they pleased. But the situation continued to change after the enactment of the Indian Forest Act 1927. The master of the forest, the tribal is now no more than a wage earner.[4]

Development is a dynamic concept. It implies the full realisation of rights of people to self-determination and their inalienable right to participate in and enjoy economic, cultural and social entitlements. Today there is no country in the world which can limit the scope of its development to economic advancement alone. Human development is an intrinsic part of the overall development perspective. A strong focus on eradication of human deprivations along with ensuring rights and opportunities to all people on an equitable basis is the cornerstone of human development. [5]The Human Development Reports look at development as "increasing people's choices".[6] Tribals have been the most-affected victims of development projects for long now.[7] Since independence, tribals have been displaced from their lands due to large scale development projects like dams, nuclear power plants, river valley projects, mining of minerals, tourism etc.[8] This is because tribal lands are rich in hydrological mineral, oil, gas, forest and other resources, thus making them the most attractive sites to locate development projects. While the mainstream has benefitted from the fruits of these development projects, those displaced tribals have gone deeper into the poverty trap.[9] These projects have led to large scale displacements of tribals for e.g. after independence in Sardar Sarovar Project, about 41,000 families of 245 villages including a large number of advises were displaced and

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4 V. S Saxena, "Social Forestry in Tribal Development," *Desh Bandhu, Social Forestry and Tribal Development* (1986), pp. 38-39. See also Leelakrishnan P., *Environmental Law Case Book* 2nd Edition, Lexis Nexis Butterworths, New Delhi (2006), p. 269.

5 A.K Shiva Kumar, *"Poverty and Human Development in India: Getting Priorities Right,"* Occasional Paper 30, UNDP Reports.

6 As argued by development economists such as Prof. Amartya Sen and by Human Development Reports.

7 Fernandes, W., *Sixty Years of Development-Induced Displacement in India: Scale, Impact, and the Search for Alternatives*, published in Mathur H.M., ed., *India Social Development Report : Development and Displacement* (2008).

8 O.H. Magga, *Indigenous Peoples and Development,* published in *United Nations Development Programme (UNDP)*, Human Development Report (2004).

9 L.K. Mahapatra, *Development for Whom? Depriving the Dispossessed Tribals,* Social Action, (1991).

became 'evictees' of the project and lost their rights and privileges over the land and forest.[10]

1.2 Development Induced Displacement

Development induced displacement is a type of forced migration for the purposes of economic development. It is a social problem affecting multiple levels of human organization, from tribal, rural to urban communities. Roughly 10 million people are estimated to be displaced each year due to dam construction, urban development, and transportation and infrastructural programs by the World Bank Environment Department (WBED). This shockingly high number still fails to account for large number of the displaced due to the lack of institutions or publications dedicated to tracking overall development-induced displacement and resettlement. Development induced displacement has led to the displacement of 1,024,000 people in South Asia only which accounts for 52.1% of total number of people displaced world-wide.[11] The dominant perspective is that the positive aspects of development projects like public interest outweigh the negative ones like displacement or sacrifice of a few. The basic argument of "someone has to suffer if the nation has to prosper is a rampant violation of human rights.

Michael Cernea, a sociologist, who has researched development-induced displacement and resettlement for the World Bank, has pointed out that being forcibly ousted from one's land and habitat carries with it a risk of becoming poorer than before displacement, due to the lack of compensation for the loss of assets and effective assistance to re-establish the displaced people. He has listed landlessness, joblessness, homelessness, marginalisation, food security, increased morbidity and mortality, loss of access to common property and social disintegration as the risks associated with intrinsic to displacement.

1.3 Human Rights Challenges that arise in Relation to Development-Induced Displacement

There is no doubt about the developmental benefits of any planned project, but these cannot be weighed against human rights. Human rights thus have to be considered independently. In 1986, the UN General Assembly adopted a Declaration on the Right to Development.[12] The heart of the problem is that people displaced by development projects are generally seen as a necessary sacrifice on the road to development. The Human rights that are affected:

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10 See, S.C. Shastri, *Human Rights, Development and Environmental Law, An Anthology*, Bharat Law Publications, Jaipur (2006), p. 334.

11 "Global Overview", available at http://www.forcedmigration.org/guides/fmo022/fmo022-2.htm

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

Right to life: The right to life and livelihood is threatened by the loss of home and the means to make a living when people are displaced from habitual residences and traditional homelands. The right to life is protected in the UDHR (Article 3) and the International Covenant on Civil and Political Rights (Article 6).[13]

In Indian context, The Supreme Court in *OllegaTellis*[14] case envisaged right to livelihood under the aegis of Article 21 and condemned the unjustifiable displacement of people from their land. Right to life doesn't mean merely animal existence but living with human dignity and all that goes along with it like right to shelter.[15]

Moreover, Unsystematic and piecemeal approach to development has resulted in depletion of the environment which "makes life worth living, materially and culturally.[16]"And so it has lead to violation of right to clean and healthy environment.

Right to Own Property: The rights to adequate housing and security of the person and property serve to protect individuals and communities from being arbitrarily displaced from their homes and land. The right to own property and not to be arbitrarily deprived of this property is spelled out in the UDHR Articles 17 as well as in Article 6 of the ICESCR.

Right to Residence: The eviction or displacement of persons unlawfully amounts to violation of the rights to freedom of residence.[17] Article 19(e) of the Indian constitution asserts right to residence as fundamental right.

All these rights and many others are of direct relevance in the case of large-scale displacement of people. Indeed, in a number of cases, not only socio-economic rights such as the right to housing that are at stake but a number of civil and political rights, from the right to be informed about the displacement procedures to the freedom of expression, may be violated if the government tries to coerce people to move out from their homes.[18]

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13 Robinson. W. Courtland, *Risks and Rights: The Causes, Consequences, and Challenges of Development-Induced Displacement*, The Brookings Institution-SAIS Project on Internal Displacement, May 2003.

14 AIR 1986 SC 180.

15 Article 11 of the ICESCR, recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing.

16 Rajagopal, *Human Rights and Development*, p. 10.

17 Article 12 of the UN International Covenant on Civil and Political Rights (ICCPR) covers the right to liberty of movement and freedom to choose one's residence

18 Miloon Kothari and Ashish Kothari, "Displaced People: Forced Evictions and Human Rights," *Frontline*, 21 May 1993.

1.4 International Response towards Development induced Displacement

Over the past decade, different international legal entities and institutions have responded to the human rights impacts and risks of development-induced displacement by formulating a variety of guidelines, laws and best practices. Some of the most important international guidelines and practice on this issue are:

- The UN Guiding Principles[19] on Internal Displacement.
- The OECD's Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects, 1992.[20]
- World Bank's Operational Directive 4.30 on Involuntary Resettlement.[21]
- United Nations and Other International Organizations- Different agencies of UN work as cluster and have sectoral responsibility to deal with the issue of development-induced displacement rehabilitation and resettlement.

  a. The Representative of the Secretary-General on IDPs

  The report formed by this agency is the basis for the provisions in the *Guiding Principles* on protection against displacement.

  b. Internal Displacement Unit

  Using the Guiding Principles as an overall framework, the Unit identify and draw attention to gaps in the response to internal displacement

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19 "Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border." Francis Deng and Roberta Cohen have argued that the construction of hydroelectric dams could be considered a "human-made disaster" and therefore that those displaced fall within the definition in the Guiding Principles.

20 "Involuntary population displacement should be avoided or minimised whenever feasible by exploring all viable alternative project designs. In every case, the alternative to refrain from carrying out the project (the "non-action" alternative) should seriously be considered, and people's needs and environmental protection must be given due weight in the decision-making process."

21 In 1990, the World Bank developed guidelines to protect those displaced by development projects. The basic principle of the World Bank's Involuntary Resettlement Policy is that the displaced should enjoy some of the benefits of the project and their standards of living be improved or at least not degraded. http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/toc2/CA2D01A4D1BDF58085256B19008197F6?OpenDocument

c. World Food Program.[22]

The essential condition for the provision of WFP food is the food insecurity of displaced people.

d. UN Development Programme

UNDP in particular has become increasingly involved in programs involving the resettlement and reintegration of internally displaced populations.

e. UN-Habitat

The twin goals of the Habitat Agenda are "adequate shelter for all" and "sustainable human settlements development in an urbanizing world.

1.5 Position in India regarding Rights of Tribal Communities over Natural Resources

Since the Vedic times the presence of tribal communities or distinctive groups of people has been recognized in India and their rights over natural resources have always been respected. Till the advent of British these people were almost undisturbed and were free to manage their own affairs in their own ways. They depended on nature for their sustenance and had access to forests and forest resources. But the arrival of British changed the situation.

1.5.1 Pre-Independence Era

The British rule ushered an era of plunder of nature and natural resources and disrupted the ecological balance as well as struck a blow to the philosophy of forests as tribal habitat. The onslaught on forests was primarily due to increasing demands for military purposes, for British navy, for supply of teak and sandalwood for export trade and extension of agriculture in order to augment revenue.[23]

The first step of the British Government to acquire state monopoly right over the forest was the enactment of the Forest Act, 1865. It was revised in 1878 and extended to most of the territories under British rule. It provided for reservation of forests by the state. The reserved forests were closed to the people and the forest administration had powers to impose penalties for any transgression of the provisions of the Act. The Indian Forest Act 1927 was enacted to implement the

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22 World Food Program, *WFP—Reaching People in Situations of Displacement* (Rome: World Food Program), March (2000), p. 4.

23 J.B. Lal, *India's Forests: Myth and Reality*, Natraj Publishers, Dehradun (1989), p. 18.

forest policy of 1884 and it consolidated the pre-existing laws. The Act was passed, "to consolidate the existing laws relating to forest, the transit of forest produce and the duty leviable on timber." Thus it was with a revenue oriented policy and passed with the main object of regulating dealings in forest produce and to augment the public exchequer by levy of duties on timber. It provided for the creation of reserved forests, protected forests and village forests. The state government could constitute any forestland or waste land as a reserved forest by issuing a notification. The reserved forest would then become a land over which the state government would have proprietary rights and would also be entitled to own the whole, or any part of the forest produce. Activities in the reserved forest are also regulated. Rights over land, and rights to forest produce and water course could be exercised only subject to regulation. From the moment a notification for reserved forest is made, all claims or interests in, or over any land or portion of the reserved forest are subjected to the decisions of a settlement officer. In a protected forest the government notification could declare the manner in which the area could be used and it also prohibited certain activities like stone quarrying, burning of lime and removal of forest produce. Thus the poor local people and tribal populations were prevented from entering the forests and their rights over the forest produce were snatched away. Millions of tribal people were displaced from their habitats and lost their source of livelihood. It has given rise to a conflict over natural resources between the state and the tribal populations.

1.5.2 Post-Independence Era and the Constitutional Provisions

After Independence, almost all pre-independence arrangements continued even after the States Re-organization in the early 1950s. The tribal areas were dissected and excluded and were distributed in various states particularly in the North-East India. The States of Rajasthan, Arunachal Pradesh, Assam, Manipur, Bihar, West-Bengal, Gujarat, and Maharashtra have tribal population and tribes in abundance. After Independence the main aim was to protect the identity of the tribal people and at the same time to encourage them to come into the mainstream of the national life.

The tribal issue got prominence in the draft Constitution due to efforts of Shri Jaipal Singh, a prominent tribal leader. The Constituent Assembly Debates reveal that there were differences of opinion for the protection to be provided in the Constitution, but ultimately it was agreed not to isolate the tribes, but assimilate them in the national mainstream. Hence special provisions were incorporated in the Constitution for the protection of weaker sections of the society including tribal people. Various provisions were incorporated in Part III and Part IV of the Constitution which impose an obligation on the State to

provide facilities and opportunities for development of economic and educational standards of tribal people.[24]

It is to be noted here that the Constitution or any other Act has not defined the term Tribe or Tribal people, but it is left to the President to specify the same by issuing a notification which shall be treated as tribe under the Fifth Schedule with respect to a State.

1.5.3 National Policies and Legislations

The Constitution of India envisages a welfare state concept and contains numerous provisions for protection of the weaker sections of the society specially the tribal people. In consonance with the spirit of the Constitution various policies and laws have been framed in the country from time to time with a view to protect the rights of the tribal population and to bring them into the mainstream society.

The National Forest Policy, 1988 recognized the need to involve the tribal people in environmental protection. It declares that, 'having regard to the symbiotic relationship between tribal people and forest, a primary task of all agencies responsible for forest management including forest development corporations should be to, associate the tribal people closely in the protection, regeneration and development of forests as well as to provide gainful employment to people living in and around the forests'. The policy further suggested that the contractors to cut the trees should be replaced by Tribal Cooperatives; the forest villages should be developed at par with revenue villages; area development programmes should be undertaken to meet the needs of the tribal economy and; family welfare schemes should be introduced to improve the status of tribal people.

It is pertinent to point out here that the major Act in India which deals with forest resources i.e. **Indian Forest Act, 1927** does not contain any provision for protecting the rights of the tribal people and completely ignores their interests. Though the Forest Policy 1988 provided for protection of the rights of tribal people it took almost sixteen years for the government to declare a specific National Policy on Tribal's (i.e. in 2004) and ultimately, in bringing out the Scheduled Tribes(Recognition of Forests Rights) Bill in 2005. Also during this long gap the Central Government did not take any steps to amend the Forests

[24] For example See, Articles 14, 19 and 21. See also Article 46, which enjoins upon the State to promote, with special care, the educational and economic interest of the weaker sections of the people and, in particular the scheduled tribes and promises to protect them from social injustice and forms of exploitation. Further Article 275 (1) provides for grants in aid for welfare of the scheduled areas.

Act, 1927 for including the objectives enshrined in the policy and translate them into actual working.[25] Thus it was only in 2004 that a specific national policy for tribals was introduced in the country.

The National Policy on Tribal's 2004, paid attention to the rights of the tribal people for the first time in India and recognized their importance in preservation of natural environment. It states that, *'Scheduled Tribes in general are the repositories of indigenous knowledge and wisdom in certain aspects which must be protected and made use of'*. It declares that traditional wisdom of tribal people in water harvesting, of indigenously developed irrigation channels, construction of bridges in hills, adaption to desert life, utilization of forest species like herbs, shrubs for medicinal purposes must be preserved and promoted. It also declares that legal and institutional arrangements will be made for protection of intellectual property rights of the tribes which are of ethnic origin and also curtailment of the rights of corporate and other agencies to access and exploit their resource base.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forests Rights) Act, 2006 has been hailed as a key piece of forest legislation. It was passed on December 18, 2006. A little over one year after it was passed, the Act was notified into force on December 31, 2007. On January 1, 2008, this was followed by the notification of the Rules framed by the Ministry of Tribal Affairs to supplement the procedural aspects of the Act. It has also been called "the *Forest Rights Act*", "the *Tribal Rights Act*", "the *Tribal Bill*", and the "*Tribal Land Act.*" The law concerns the rights of forest-dwelling communities to land and other resources, denied to them over decades as a result of the continuance of colonial forest laws in India. It seeks to rectify the historical injustice done to tribal's during consolidation exercises carried on by the forest departments both in the colonial and post independence era.

1.6 Judiciary on Displacement of Tribals

The first time that such displacement came to be judicially challenged was during the Sardar Sarovar River Valley Project on River Narmada where the legitimacy of the displacement of tribals of Madhya Pradesh, Gujarat and Maharashtra was one of the questions before the Supreme Court. The court while answering this question in *Narmada Bachao Andolan v. Union of India and Others*[26] expounded the law in the following words:[27]

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25 S.C. Shastri, "Law Relating to Preservation and Protection of the Rights of Tribal People in India and Human Rights", *Development and Environmental Law, An Anthology*, Bharat Publications, Jaipur (2006), p. 334.

26 AIR (2000) SC 3751.

27 *Narmada Bachao Andolan* v. *Union of India and Others*, AIR 2000 SC 3751.

> The displacement of the tribals and other persons would not per se result in the violation their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than which they enjoyed in their tribal hamlets. The gradual assimilation in the main stream of the society will lead to betterment and progress. (emphasis supplied)

This ratio has been followed uniformly in *N.D. Jayal and Ors. v. Union of India and Ors.*[28] and *State of Kerala and Anr. v. Peoples Union for Civil Liberties, Kerala State Unit and Ors.*[29] The Court, in all these case, while the reaching this conclusions has not addressed the problems of disruption of the cultural ties of tribals due to displacement from their land. This is despite the fact that the Court has, starting from *Samatha* case[30]upto the *Narmada Bachao*[31] and *N.D. Jayal*[32] case, recognised the cultural links of tribals with their lands. In these cases, the Court has recognised that uprooting tribals from their natural surroundings would disrupt their culture. Though the *Samatha* Court showed sensitivity to the issue of allowing preservation of tribal culture, it still chose assimilation into the mainstream as a way of uplifting them economically.[33] The Court, however, made significant observations on this issue concerning tribals in stating:

> Thus, the Fifth and Sixth Schedules form an integral scheme of the Constitution with direction, philosophy and anxiety is to protect the tribals from exploitation and to preserve valuable endowment of their land for their economic empowerment to elongate social and economic democracy with liberty, equality, fraternity and dignity of their person in our political Bharat.

However, these observations were ignored by the *Narmada* and subsequent courts deciding the issue. In *Narmada* case, the Court stated that the cultural disruption of tribals has to give way to the dam because it is for the larger good.[34] Having decided that, it expressly adopted the policy of assimilating the tribals into the mainstream for their 'progress'.[35] In *N.D. Jayal* case, the Court noted that due to prior rehabilitation, "*they* (tribals*) will be in better position to start their life by acclimatizing themselves with the new environment.*"[36] In *T.N.*

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28 (2004) 9 SCC 362.

29 (2009) 8 SCC 46.

30 *Samatha* v. *State of A.P. and Ors.,* AIR 1997 SC 3297, para 10.

31 *Supra* note 4, para 237.

32 (2004) 9 SCC 362, para 105.

33 *Supra* note 6, para 47.

34 *Supra* note 4, para 237 (majority opinion).

35 *Supra* note 4, para 170 (majority opinion).

36 *Supra* note 5, para 59.

Godavaraman Thirumulpad v. Union of India (UOI) and Ors.,[37] while allowing mining in Niyamgiri hills, the Court skipped even this '*formality*' of acknowledging the disruption of the cultural and social links of tribals who were residing in and dependent on the Niyamgiri.

The Court stated:

> 6. On the other side, we have a picture of abject poverty in which the local people are living in Lanjigarh Tehsil including the tribal people. There is no proper housing. There are no hospitals. There are no schools and people are living in extremely poor conditions which is not in dispute.
>
> 7. Indian economy for last couple of years has been growing at the rate of 8 to 9% of GDP. It is a remarkable achievement. However, accelerated growth rate of GDP does not provide Inclusive Growth. Keeping in mind the two extremes, this Court thought of balancing development vis-a-vis protection of wildlife ecology and environment in view of the principle of Sustainable Development.

The attitude of the Court can be better put like this: 'Oh, India is growing economically, but tribals are still poor. So we should allow displacement for mining projects on their land so that they can work as labourers in those industries and thereby '*progress*'."

Talking of assimilation, the Court in the *State of Kerala and Anr. vs. Peoples Union for Civil Liberties, Kerala State Unit and Ors.*[38] quoted the following paragraph by an author who had written about tribes in Kerala[39]:

> Now a question of serious importance can be raised: Is there a need to uphold/preserve this indigenous culture? The outer (can be read as "other") influences have spread their roots so strong that their minds have been colonized (can be read as 'altered'). Even though the tribes carry wonderful memories of their rich past, they do not want to be in the same situation as they were in days of yore. So, the need for conservation of the tribal culture is the problem of the non-tribes, especially the researchers, scholars and activists working in this area. Intentionally or unintentionally, changes are the only constant feature of any culture. It can be observed that no culture can retain its flavor at different points of time. But the questions to be addressed to the "main-stream" and its government are: Are the tribes given freedom to accept

37 (2008) 2 SCC 222.

38 (2009) 8 SCC 46

39 Alex Rayson. K., "Tribes of Kerala: Identity Crisis", *OSLE-India Newsletter* 5, June 2007.

> or deny what ever they want? Are they given a free space to think, act and establish (as they used to in days of yore?)

but nevertheless readily sanctioned another *'development project'*. Thus, we observe that in all such cases, the Courts have given the green signal to the projects in question because of the so-called *'larger interest'* involved. The Court has seen these development projects as an opportunity for the displaced tribals to assimilate and *'progress'*. The angle of the cultural rights of tribals has been completely overlooked despite recognition of its disruption. The Court doesn't realize that its over-zealousness to assimilate is depriving the tribals of the *choice* to conserve their culture.

1.7 Conclusion

The effects of displacement spill over to generations in many ways, such as loss of traditional means of employment, change of environment, disrupted community life and relationships, marginalization, a profound psychological trauma and more. The issue of displacement is an example of how law has to be consistent with socioeconomic and political circumstances, and it appears to have failed in doing so. To conclude, there is a strong need to put legal thought into issues concerning the land acquirers as well as to thoroughly investigate issues regarding removing the imbalance from the system.

There is doubtless a need for institutionalising thorough and objective technical scrutinies of the designs of any developmental project. The new system should be rigid and comprehensive enough to reassure the project affected families and the funding agencies that only the least-cost option in human and environmental terms is chosen. Voluntary, but well organised social actions, which should involve Engineers, Jurists, Social Scientists like Sociologists and Economists are necessary to make the process of generation of alternative options and the selection of the least-cost option. In those instances where displacement is inevitable, it is imperative that the full costs of rehabilitation be internalized into the project cost.

It is incumbent upon the operators of the wheel of development to seek the participation of those displaced or to be displaced. It can be done directly or through their formal and informal leaders, representatives and even the Non-Governmental Organizations. A functional grass root democracy and people's participation in decision making that benefits and harmonises all interests, is probably the best possible way to minimise the miseries of affected.

1.8 Recommendations

Ill-consequences of the displacement lead to the requirement of policies and legislations that address the issues of not only development induced displacement, but also about rehabilitation and resettlement. Following are some

suggestion and recommendations to deal with problem of displacement caused by development:

1. States should ensure that eviction impact assessments are carried out prior to the initiation of any project which could result in development-based displacement, with a view to fully securing the human rights of all potentially affected persons, groups and communities.

2. States should fully explore all possible alternatives to any act involving forced eviction.

3. States should adopt, to the maximum of their available resources, appropriate strategies, policies and programmes to ensure effective protection of individuals, groups and communities against forced eviction and its consequences.

4. States must recognize that the prohibition of forced evictions includes arbitrary displacement that results in altering the ethnic, religious or racial composition of the affected population.

5. Sufficient information shall be provided to affected persons, groups and communities concerning all State projects as well as to the planning and implementation processes relating to the resettlement concerned, including information concerning the purpose to which the eviction dwelling or site is to be put and the persons, groups or communities who will benefit from the evicted site.

6. The State must provide or ensure fair and just compensation for any losses of personal, real or other property or goods, including rights or interests in property.

7. Cash compensation should under no circumstances replace real compensation in the form of land and common property resources. Where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better.

8. Resettlement must occur in a just and equitable manner and in full accordance with international human rights law.

9. States should ensure that adequate and effective legal or other appropriate remedies are available to any persons claiming that his/her right of protection against forced evictions has been violated or is under threat of violation.[40]

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[40] Usha Ramanathan, "Displacement and the Law," *Economic and Political Weekly*, Vol. 31 (1996).

10. States should entrust an independent national body, such as a national human rights institution, to monitor and investigate forced evictions and State compliance with these guidelines and international human rights law.

11. To make new Law on rehabilitation and change the LAA (1894), since it goes against the rights of the poor. Rehabilitation should not be separated from land acquisition and that the LAA (1894) should be changed in such a manner as to minimize displacement and turn rehabilitation into an integral part of such acquisition.

12. While sanctioning any development project State should bear in mind the Public Trust Doctrine that State is trustee of natural resources.

13. The very basis of the Land acquisition policies in its legal premises is required to be compatible with constitutional frame of Fundamental Rights, Directive Principles of State Policy and Special Provisions for the Scheduled Castes / Tribes and weaker sections.

It must be remembered that tribal communities are repositories of myriad cultural traditions and their knowledge of environment and natural resources is a part of the rich heritage of the country. It is of crucial importance that this cultural heritage and the rights of tribal's are protected. It is not only the duty of Government or any other authorities but it is also the duty of each and every citizen to protect and promote the welfare of his brother who is the real owner of the land and a friend of the forest.

CONSUMER PROTECTION : NEED FOR PRO-ACTIVE APPROACH

Ajay Gulati*

Consumer Protection movement has taken firm roots in the Indian legal sector. A well-developed consumer interest and rights enforcement mechanism is a multiple indicator of development. It is a sign of sensitivity of law for citizens, a symbol of human development and a pointer towards governmental concern for general social welfare. A strong consumer protection regime has spill-over effect on certain other areas. For example, Competition law and policy has its foundation in consumer protection. Competition law enforcement is exclusively concerned with regulating and preventing different forms of anti-competitive behaviour which is basically an effort to promote consumer welfare by ensuring that products and services are made available in the market at the most competitive price without any collusion between producers / service providers. Additionally, an effective consumer rights regime also acts as a check on deviant corporate behaviour and also propels the cause of corporate social responsibility (CSR). Threat of legal action by consumer ensures that the private enterprises maintain a quality standard, both of products as well as services. Besides, corporate houses do their extra bit by spending a part of their profits towards CSR requirements, either by donating funds or setting up social service schemes like charitable institutions in order to create an image of consumer and societal friendly organisations which affects the consumer attitude, preferences and spending habits to an extent. Concern for consumer protection has resulted in setting up of Offices of Ombudsman in certain crucial economic sectors like banking, insurance and telecom.

The consumer movement in India is as old as trade and commerce.[1] Protection of consumer rights in modern times dates back to 1962.[2] While addressing the Congress on the importance and relevance of consumer rights protection, the United States President in a message, proclaimed: (i) the right to choice, (ii) the right to information, (iii) the right to safety, and (iv) the right to be heard. In India, December 24, is celebrated as National Consumer Rights Day as the Consumer Protection Act, 1986 was enacted on that day. Another significant day in the history of world consumer movement is April 9, 1985 when the General Assembly of the United Nations adopted a set of guidelines for consumer

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1 In Kautilya's *Arthashastra*, there are references to the concept of consumer protection against exploitation by the trader and retailer with respect to quality, short weight, measurement and adulteration of goods.

2 On 15 March 1962, the Consumer Bill of Rights was proclaimed by the United States President John F Kennedyin a message to the Congress.

protection.[3] These guidelines constituted a comprehensive policy framework outlining what governments need to do to promote consumer protection in the following areas: (i) physical safety, (ii) protection and promotion of consumer economic interests, (iii) standards for safety and quality of consumer goods and services, (iv) measures enabling consumers to obtain redressal, (v) measures relating to specific areas (food, water, and pharmaceuticals); and (vi) consumer education and information programme.[4]

We have over 25 years of experience in consumer disputes redressal starting from 1986 when the Consumer Protection Act came into force. The consumer courts have undoubtedly been a boon for the gullible Indian customer because India is not a typical free market economy where consumers are the kings. Prior to enactment of CPA 1986, consumers had practically no avenue to get their grievance redressed if they purchased goods which turned out to be defective or hired/ obtained services which did not give the desired result. Private enterprises whether big or small, retailers, wholesalers or manufacturer (or service providers) were unabashedly indifferent to consumer grievances. The remedy before the consumer was to either approach the civil court by raising a claim of action under the Contract Act i.e. breach of express or implied warranty or condition in relation to goods or services or the MRTP Commission. However, the remedy of civil court was more problematic than the problem itself because of the expensive and complicated court process whereas MRTP Act suffered from many shortcomings which led to its repeal. Setting up of consumer courts (with its inexpensive, less complicated procedure and pro-consumer approach) brought about a wholesale change in the attitude of consumers who gradually became more and more assertive of their rights. The most startling aspect of consumer movement has been its dynamism. Over the last 25 years, consumer rights have progressively spread out to cover a host of non-traditional consumer areas like education, health, real estate and private finance.

However, Law is dynamic and so it must keep changing so as to incorporate and accommodate new concerns. As in the case of any developing sector, there is a need as well as scope for further strengthening the consumer rights' protection.

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3 United Nations General Assembly Resolution A/RES/39/248 16 April 1985.
In 1981, the United Nations Economic and Social Council "requested the Secretary-General to continue consultations on consumer protection with a view to elaborating a set of general guidelines for consumer protection, taking particularly into account the needs of the developing countries". In 1983, draft guidelines for consumer protection were submitted to ECOSOC in response to its request. Following extensive discussions and negotiations, the Guidelines were adopted by consensus resolution of the United Nations General Assembly on 9 April 1985.

4 They have since been amended by the addition of a new section on sustainable consumption on 26 July 1999 – UN Resolution 1999/7 Economic and Social Council 2nd Plenary Meeting 26 July 1999 *1999.7 - Expansion of the United Nations guidelines on consumer protection to include sustainable consumption.*

The need for improvement arises from the fact that Consumer Protection Act follows a compensatory rather than a punitive or preventive approach. The disputes' redressal mechanism under the CPA is restricted to a 3 tier quasi-judicial set up. In other words, there is no scope for the consumer to approach a designated administrative authority with his complaint against an anti-consumer practice and in order to get the grievance redressed, there is no recourse except for the consumer to approach the court. This weakness is aggravated by the fact that consumer awareness about their rights is alarmingly low. There is thus an urgent need to set up a mechanism to address the consumer grievances at the primary or the grass root level so that there is a buffer system in place which will serve two purposes – firstly, consumers will have an alternative dispute/ grievance redressal apparatus other than the court, and secondly an effective primary level grievance redressal mechanism will reduce the number of cases coming to the Consumer courts. This paper will explore possibilities of setting up such a mechanism.

As a starting point of this discussion paper, I would refer to the report of the study on the Consumer Protection Act commissioned by the Comptroller and Auditor General (C & AG) of India and conducted in July– August 2005, which brought out that 66% of consumers were not aware of consumer rights and 82% were not even aware of the Consumer Protection Act. In rural areas, only 13% of the population had heard of the Consumer Protection Act. These startling figures prove that despite more than 25 years of enactment of the CPA 1986, in real terms, consumer right movement is still in its nascent stage in India. Apparently, the slow progress of consumer awareness can be attributed to lack of legal education which itself is an outcome of low literacy rate in India. Additional reason can be ascribed to the general abhorrence for approaching a court owing to reasons which have already been briefly mentioned above. It is quite logical that owing to such poor awareness of consumer rights, citizens are also unaware of the less cumbersome and inexpensive process of approaching a consumer court. The need for spreading awareness about consumer protection law notwithstanding, there is another major factor due to which consumer rights are still not being enforced to a desirable extent i.e. the only remedy under the CPA is to approach a consumer court and this fact coupled with general aversion to court process owing to it being lengthy, expensive and complicated. I would like to recapitulate certain real life incidents (these incidents are the reason which forced me to think of an alternative to courts as a means of consumer grievance redressal) which will underscore the afore-stated argument.

While on a vacation to Udaipur, I visited a café situated in a historic palace, (perched on a hill top, known as Monsoon Palace). The café was run by a well-known hospitality group 'The Lalit'. On being asked, the waiter brought two bottles of mineral water of a particular brand. When the bill was asked for, the waiter stated a higher price than what was mentioned on the bottle. When

confronted, the waiter refused to charge the actual price. Such was their audacity that when I insisted for a bill, the café billed the inflated amount without any hesitation. What really infuriated me was the fact that such a well know hospitality group was overcharging the consumers. Threat of suing the café in a consumer court was dismissed by the waiter himself. I was determined to sue them in consumer court and not only did I preserve the bill, I also preserved the entry tickets to the protected hill forest in which the Palace was situated so as to prove my visit to that café. However, I was to leave Udaipur the day after and it was impossible for me to contact a lawyer and file a complaint in consumer court. I was angry and despite having complete knowledge of my rights and the means to enforce them, I was helpless because the only recourse that I had was to approach the consumer court for which I had no time, either to file the complaint or to pursue it.

The second incident occurred on a national highway when I was driving down to Jaipur from Delhi. I stopped on a roadside restaurant cum resort (Kings Restaurant) to buy soft drinks over the counter. To my surprise, the soft drinks were charged at a price higher than what was mentioned on the soft drink cans. Here again, threat of going to consumer court or even disclosure of my identity as a lawyer went in complete vain. What was intriguing was that the restaurant was charging VAT on the inflated price and giving a bill as well for that. The only conclusion that I could draw was that either he was not paying the VAT at all to the state government or the state tax officials were a party to this fraud. Standing on a national highway, it was impossible for me to think of filing a complaint with a consumer court.

The third incident is even more interesting. On Delhi - Chandigarh highway near Ambala, I stopped late in the evening at a makeshift tea – shop, situated in the premises of a petrol pump, to purchase soft drinks. After taking the bottles, when I asked the vendor as to how much I was to pay, the vendor quoted a higher price than what was on the bottle. He refused to accept the printed price. This time, however, I did not threaten him with consumer court simply because at that time and place, it would have been a futile exercise.

There are umpteen number of instances, like the three mentioned above, which are experienced everyday by consumers. Bus stands and railway stations are two places where over charging is rampant. The amount involved in the aforementioned real life instances is marginal but what is important is that each time such a malpractice is committed, the cause of consumer protection law is defeated. Hospitality institutions, especially restaurants and hotels openly charge higher price than the MRP on goods which have such a prefixed price label. In addition, one can imagine the extent of illegal money which is generated through over charging. And yet there is no check on these malpractices. The reason is not far to seek. If we are being overcharged by 2 rupees for a mineral bottle or a

pack of biscuits, how many of us would take the trouble of lodging a compliant with a consumer court considering the fact that one has to deposit a minimum fixed amount of Rs. 100 as court fees (in District Forum Chandigarh) and also hire a lawyer.

Under the CPA, a consumer's only option is to file a complaint under section 12, relevant part of which reads as under:

"Section 12. Manner in which complaint shall be made: – (1) A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by –

(a) The consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided;

(b) Any recognised consumer association whether consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided is a member of such association or not;

(c) One or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or

(d) The Central or the State Government, as the case may be, either in its individual capacity or as a representative of interests of the consumers in general."

Although the words used in section 12 are 'may be filed' but infact these words have no meaning because if a consumer chooses not to approach a consumer court, he has no other forum in which he can raise his grievance. This problem is compounded when we analyse the jurisdiction aspect of a consumer complaint i.e. where can the complaint be filed?

Jurisdiction of a District Consumer Forum is explained in section 11 of the CPA, relevant part of which is reproduced as under:

Section 11. Jurisdiction of the District Forum:-

(2) A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction –

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain; or

(b) *any of the opposite parties, where there are more than one at the time of institution of complaint, actually or voluntarily resides or carries on business or has a branch office or personally works for gain provided that in such case either the permission of the District Forum is given, or the opposite parties who do not reside or carry on business or have a branch office or personally work for gain, as the case may be, acquiesce in such institution; or*

(c) *the cause of action, wholly or in part, arises."*

Language of Section 11 patently favours the convenience of the opposite party, not of the consumer. Jurisdictional aspect was the only reason why no action was taken against overcharging in the first two instances, which have been detailed above. If a consumer happens to be harassed or his rights are violated in a place which is outside his place of ordinary residence, it is almost impossible for him to initiate a complaint and seek the enforcement of his rights because of the jurisdictional bar.

Faced with this situation, I propose that the Central Government should consider setting up a Consumer Inspector cadre/ force by making suitable amendment in the CPA or by way of subordinate legislation. I draw support for this suggestion from the Drugs and Cosmetics Act 1940 and the Prevention of Food Adulteration Act of which CPA is an extension (as both acts deal with protection of consumers although under a specific mandate) and under which Inspectors are entrusted with responsibility of quality control as well as ensuring that the relevant provisions of the Acts are complied with. Section 3 of the CPA also lays down that "*the provisions of this Act shall be **in addition** and not in derogation of the provisions of any other law for the time being in force*".

Such a force should be set up on a nationwide basis as a separate cadre and not by way of designating existing government officers as consumer inspectors. This will ensure that consumer inspectors are devoted exclusively to the task of ensuring compliance with the provisions of the CPA. The jurisdiction of such consumer inspectors should be on the same lines as area wise police stations so as to cover rural as well as urban and semi-urban areas. In addition, they should be available for attending consumer calls beyond the normal government working office hours. There should be conspicuous display of the contact details of concerned consumer inspector in each commercial establishment as also by way of public information boards. Consumer inspectors would be required to immediately reach the venue/ commercial establishment where the consumer is present and alleges a violation of his rights. One can imagine that if recourse to a public authority is available with such ease and convenience i.e. consumer inspectors, not only will it empower the consumers who will then try to prevent malpractices by commercial establishments/ vendors in a much larger proportion than at present but even the commercial establishments/ vendors themselves will

not violate the consumer rights owing to the threat of immediate consumer action.

It is important to discuss the role that consumer inspectors are likely to play and the powers that they should be vested with. It must be understood beforehand that the concept of consumer inspectors is not envisaged to be a panacea for all ills. It will definitely have a limited mandate, initially at least and cannot be expected to replace the forum of consumer courts for dispute resolution. It will however, provide an intermediate forum where consumers can voice their grievance and to a limited extent even seek its redressal. In so far as dispute resolution is concerned, that responsibility will continue to vest in the consumer courts.

First of all, consumers will have the freedom to immediately report any violation of their rights. Especially, in instances of overcharging by vendors or substandard quality of goods/ services which can be inquired into expeditiously at a preliminary level, the consumer inspectors should be vested with the authority to serve a caution notice to the concerned vendor giving him an opportunity to remedy the situation. In case the vendor fails to act, the consumer inspectors should prepare a report which should be read in evidence as a part of complainant evidence before the consumer court. Such evidence will not only reduce the onus of proving the allegations by the complainant but will also expedite the process of dispute adjudication.

Secondly, if the consumer is from outstation and is unable to pursue the case by filing a complaint in the relevant consumer court owing to the mandate of section 11 i.e. jurisdiction of a district forum, the consumer inspectors should be given the authority to initiate proceedings against an establishment/ opposite party where allegations of violations of consumer right are prima facie substantiated after preliminary enquiry. The complainant should have the option to lodge a complaint through the consumer inspector in which case it would be obligatory for the consumer inspector to initiate a consumer complaint. A reasonable fee can be prescribed, which should be graded in accordance with the value of claim/ dispute and which the complainant/consumer shall be required to pay so as to cover the litigation costs i.e. hiring of lawyer, filing of complaint e.g. where the vendor is overcharging, the fee should be fixed keeping in mind the value of monetary dispute. In this regard, Legal Service Authorities (LSA) which have been set up in all states and UT's under the Legal Service Authorities Act 1987 can be of great help. The proposed fee mentioned above can be prescribed with reference to the legal fee table as setup by the legal services authorities in each State which should include the mandatory fees for filing a consumer complaint. The fee table can be reasonably higher than the one formulated by legal services authorities so as to take into account the market fee structure. On the lines of legal aid counsel panel, a consumer aid panel can be set up from which lawyers

can be assigned such complaints and be paid as per the fee table mentioned above. Even the legal aid panel can double up as consumer-aid panel also. It also needs to be underscored that consumer aid here is not used in the sense of providing free or subsidised legal services to the consumer but in the sense of providing services of a lawyer which would enable an outstation consumer/ complainant to seek redressal of his grievance in a much more convenient manner and simultaneously ensuring that consumer rights violations do not go unpunished.

Thirdly, in those matter where the monetary dispute, including damages for defective goods/ deficient services and mental harassment (as claimed by the consumer) does not go beyond Rs. 15000 or Rs. 20000, the consumer inspectors should have the authority to compulsorily forward the complaint to permanent 'LokAdalats', irrespective of whether the consumer/ complainant is out station or a local resident. This will not only reduce the burden on consumer forums but will also be a positive development for Alternate Dispute Resolution system. However, in case the dispute is not resolved before the LokAdalat on a mutual consent basis, the LokAdalat should transfer the case along with its comments on the attitude of both the parties in the proceedings before it, to the competent District Consumer Forum which, while deciding the dispute on merit, should keep in mind whether the vendor/ opposite party or the complainant refused to arrive at settlement without any due cause and award damages accordingly.

A preliminary objection which can be raised against the power of consumer inspectors is regarding the locus of filing a consumer complaint. Under section 12, a consumer complaint can be filed either by the *consumer* himself, **or** *any recognised consumer association* **or** by *one or more consumers, where there are numerous consumers having the same interest i.e. representative capacity* **or***The Central or the State Government, as the case may be, either in its individual capacity or as a representative of interests of the consumers in general* whereas consumer inspectors do not fall under any such category. In this regard, assistance can be sought from sub section (d) of section 12 by virtue of which the Central or State Government can file a consumer complaint in its individual capacity or in the general interest of consumers. The Consumer Protection Act or the rules framed thereunder are silent as to how and when will the Central or a State Government may intervene or approach consumer court. No procedure is prescribed whereby consumers can petition the Central or State Government requesting them to take up the matter. This sub-section of section 12 CPA can be pressed into service by way of subordinate legislation and setting up the cadre of consumer inspectors without the need to amend CPA. Consumer Inspectors will thus derive their authority to file a consumer complaint on behalf of the aggrieved consumer by virtue of rules framed under sub-section (d) of section 12 of the CPA.

There is another aspect regarding the power of consumer inspectors which needs to be addressed. In cases where the consumer inspectors do not have the authority to initiate a complaint on behalf of the consumer, should the role of consumer inspectors be restricted to serving a caution notice and sending a report to the district forum? Such a restricted role would be wastage of the whole exercise of setting up a cadre of consumer inspectors. In this regard, 2 possible courses of action can be followed. In those cases, where the vendor (of goods or services as the case may be) does not rectify his conduct even after being served with a caution notice by the consumer inspector, the consumer forums should take into consideration the report submitted by consumer inspectors not only for evidentiary purposes but also at the time of awarding damages to the complainant. In such cases where the consumer inspectors submit a report showing prima facie violation of consumer rights/ CPA and the Consumer Forums uphold the complaint, the Consumer Forum should award exemplary damages to the complainant. Such damages should be punitive in nature and not compensatory so that it acts as a deterrent for vendors. Also such exemplary damages should be apart from the damages under the normal heads e.g. harassment to the consumer, for defective goods, deficient service. A part of such exemplary damages (ranging from 30% – 50% depending upon whether the complaint is initiated by the complainant himself or the consumer inspectors) should be ordered to be deposited in the Consumer Welfare Fund envisaged under the Consumer Welfare Fund Rules, 1992. Under Rule 8 (d) of the said rules, there is a recognised possibility of reimbursement of legal expenses incurred by a complainant or class of complainants. The use of consumer welfare fund can be extended by incorporating a provision whereby a part of professional fees to lawyers of the consumer aid panel can be paid out if this fund (this will cover the aspect of market fee structure of lawyers). This Fund can also be utilised for covering litigation fees in cases where the dispute over price is nominal i.e. as in the case of overcharging of a cold drink or subject to a limit, say Rs. 1000. In such a case the consumer can be charged only the prescribed court fee and the litigation charges should be met out of the consumer welfare fund (subject to the provision of referring the matter first to a 'lokadalat' by the consumer inspector, as proposed above).

The second possible course of action could be that the Consumer Inspectors are given the power to impose a fine on the basis of their report which discloses a consumer right violation. In such a scenario instead of consumer filing a complaint, it will be the vendor who will have to approach the consumer court challenging the imposition of fine. In my opinion, this course of action also has a great deterrent effect and will also be in the real sense protection of consumer harassment.

The penultimate section of this discussion paper is concerning the scope or terms of reference of consumer inspectors. It is a moot point as to in regard to which

goods or services should the consumer inspectors exercise their authority. This will require some deliberation by experts since a careful balance has to be struck between the role of consumer inspectors as a grievance redressal forum and that of consumer forums as a dispute settlement forum. As a starting point, consumer inspectors should be vested with authority to deal with complaints involving patent violation of consumer rights e.g. In case of overcharging i.e. section 2 (c) (iv); in case of defective goods i.e. section 2 (c) (ii); in case of goods and services being offered for public sale which are hazardous to life and safety i.e. section 2 (c) (v) and (vi) and in case of a restrictive trade practice i.e. section 2 (nnn). The above mentioned are some of the consumer malpractices in which it which it will be easier for the consumer inspector to hold a preliminary enquiry and serve a caution notice or submit a report, as the case may be. Thereafter, as the experience grows and shortcomings (which are bound to surface) are removed, the mandate of consumer inspectors can be enlarged appropriately.

In the final section of this discussion, I would revert to the report of CAG which was mentioned early on. Lack of Consumer awareness cannot be redressed by strengthening the system alone (as proposed above) because lack of awareness is not about a particular provision or forum but of the Act itself i.e. the remedy of Consumer Protection Act. Although, under section 4 of the CPA, a Central Consumer Protection Council is to be set up whose mandate under section 6 is quite impressive and includes promotion of right to consumer education, the facts of CAG report shows that the Council has done little towards this end. In this regard, the Legal Services Authorities can contribute significantly especially since a number of law schools and colleges are now becoming partners in spreading awareness about legal aid and legal literacy by setting up legal aid clinics within the law schools/ colleges which are run by law teachers, students and legal aid lawyers. There needs to be a healthy link between the Central and State Consumer Protection Council and State Legal Services Authorities so that the Legal Aid clinics can be optimally utilised for spreading consumer awareness about CPA. It is only when the consumers are fully aware that the consumer protection system can be truly energized.

JUDICIAL REVIEW OF ADMINISTRATIVE POLICY : THE INDIAN APPROACH

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The Indian Constitution has incorporated the doctrine of separation of powers whereby the powers are pragmatically distributed amongst the three organs of the government i.e., the legislature, the executive and the judiciary. It has been aptly remarked that the doctrine of separation of powers is not recognized in its absolute rigidity in the Indian Constitution but the functions of all organs of the government have been sufficiently differentiated whereby the assumption of power by one organ, of the functions belongings to another organ are not contemplated.[1] It is the basic requirement that the three organs of the State should not function in a spirit of hostility or suspicion but they must function rationally and harmoniously, so that there is no friction in the three constituents of the democratic state. Such a harmonious working environment was the vision of the founding fathers of the Indian Constitution which alone can lead to development, growth and stabilization.

The principles of rule of law, judicial review, separation of powers, etc., have been recognized as the basic structure of the Constitution and primarily the job has been assigned to the judiciary to review the action of legislature and executive in determining whether they have transgressed their limits or not.[2] The power of judicial review is recognized as heart and soul of Indian Constitution and if this power is taken away, it will sound the death knell of the rule of law. Rule of law as basic feature permeates the entire Constitutional structure and independence of the judiciary is *sine qua non* for the efficacy of the rule of law.[3]

The power of judicial review is an integral part of Constitution and in the absence of it, there will be no government of laws; and rule of law would become a teasing illusion and a promise of unreality.[4] In *State of Bihar and others* v. *Subash Singh*[5], the Supreme Court opined that in our democracy governed by the rule of law the Judiciary has expressly been entrusted with the power of judicial reviews as *sentinel in qui vive.* Basically, judicial review of administrative actions as also of legislation is exercised against the action of the State. Since the State or public authorities act in exercise of their executive or legislative power they are amenable to the judicial review. The State, therefore,

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1 *Ram Jawaya Kapoor* v. *State of Punjab*, AIR 1955 SC 549.
2 *I.R. Coelho* v. *State of Tamil Nadu*, AIR 2007 SC 861.
3 *Krishna Swami* v. *Union of India* 1992 (4) SCC 605.
4 *R.K. Jain* v. *Union of India*, AIR 1993 SC 1769.
5 AIR 1997 SC 1390; See also, *Asif Hameed* v. *State of J & K*, AIR 1989 SC 1901.

is subject to *etat de droit*, i.e. State is submitted to the law which implies that all actions of the State or its authorities and officials must be carried out subject to the Constitution and within the limits set by the law, i.e. constitutionalism. In other words, the State is to obey the law. The more the administrative action in our welfare State expands widely touching the individuals, the more is the scope of judicial review of State action. Judicial review of administrative action is, therefore, an essential part of rule of law. The judicial control on administrative action, thus, affords the Courts to determine not only the constitutionality of the law but also the procedural part of administrative action as a part of judicial review.

It is a matter of historical experience that there is tendency in every government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the legislative check is getting diluted, it is left to the courts as the only other reviewing authority to be increasingly vigilant to ensure observance with the rule of law and in this task the court must not flinch or falter.[6] The judiciary exercises the power of judicial review on following assumptions:

I. It holds the power as trust to keep up the spirit of the Constitution.

II. It has to maintain

   i. the equitable distribution,

   ii. non transgression of the constitutional limits

   iii. non-erosion of the constitutional mandate of equality, democracy, secularism, socialism etc.

   iv. indestructibility of the basic structure especially, the Fundamental Rights of the people.

III. The exercise is purely on the basis of facts and the law.

IV. It is unguided by any social, economic or political prejudices.

It is a story of bygone days, where the administration used to exercise only administrative functions. In the contemporary era, the administration enjoys the trinity of powers, i.e., the executive, legislative and the judicial. The vast powers conferred on the executive warranted a strict vigil because it is believed that power corrupts a man and absolute power corrupts absolutely. The subjection of the executive to the judiciary had never been visualized on the pretext that the executive is accountable to the legislature and the same was considered supreme.

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6 *Kasturi Lal Lakshmi Reddy* v. *State of J & K*, AIR 1980 SC 1628.

Whenever the Parliament authorizes and approves a power conferred on the executive, the role of the courts gets minimized.[7] This concept was considered a concept of British legacy and in the countries having a Constitution, the Constitution instead of Parliament is considered supreme. Such a shift in the sovereignty gave significant powers to the judiciary not only to determine the actions of the executive in terms of the constitutional mandate but also in terms of the statutory prescription. The contours of judicial review were perfectly laid down by *Marbury* v. *Madison*[8] wherein it was emphasized that the limits would be meaningless if they may be passed by those intended to be restrained.

1.1 Discretion and Policy

All pervasive nature of powers in modern times is a result of change in functional approach of State from *laissez faire* to welfare state whereby the State is expected to regulate and interfere in every aspect of human life. Therefore it is desirably expedient to securely arm the administrator to initiate varied actions, and the necessary power in the armour is the discretionary powers. The executive enjoys the discretionary powers in relation to the actions sanctioned by the statute as well as in matters of determining a policy. The policy considerations result into adopting a statute for the furtherance of the policy or for putting in operation the statutory power vested in it. The Supreme Court has lucidly opined that there has to be room for discretion with an authority within the operation of rule of law, even though it has to be reduced to the minimum extent necessary for proper governance.[9]

Administrative discretion is *sine qua non* in the modern welfare State for the smooth and good governance. It signifies availability of more than one course of action to the administrator. Expectedly the administrator has to use the powers objectively and not subjectively. The objectivity is spelled out by the law or it may be inferred from the purposes of the enactment. Any deviation from the objective standards can easily be classified an unreasonable exercise of administrative discretion. Discretion arbitrarily exercised is considered antithesis to equality.[10]

Justice Coke aptly defined discretion as an understanding to discern between fallacy and truth, between right and wrong, between shadows and substances, between equity and pretence, and not according to personal whims and private

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7 Hilaire Barnett, *Constitutional and Administrative Law*, Lawman (India) Pvt. Ltd. New Delhi (1996), p. 106; See also, H.W.R. Wade, *Administrative Law*, Oxford University Press (2000); Griffith & Street, *Principles of Administrative Law*, London, Isaac Pitman & Sons (1952); Foulkes, *Administrative Law*, Oxford University Press (1995).

8 5 US (1 Cranch) 137 (1803).

9 *Supreme Court Advocates on record* v. *Union of India*, (1993) 4 SCC 441.

10 *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597; see also *E.P. Royappa* v. *State of Tamil Nadu* AIR 1974 SC 555.

actions.[11] The celebrated definition signifies that discretion implies drawing of distinctions between two extremes observing reasonable criterion. *Lord Halsbury LC* observed that discretionary power should be exercised according to the rules of reason and justice, according to law and not humour and it should not be arbitrary, vague and fanciful, but legal and regular.[12] The person bestowed with discretion must exhibit judicious exercise of it on reasonable and rationale grounds. Often than not the conferment of discretionary powers get into the head of the bearer leading to the misuse of the powers and the same is used indiscriminately for extraneous considerations leaving out the objectivity.

There are at least four reasons for conferring discretion on administrative authorities: (i) the contemporary problems are of complex and incomprehensive nature, (ii) majority of the problems are novel and non- experimented, (iii) unforseability of the problems, (iv) and circumstantial difference related to the problems. Therefore the discretionary powers are inherently required in contemporary era.

Initially the courts had adopted the hands-off policy in interfering with the exercise of discretionary powers by the administrative authorities. In matters of policy decisions the courts have maintained judicial restraint on the pretext that the executive is accountable to Parliament and is answerable there.[13] *Lord Halsbury* observed that where legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any court to contest that discretion.[14] This does not however imply that there is absence of control over discretionary powers. The wider the discretion the more are its chances of abuse and it is more destructive than any potent weapon bringing an end to liberty.[15] Absolute freedom in action generally lead to arbitrariness which in turn jeopardizes the human liberty, henceforth effective control mechanism is required to preserve rule of law and prevent despotism. Courts have rightly rejected the concept of absolutism and kept the exercise of discretionary powers within the bounds. Be it may *Padfield*v. *Minister of Agriculture*[16]*; Accontant General* v. *S. DoraiSwamy*[17]*; Air India* v.*NergeshMeerza*[18]*; State of West Bengal*

11 *Rooke's* Case, (1598) 5, Co. Rep. 996.

12 *Sharp* v. *Wakefield* (1891) AC 1873.

13 *R. K. Garg* v. *UOI*, AIR 1981 SC 2138; *M.P. Oil Extraction* v. *State of M.P.*, AIR 1998 SC 145; *Bhavesh D. Parish* v. *Union of India,* AIR (2000) SC 2047.

14 *Westminister Corp.* v. *London & North Eastern Rly. Corp., (1905) AC 426; See also A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27; *R.M. Lohia* v. *State of Bihar*, AIR 1966 SC 740.

15 *US* v.*Wunderlik*, 342 US 98; see also *New York* v. *US*, 342 US 882.

16 (1968) AC 997.

17 AIR 1981 SC 783.

18 AIR 1981 SC 1829.

v. *Anwar Ali Sarkar*[19]; *Ajay Hasia*v. *Khalid Mujib*[20]; *Suman Gupta* v. *State of J&K*[21]; *State* v.*Babulal*[22]; *HimmatLal*v. *Police Commisioner*[23], etc.

The courts generally do not go into the merits of discretionary decision making but whenever the decision seems to be in violation of principles of rule of law, they can easily quash it. Therefore, the courts can quash a discretionary act on grounds of *ultravires*, *malafides*, exercise of power for an improper purpose, irrelevant consideration, leaving out relevant considerations; unreasonableness or non exercise of discretion, etc. The courts imply these limits within the power conferred without same being mentioned specifically in the statute[24].

1.2 Public Interest in Policy Matters and Judicial Review

The Apex Court has expounded the elements of public interest as:

I. Whether *Public money* would be expended for the purposes of the contract;

II. The *goods or services which are being commissioned could be for a public purpose*, such as, construction of roads, public buildings, power plants or other public utilities.

III. The public would be *directly interested in the timely fulfillment of the contract* so that the services become available to the public expeditiously.

IV. The public would also be *interested in the quality of the work* undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g. a delay in commissioning a power project could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation[25].

In *Raunaq International Ltd.* v. *I.V.R.Construction Ltd.*[26], the Maharashtra State Electricity Board floated a tender for supply, erection, commissioning etc., of large diameter pipes and steel tanks for its Thermal Power Station.

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19 AIR 1952 SC 75.
20 AIR 1983 SC 487.
21 AIR 1983 SC 1235.
22 AIR 1956 All. 521.
23 AIR (1973) SC 87.
24 Jain & Jain, *Cases and Material on Administrative Law*, Vol.III, ILJ (2000).
25 *Infra.*
26 AIR 1999 SC 393.

The qualifying requirements of bidders were specified in the tender. The Board was give power to relax the qualifying requirement. The Board looking at the expertise and past experience of a tenderer, M\s Raunaq International Ltd., although it did not exactly tally with the prescribed criteria, decided to grant the contract to him by relaxing the qualification. The award of contract was challenged by another tenderer, I.V.R. Construction Ltd., who did not fulfill the requisite criteria fixed for tenderers and whose offer was much higher in the high court of Bombay which stayed the operation.

The Supreme Court opined that the scope of judicial review in administrative determination is very limited and the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It was held that any judicial relief at the instance of a party which does not fulfill the requisite criteria would be misplaced.

Hence before entertaining a writ petition and passing any interim orders in such petitions, the Court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, or an allegation that the contract has been entered into for collateral purposes, mala fide, arbitrariness or unreasonableness, and the Court is satisfied on the material before it, that the allegation needs further examination, the Court should intervene.

In *West Bengal Electricity Board* v. *Patel engineering Co. Ltd and Ors.*[27], the Supreme Court while upholding the Calcutta High Court decision refused to validate the decision of State to allow correction of bid documents and to consider that bid after correction along with other bids. Justifying the dismissal of appeal Supreme Court held that the project undertaken is for the benefit of public, the mode of execution of the work of the project should also ensure that the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of the work of the project as it serves dual purposes. On the one hand, it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work; and on the other hand, it affords the appellant a choice to select the best of the competitors on competitive price without prejudice to the quality of the work. Above all, it eliminates favoritism and discrimination in

[27] AIR 2001 SC 682.

awarding public works to contractors. The contract is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest, the requirements of compliance of rules and conditions cannot be ignored. It is always open to the government to negotiate with the next lowest bidder for awarding the contract on economically viable price bid.

The court further opined that the in an international competitive bidding which postulates keen competition and high efficiency, the bidders have or should have assistance of technical experts. The degree of care required in such bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. In a work of this nature and magnitude where bidders who fulfill pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach; otherwise it will encourage and provide scope for discrimination, arbitrariness and favoritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided, by the State or its agencies in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. Such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules.

In *Balco Employees Union (Regd.)* v. *Union of India*[28], the administrative decision of disinvestment policy in Bharat Aluminium Co. Ltd. was challenged before the Supreme Court of India, wherein the government decided to disinvest on the recommendations of the public sector disinvestment commission. It was alleged that the disinvestment will jeopardize the rights of the employees as they will not get the protection of the constitutional rights both substantive as well as procedural. It was contested on behalf of the State that the economic policies of the govt. are not amenable to judicial review. Successive governments have gone for disinvestment because the rates of govt. enterprises have been low, the States cannot sustain in the globally competitive market and the government is unsuccessful in changing the work culture.

[28] AIR 2002 SC 350.

scheme, a decision was taken by Govt. for their further training as veterinary pharmacist with the object to absorb them as veterinary pharmacist. Request of candidates under dairy scheme for being considered for veterinary pharmacist training was rejected by State government. Supreme Court reversing the judgment of the High Court opined that the govt. had given detailed reasons why it had made special provisions for veterinary scheme trainees, which could not be termed as arbitrary or irrational. Classification of candidates under two schemes, their eligibility criteria for selection as trainees was distinct and founded on intelligible differentia with different objectives. Therefore, trainees under dairy scheme could not be treated at par with trainees under veterinary scheme; hence refusal of State Govt. to impart additional training to candidates under dairy scheme was neither arbitrary nor discriminatory. The Apex court observed that decision to make a special concession for Gopal Sahayaks in the matter of additional training as Veterinary Pharmacists was admittedly a policy decision. The framing of administrative policy is within the exclusive realm of the executive and its freedom to do so is, as a general rule, not interfered with by Courts unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution.

In *Centre for Public Interest Litigation* v. *Union of India,*[38] the policy decision of the govt. to offer the oil fields for development on a joint venture basis was challenged before the Delhi High Court on the ground that the contract was awarded arbitrarily for collateral consideration and is actuated by mala fides. They alleged that the contract was awarded at a throw away price by the maneuvering of the officials of the department who recorded the quantum of oil reserves at a low rate and allowed the price permutation at a fixed rate. More over the contract and the evaluation of the bids lacked transparency. The High court opined that the court will be restraint in such evaluation as the government had greater latitude and flexibility in economic matters and there can be more than one view in the evaluation process. It was alleged before the Supreme Court that the department did not placed the comparative analysis before the government of India whether to stand alone or go for joint venture. The court held that the non-placement of comparative analysis before government, which was taken note of, does not specify the non application of mind. The court cannot venture on guess- work over the technical knowhow. Court pointed out that the judicial review can be made on the grounds of illegality, irrationality or procedural impropriety and it cannot venture out to determine the highly technical and complex economic determinants.

[38] AIR 2001 SC 80.

In *Kailash Chand Sharma* v. *State of Rajasthan*[39], the State government took a policy decision and issued a circular that the posts for teachers shall be filled on the basis of qualification and preferential treatment shall be given to candidates of a district and panchayat. Government contended that the award of bonus marks to the residents of rural areas is a measure of affirmative action or compensatory discrimination to help the disadvantaged sections, namely, the rural people and that giving relaxations and concessions to disadvantaged people are an integral part of the equality clause enshrined in Article 14. The court pointed out that the there can be little doubt that the impugned circular is the product of the policy decision taken by the State government. Even then, such decision has to pass the test of Articles 14 and 16 of the Constitution. If the policy decision, which in the present case has the undoubted effect of deviating from the normal and salutary rule of selection based on merit is subversive of the doctrine of equality, it cannot sustain. It should be free from the vice of arbitrariness and conform to the well-settled norms both positive and negative underlying Articles 14 and 16, which together with Article 15 form part of the Constitutional code of equality. Court reiterated that residence by itself, be it be within a State, region, district or lesser area within a district cannot be a ground to accord preferential treatment or reservation, save as provided in Article 16(3). It is not possible to compartmentalize the State into Districts with a view to offer employment to the residents of that District on a preferential basis. The impugned circular in so far as the award of bonus marks was declared to be illegal and unconstitutional.

In *Netai Bag* v. *State of West Bengal*[40], the court on the question of allocation of land to private parties after its acquisition for public purpose opined that generally when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. That would be a sure method of guaranteeing the compliance of mandate of Art 14 of the Constitution. Non-floating of tenders or not holding of public auction would not be in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Making an exception to the general rule could be justified by the State executive. The constitutional Courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality, nor the Courts can substitute their opinion for the bona fide opinion of the State executive. The Courts are not concerned with the ultimate decision but only with the fairness of the decisions making process. The government is entitled to make pragmatic adjustments and policy decision which may be necessary or called for under the peculiar circumstance. The courts cannot strike down a policy decision taken by the government merely because it feels that another decision would have been fairer

[39] AIR 2002 SC 2877, See also, *A.V.S. Narasimha Rao* v. *State of A.P.*, AIR 1970 SC 422.
[40] AIR 2000 SC 3313; See also, *M.P. Oil Extraction* v. *State of M.P,* AIR 1998 SC 145.

or wiser or more scientific or logical. Policy decision can be interfered with by the court only if such decision is shown to be patently arbitrary, discriminatory or mala fide[41]. It has been consistently held by Supreme Court that in a democracy governed by the rule of law, the Executive Government or any of its officers cannot be allowed to possess arbitrary powers over the interests of the individual. Every action of the Executive Government must be in conformity with reason and should be free from arbitrariness. The Government cannot be equated with an individual in the matter of selection of the recipient for its largesse. Whether any advertisement should have been issued or public auction or floating of tender should be dispensed with are matters which require pleadings in order to enable the state to explain or justify their action in the circumstance of the case. However, one of the methods of securing public interest when it is necessary to dispose of public or state owned property is by way of public auction or by inviting tenders. But such a rule is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but it must be shown that such an action was rational and not suggestive of discrimination. In the absence of specific allegations of the malafides, it cannot be said that mere violation of some alleged statutory provisions or safeguards would render the state action to be arbitrary in all the cases.

In *Y. Srinivasan Rao*v. *J. Veeraiah*,[42] it was held that the policy of the government to give preference to less educated youth over more educated youth in granting licence for running fair price shop was arbitrary and unreasonable as such policy amounts to allowing premium on ignorance, incompetence and consequently inefficiency.

In *Shri Ram Sugar Industries* v. *State of A.P.*,[43] the government of A.P. was given the powers to exempt any sugar industry from the payment of tax under the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act. The government formulated a policy to grant the exemption only to the co-operative societies on the ground that such a policy is in consonance with the directive principles of state policy. The majority[44] upheld the policy of the government holding that the government having discretion may legitimately adopt a general rule or principle to guide itself in the exercise of the discretion. The minority view[45] was that the adoption of such a policy predetermines the issue, leaving no scope for the exercise of the discretion. The authority entrusted with discretion must not, by adopting a rule or policy, disable itself from exercising its discretion.

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41 *State of M.P.* v. *Nanadlal Jaiswal*, AIR 1987 SC 251.
42 AIR 1993 SC 929.
43 AIR 1974 SC 1795.
44 Per *Alagiriswamy, H. R. Khanna, JJ. and A.N. Ray, C.J.*
45 Per *Mathew and Bhagwati, J.J.*

1.4 Policy Decisions and Relevant Factors; the Judicial Review

Policy decisions can be reviewed by the courts on the ground that the administration has not formulated the policy in the constitutional spirit or the statutory spirit. In policy matters, it is the duty of the administration to observe the limits prescribed by the legislature and act within those limits. If the administration transgresses those limits, the judiciary can check such transgression.

In *Ranjeet Singh* v. *Union of India*,[46] the guns manufacturing quota of the petitioner was curtailed by the government on the pretext of the new industrial policy. The court observed that the new policy permitted the existing business houses and the determination of the quota of a manufacturing unit has to be on the basis of relevant considerations, i.e., the production capacity of the unit, the quality of the guns produced, the economic viability of the unit, and the requirement of the administrative policy pertinent to the maintenance of the law and order and internal security. Since the government did not consider the relevant factors, the decision was held to be arbitrary.

In *Roberts* v. *Hopwood*,[47] the policy of the council to grant higher wages to workers over the national average wages was held to be in violation of the prescribed standard.

1.5 Legitimate Expectation and Policy Matters

The doctrine of legitimate expectation will apply if the two considerations are there, one, if the person is made to believe that a particular course of action will be followed, or the person relies on a past policy or guidelines governing the course of action.

In *Punjab Communications Ltd.* v. *Union of India*,[48] the Asian Development Bank sanctioned a loan for setting up wireless telecom services for eastern U.P and the govt. invited tenders for it, but the project was not sanctioned for pretty long time and ultimately the loan was withdrawn. Thereafter the govt. took decision of covering more States with a new policy with funds generated from own resources. The appellant challenged the decision of changing the policy alleging state-managed fraud leading to denial of appellant's legitimate expectation. The apex court opined without deliberating on the facts of the in fructuous petition as the ADB loan had been withdrawn that the new government policies are wider and there can be no legitimate expectation in regard to the ADB loan contract and in any event the new policy is based on overriding considerations of public interest and cannot be questioned.

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46 AIR 1981 SC 461.
47 (1925) AC 578.
48 AIR 1999 SC 1801.

The court quoted with approval the observations of Lord *Diplock* in *Hughes* v. *Department of Health and Social Security*[49],

> Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government. An expectation could be based on an express promise or representation or by established past action of settled conduct. The representation must be clear and unambiguous.

The court referred to Indian cases highlighting that the doctrine of legitimate expectation in the substantive sense has been accepted as part of Indian law and that the decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence[50]. In regard to judicial review of policy matter, the court cited with approval the observations of *R* v. *Secretary of State for Transport,*[51]where the learned Judge laid down that the Wednesbury reasonableness test alone applied for finding out if the change from one policy to another was justified. *Laws, J.* stated:

> The Court is not the Judge of the merits of the decision maker's policy .... The public authority in question is the Judge of the issue whether 'overriding public interest' justifies such a change in policy ... But that is no more than saying that a change in policy, like any discretionary decision by a public authority, must not transgress Wednesbury principles.

The result is that change in policy can defeat a substantive legitimate expectation if it cannot be justified on Wednesbury reasonableness. Decision maker has the choice in the balancing of the pros and cons relevant to the change in policy and therefore, the choice of the policy is for the decision-maker and not for the Court, The legitimate substantive expectation merely permits the Court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made.

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49 (1985) AC 778.

50 *Navjyoti Co-op. Group Housing Society* v. *Union of India* (1992) 4 SCC 477; *Food Corporation of India* v. *M/s Kamdhenu Cattle Feed Industries* (1993) 1 SCC 71; *Union of India* v. *Hindustan Development Corporation* (1993) 3 SCC 499.

51 BC (1994) 1 WLR 74.

1.6 Natural Justice Principles in Policy Matters and Judicial Review

The policy matters can be reviewed on the basis of procedural impropriety, i.e., if the administration fails to comply with the procedures prescribed by the statute. Therefore in such matters the courts determine the procedures as directory or mandatory and thereafter regulate the policy based actions.

In *Kishan Prakash* v. *Union of India*[52], the government while framing the scheme need not consult any of the parties before change in the scheme as there is no obligation on it to do so. Neither the parties can demand such consultation each time there is change in the scheme. In matters of legislative nature, consultation is not required unless the law requires the same to be done. However the power of government to frame the scheme without guidelines is bad.

In *Ramchandra Murarilal Bhattad* v. *State of Maharashtra,*[53] the change in the policy decision by the Mumbai Metropolitan Region Development Authority in rejecting the earlier bids and inviting fresh bids was challenged before the apex court on the grounds that the authority has not given any reasons for the rejection of bids, the purported shift in the policy is impermissible in law. It was contended on behalf of the authority that the appellant has not given the bid second time, and the judicial review is not permissible as it was a matter of policy decision and there is no violation of any constitutional or statutory right. Upholding the judgment of the Bombay high court, the Supreme Court opined that the power to deal with a contractual matter and a power of a statutory authority to exercise its statutory power in determining the rights and liabilities of the parties are distinct and different. Whereas reasons are required to be assigned in a case where civil or evil consequences may ensue, the same may not be necessary where it is contractual in nature, save and except in some cases. Some reasons may be required to be assigned for rejecting the bid, but in the instant case no reason was required to be assigned as there has been a change in the policy decision. Although the terms of the invitation to tender may not be open to judicial scrutiny; yet the award of contract by the Government to agencies can be scrutinized by the courts, in exercise of their power of judicial review, to prevent arbitrariness or favouritism.[54] However, the court may refuse to exercise its jurisdiction, if it does not involve any public interest. The expansive role of Courts in exercising its power of judicial review is not in dispute but each case must be decided on its own facts.

In *Star Enterprises* v. *City and Industrial Development Corporation of Maharashtra,* Ranganath Mishra, J., opined that in recent times judicial review

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52 AIR 2001 SC 1493.

53 AIR 2007 SC 401.

54 *Directorate of Education* v. *Educomp Datamatics Ltd.* (2004) 4 SCC 19.

of administrative action has become expansive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertaking have grown up, the stake of public exchequer is also large justifying larger social audit, judicial control and review by opening of public gaze. This necessitates recording of reasons for executive actions including cases of rejection of highest offers which assures credibility to the action, disciplines public conduct and improves the culture of accountability.[55] On the question of invoking the public trust doctrine, the court emphasized that the Public trust doctrine provides that discretionary jurisdiction and powers should not be arbitrarily exercised but the powers conferred there under on the authority cannot be stretched so as to disentitle the authority to alter any scheme,[56] and a policy decision may be subjected to change from time to time, the same by itself does not render the policy decision illegal or otherwise vitiated in law.

1.7 Concluding Observations

The efficacy of judicial check on the improper exercise of the powers by the government is beyond doubt. The contours of judicial review expressed in *Marbury'*scase have been constantly improved upon by the judiciary and one could not find the judicial wing without an answer to the colorable and arbitrary exercise of power the only exception to judicial intervention had been the pure administrative matters including the policy decisions. This hesitation was on the assumption that the government is answerable to the legislature as well as to the people of the country. The assumption was based on the evolution of the powers of the judiciary in British system wherein the Parliament is considered supreme and the judiciary is concerned only with the legality of the action of the government so as to ensure that the administration functions within the four corners of the Statute.

In a country like India, the judiciary enjoys magnanimous powers and its sphere of powers has been constantly been increasing. The paramount duty of the judiciary is to uphold the Constitution which is supreme. Therefore, it not only determines the legality, but also ensures the constitutionality. Be it may legislative, judicial or executive powers, the administration is answerable to judiciary. Even in policy matters, the judiciary has the power to determine that the policy is conceived and adopted in furtherance of the constitutional mandate, i.e., it is fairly based on the directive principles of State policy; and it ensures observance of fundamental principles enshrined therein. It is the duty of the courts to maintain that the administration adopts and executes the policy in

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55 (1990) 3 SCC 280.

56 *Banglore Medical Trust v. B.S. Muddappa* (1991) 4 SCC 54.

furtherance of the statutory mandate; and observes the principles of fair play, i.e., public interest, wednesbury reasonableness, processual fairness.

In *British Oxygen Co. Ltd. v. Ministry of Technology*,[57] *Lord Reid* pointed out that a minister having discretion may formulate a policy or make a limiting rule as to the future exercise of his discretion, if he thinks good administration requires it, provided that he listens to any applicant who has something new to say. The general rule is that anyone who has to exercise a statutory discretion must not shut his ears to an applicant.

[57] (1970) 3 WLR 488.

JUDICIAL INTERPRETATION ON MEDICAL NEGLIGENCE UNDER THE *CONSUMER PROTECTION ACT*, 1986

J. Starmi, M.L.*

1.1 Introduction

In India, the year 1986 is a 'Magna Carta' in the history of Consumerism. It was this year that witnessed the enactment of the Consumer Protection Act. The consumer protection in India is not a post-modern thought, it has evolved through centuries. Its roots can be found in Manu Smiriti. Consumer Protection has had relevance since the existence of consumers in India. Manu Smriti lays out a charter of ethics for sellers on how to sell consumer products to consumers. It must be *uberimaefidae*[1] and also states that the Caveat emptor[2]. It also specifies the penalties that must be handed out to sellers who are unethical in their actions. Manu Smriti prohibits the mixing of one commodity with other. It also mandates proper disclosure of quantity and quality. In itself Manu Smriti does not focus on consumer protection but does show the concern of ancient society on consumerism matters. Every year 15th of March is celebrated as National Consumer Rights Day marking the day when Bill for Consumer Rights was moved in the US Congress. Medical profession is one of the most oldest professions of the world and is the most humanitarian one. There is no better service than to serve the suffering, wounded and the sick. Aryans embodied the rule that, Vidyonarayanoharihi (which means doctors are equivalent to Lord Vishnu). Since long the medical profession is highly respected, but today a decline in the standard of the medical profession can be attributed to increasing number of litigations against doctors for being negligent narrowing down to "medical negligence"[3]. Hospital managements are increasingly facing complaints regarding the facilities, standards of professional competence, and the appropriateness of their therapeutic and diagnostic methods. When incidents like these began to rise, the judiciary plays a vital role to protect the consumer from medical negligence. This article broadly speaks about the medical negligence under *Consumer Protection Act*, 1986 and how judiciary responds the negligent activities of the doctors.

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1 *Uberrimaefidei*, is a Latin phrase meaning "utmost good faith" (literally, "most abundant faith").

2 Under the doctrine of caveat emptor, the buyer could not recover from the seller for defects on the property that rendered the property unfit for ordinary purposes. The only exception was if the seller actively concealed latent defects or otherwise made material misrepresentations amounting to fraud.

3 Manjhurishahoo, "Judicial Interpretation of Medical Negligence Under Consumer Protection," available at http://www.manjhurishahoo.com (last accessed on 16.6.2012).

1.2 Medical Negligence

Negligence is a breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are duty; breach; and resulting damage.[4] The essential ingredient of *mensrea* cannot be included from consideration when the charge in a criminal court consists of criminal negligence. Medical negligence defined as, the failure to exercise rational caution and capability during diagnosis and treatment over a patient in accordance to the prevailing standards in force at that point of time. In case of *Bolam v. Friern hospital management committee,*[5] the test for establishing medical negligence was set. "The doctor is required to exercise the ordinary skill of a competent doctor in his field. He must exercise this skill in accordance with a reasonable body of medical opinion skilled in the area of medicine."[6] In *Dr. Kunal Saha v. Dr. Sukumar Mukherjee and Ors.,* decided on 1st June, 2006, the National Consumer Commission summarised the medical negligence law.[7] Medical profession has been brought under the Section 2(1) (o) of the *Consumer Protection Act*, 1986. Section 2 (o) of the *Consumer Protection Act,* 1986 has defined the term services.[8] In a significant ruling in *Vasantha P. Nair v. Smt. V.P. Nair*[9] the national commission held a patient is a 'consumer' and a medical assistance was a 'service'. A doctor is held liable for only his acts (other than cases of vicarious liability). Vicarious liability arise in case of government hospital though doctor responsible but hospital has to pay the compensation.

1.2.1 Medical Negligence in Antagonism to Professional Doctors

The following legal issues have been addressed and responded to by different forums and Courts in India. From the time of Lord Denning until now it has been held in several judgments that a charge of professional negligence against the medical professional stood on a different footing from a charge of negligence

4 *Jacob Mathew* v. *State of Punjab*, 2005 (3) ALT (Cri.) 1 (SC): 2005 (5) SCJ 601.

5 (1957) 1 WLR 582.

6 Modi, *Medical Jurisprudence and Toxicology*, Butterworths, New Delhi, 22nd Edn. (1999).

7 Manjhurishahoo, "Judicial Interpretation of Medical Negligence Under Consumer Protection", available at http://www.manjhurishahoo.com, (last accessed on 16 June 2012).

8 "Service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, [housing construction], entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

9 I (1991) CPJ 685.

against the driver of a motor car. The burden of proof is correspondingly greater on the person who alleges negligence against a doctor. It is a known fact that with the best skill in the world, things sometimes went wrong in medical treatment or surgical operation. A doctor was not to be held negligent simply because something went wrong.[10] The National Commission as well as the Apex Court in catena of decisions has held that the doctor is not liable for negligence because of someone else of better skill or knowledge would have prescribed a different treatment or operated in a different way. He is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals.[11]

The Hon'ble Supreme Court in the case of *Dr. Laxman Balkrishna v. Dr. Triambak,*[12] has held the above view that "All medical negligence cases concern various questions of fact, when we say burden of proving negligence lies on the Complainant, it means he has the task of convincing the court that his version of the facts is the correct one". In the case of *Indian Medical Association v. V.P. Shantha and Others,*[13] the Apex Court has decided that the skill of a medical practitioner differs from doctor to doctor and it is incumbent upon the Complainant to prove that a doctor was negligent in the line of treatment that resulted in the life of the patient. Therefore, a Judge can find a doctor guilty only when it is proved that he has fallen short of the standard of reasonable medical care. The Complainant to prove the negligence or deficiency in service by adducing expert evidence or opinion and this fact is to be proved beyond all reasonable doubts. Mere allegation of negligence will be of no help to the Complainant.[14]

In *Smt. Vimlesh Dixit v. Dr. R.K. Singhal,*[15] the court held that, only the report of the Chief Medical Officer of Haridwar has been produced wherein it said that the patient is a case of post-traumatic wrist drop. It is not said that it is due to any operation or the negligence of the doctor. The mere allegation will not make out a case of negligence, unless it is proved by reliable evidence and is supported by expert evidence. It is true that the operation has been performed. It is also true that the Complainant has many expenses but unless the negligence of the doctor is proved, she is not entitled to any compensation. In *Dr. Kamta Prasad Singh v. Nagina Prasad,*[16] the forum has decided from this yardstick, post-operative infection or shortening of the leg was not due to any negligence or deficiency in

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10 S.V. Joga Rao, "Medical Negligence Liability under the Consumer Protection Act: A Review of Judicial Perspective", *Symposium* (2009), Vol. 25, Issue 3, pp. 361-37.

11 Prof. (Dr.) A.S. Deoskar, *Medical Jurisprudence, Toxicology and Forensic Science for Court Room with Case Laws*, I Edn., All India Reporter (2010), p. 337.

12 AIR 1969 SC 128.

13 (1995) 6 SCC 651.

14 *Smt. Savitri Singh* v. *Dr.Ranbir P.D. Singh and others*, I (2004) CPJ 25 (Bihar).

15 I (2004) CPJ 123 (Uttaranchal).

16 III (2000) CPJ 283 (WB).

service on the part of the opposite party Appellant. Deficiency in service thus cannot be fastened on the opposite party.

1.3 Proof of Medical Negligence

The principle of *res ipsa loquitur*[17] has not been generally followed by the Consumer Courts in India including the National Commission or even by the Apex Court in deciding the case under this Act[18]. It has been held in different judgments by the National Commission and by the Hon'ble Supreme Court that a charge of professional negligence against a doctor stood on a different footing from a charge of negligence against a driver of a vehicle. The burden of proof is correspondingly greater on the person who alleges negligence against a doctor. It is a known fact that even with a doctor with the best skills, things sometimes go wrong during medical treatment or in a surgery. A doctor is not to be held negligent simply because something went wrong[19]. Simply because the patient's eyesight was not restored satisfactorily, this account alone is not grounds for holding the doctor guilty of negligence and deficient in his duty. It is settled law that it is for the Complainant to prove the negligence or deficiency in service by adducing expert evidence or opinion and this fact is to be proved beyond all reasonable doubt.

Mere allegation of negligence will be of no help to the Complainant[20]. An allegation of medical negligence is a serious issue and it is for the person who sets up the case to prove negligence based on material on record or by way of evidence. The complaint of medical negligence was dismissed because the applicant failed to establish and prove any instance of medical negligence[21]. Merely because the operation did not succeed, the doctor cannot be said to be negligent and the appeal of the doctor was allowed[22]. In another case, an X-ray report indicated a small opacity that similar to an opaque shadow that becomes visible for many causes other than a calculus[23]. It could not be assumed that still stone existed in the right kidney that had not been operated upon. Under the circumstances, we do not think that any case of negligence has been made by the Complainant. This petition is, therefore, allowed[24].

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17 *Res ipsa loquitur* is a legal Latin phrase which translates to "the thing speaks for itself."

18 Manjhurishahoo, "Judicial Interpretation of Medical Negligence Under Consumer Protection", available at http://www.manjhurishahoo.com (last accessed on 16 June 2012).

19 *Supra* note 10.

20 *Dr. Akhil Kumar Jain* v. *Lallan Prasad*, II (2004) CPJ 504.

21 *Mam Chand* v. *Dr. G S Mangat of Mangat Hospital*, I (2004) CPJ 79 (NC).

22 *Dr. (Smt) Kumud Garg* v. *Raja Bhatia*, I (2004) CPJ 369.

23 SV Joga Rao, "Medical Negligence Liability Under the Consumer Protection Act: A Review of Judicial Perspective", *Symposium*, 2009, Vol. 25, Issue 3, pp. 361-367.

24 *Dr.Harkanwaljit Singh Saini* v. *Gurbax Singh and Anr.*, I (2003) CPJ 153 (NC).

1.3.1 Role of Expert Evidence on Medical Negligence

The medico-legal expert is not a detective. He may use his knowledge and intelligence to help the police to solve a crime. His role should be to furnish the police with specific information on matters of which he has specialized knowledge. All medical negligence cases concern various questions of fact, when we say burden of proving negligence lies on the Complainant, it means he has the task of convincing the court that his version of the facts is the correct one. No expert opinion has been produced by the Complainant to contradict the report of the Board of Doctors. The appeal of the Complainant was dismissed with costs as no expert opinion has been produced by him.[25] The Commission cannot constitute itself into an expert body and contradict the statement of the doctor unless there is something contrary on the record by way of an expert opinion or there is any medical treatise on which reliance could be based.[26] In this case there was a false allegation of urinary stone not being removed as shown by a shadow in the x-ray. The burden of proving the negligent act or wrong diagnosis was on the Complainant and the appeal was dismissed in another case of alleged medical negligence as no expert evidence was produced.[27]

In *Sardool Singh v. Muni Lal Chopra and another*[28], is not a case of apparent negligence on the part of the surgeon in conducting the operation, but about the quality of the plate used for fixing the bone. The court held that, the Complainant has not produced any expert witnesses to prove that there was any fault in the performance of the operations. The District Forum rightly held that the Complainant had failed to prove his case. This expert evidence is useful for come to a positive finding in National Commission as well as Apex court.[29] Many times the complaint has been dismissed as the Complainant failed to discharge the onus to prove negligence or deficiency in service[30] because of lack of expert evidence.

1.4 Medical Profession under the Criminal Law

The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code enacted as far back as in the year 1860 sets out a few vocal examples. Section 88[31] in

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25 *Amar Singh* v. *Frances Newton Hospital and Anr.*, I (2001) CPJ 8.

26 *Dr. Karkanwaljit Singh Saini* v.*Gurbax Singh and another*, I (2003) CPJ 153 (NC).

27 *N.S. Sahota* v. *New Ruby Hospital and Ors.*, II (2000) CPJ 345.

28 I (1999) CPJ 64 (Punjab).

29 *Dr. Manjit Singh Sandhu* v.*Uday Kant Thakur and others*, III (2002) CPJ 242.

30 *Jai Prakash Saini* v. *Director, Rajiv Gandhi Cancer Institute and Research Centre and Ors.*, I (2003) CPJ 305 (Delhi).

31 *The Indian Penal Code, 1860, s.* 88, states that, "Act not intended to cause death, done by consent in good faith for person's benefit. - Nothing which is not intended to cause death, is an

the Chapter on General exceptions provides exemption for acts not intended to cause death, done by consent in good faith for the benefit of the patient. Section 92,[32] of *The Indian Penal Code, 1860,* provides for exemption in good faith for the benefit of a person without his consent though the acts cause harm, to a person has not consented to suffer such harm there are four exemptions listed in the section which is not necessary in this context to deal with. Sections 52,[33] 80, 81, 83, 88, 90, 91, 92, 304-A[34] , 336[35] , 337[36] and 338[37] of The *Indian Penal Code*, 1860, all cover the acts of medical malpraxis. It is well known that a doctor owes a duty of care to his patient. This duty can either be a contractual duty or a duty arising out of tort law. In some cases, however, though a doctor-patient relationship is not established, the courts have imposed a duty upon the doctor. In the words of the Supreme Court "every doctor, at the governmental hospital or elsewhere, has a professional obligation to extend his services with due expertise for protecting life." These cases are however, clearly restricted to situations where there is danger to the life of the person. Impliedly, therefore, in other circumstances the doctor does not owe a duty.

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offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the sore to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk or that harm".

32 *The Indian Penal Code, 1860*, Section 92 , "Act done in good faith for benefit of a person without consent.- Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent , if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it possible to obtain consent in time for the thing to be done with benefit."

33 *Id.*, Section 52 , "Good faith".- Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

34 *Id.*, Section 304A. states that "whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine, or with both".

35 *Id.*, Section 336, "Act endangering life or personal safety of others Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both".

36 *Id.*, Section 337, "Causing hurt by act endangering life or personal safety of others Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both".

37 *Id.*, Section 338, "Causing grievous hurt by act endangering life or personal safety of others Whoever causes grievous hurt to any person to doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both".

1.5 Reasonable Care and Protection

The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Failure to use due skill in diagnosis with the result that wrong treatment is given is negligence.[38] In medical negligence cases, it is for the patient to establish his case against the medical professional and not for the medical professional to prove that he acted with sufficient care and skill.[39] The National commission has also taken the same view observing that a mishap during operation cannot be said to be deficiency or negligence in medical services.[40] Negligence has to be established and cannot be presumed.[41] Both the lower Forum have held that there is no evidence brought on record by the Complainant to show that there was any negligence by the Respondent while implanting the lens in the eye of the Complainant resulting in a persistent problem in the left eye.[42]

In the case of *Nirmalendu Paul v. Dr. P.K. Bakshi and anr.,*[43] the forum held that there is hardly any cogent material to substantiate the allegation contained in the petition of Complainant. Hence, the Complainant has failed to prove the allegations against the opposite parties. Again, the National Commission in *Sethuraman Subramaniam Iyer v. Triveni Nursing Home and anr.,*[44] National Commission held that expert opinion in medical negligence played an effective role. In another case apprehended that, the absence of such evidence regarding the cause of death and absence of any expert medical evidence, the Complainants have failed to prove negligence on the part of the opposite parties.[45] As per the law, a defendant charged with negligence can clear himself if he shows that he acted in accordance with the general and approved practice. It is not required in the discharge of his duty of care that he should use the highest degree of skill, since this may never be acquired. Even a deviation from normal professional practice is not necessary in all cases evident of negligence[46]. In the case of *Martin F. D'Souza v. Mohd. Ishfaq,*[47] the Hon'ble Supreme Court of India quite explicitly addresses the concerns of medical professionals regarding the

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38 *Halsbury's Laws of England*, Vol. 30, 4th Edn., p. 36.

39 Refer to the decision of the Madhya Pradesh High Court in the case of *Smt. Sudha Gupta and Ors.* v. *State of M.P. and Ors.*, 1999 (2) MPLJ 259.

40 *Marble City Hospital and Research Centre and Ors.*v. *V.R. Soni*, II (2004) CPJ 102 (MP).

41 Refer to the decision of the National Commission in the case of *Kanhiya Kumar Singh* v. *Park Medicare and Research Centre*, III (1999) CPJ 9 (NC) - (2000) NCJ (NC) 12. A similar view has been taken by the MRTP Commission in the case of *P.K. Pandey* v.*Sufai Nursing Home*, I (1999) CPJ 65 (MRTP) - 2000 NCJ (MRTP) 268. Followed by this, refer to the Commission in *Vaqar Mohammed Khan and Anr.* v. *Dr. S. K. Tandon*, II (2000) CPJ 169.

42 *Inderjeet Singh* v. *Dr. Jagdeep Singh*, III (2004) CPJ 20 (NC).

43 III (2000) CPJ 79.

44 1998 CTJ 7.

45 *Surinder Kumar (Laddi) and Anr.* v. *Dr. Santosh Menon and Ors.*, III (2000) CPJ 517.

46 *Rajinder Singh* v. *Batra Hospital and Medical Research Centre and Anr*, III (2000) CPJ 558.

47 *Martin F. D'Souza* v. *Mohd. Ishfaq,* 2009 (2) SC 40.

adjudicatory process that is to be adopted by Courts and Forums in cases of alleged medical negligence filed against Doctors.

1.6 Conclusion

Therefore, though it is necessary to expose the errant practices being undertaken by doctors, at the same time it is in the interest of the patients to also protect the rights of the doctors and to understand the risks involved while they are dealing with complicated cases. Doctors should be more careful to perform their duties. Gross Lack of competency or gross inattention, or wanton indifferences to the patient's safety can only initiate a proceeding against a doctor. In this Act, Consumer dispute is only deal with compensation part. But its procedural aspect is too lengthy. It should disposed cases in speedy way. A healthy medical environment can create a great society. It is strongly recommended that the services provided at the government hospitals should be brought within the ambit of the services under the Consumers Protection Act, 1986, in order to ensure the accountability and promote sense of responsibility among the personnel who are employed in these hospitals to look after the welfare of general public and restore the faith of general public in these institutions.

TRIAL BY MEDIA : A SOCIO-LEGAL DILEMMA IN A DEMOCRATIC FRAMEWORK

Jasneet Kaur Walia*

1.1 Introduction

The Constitution of our Democratic Republic may not have a specific inclusion of freedom of Press as a fundamental right in Part III , but the Indian judiciary[1] spared no time in reading freedom of Press as an integral part of the freedom of speech and expression under Article 19 of the Constitution of India. The reasons may be historical, social and political. Historical, because under the British rule the Indians very well came to realize the importance of free press as a medium of expression and spreading one's opinion to create a mass movement; social, because the people have a right to know and be informed about matters of public interest; and political, because press helps in creating an informed citizenry which is a pre-requisite for a successful democracy.

It is needless to say that because press enjoys such an indispensable position in a democracy that its freedom was recommended to be included in the list of fundamental rights under Part III of the Indian Constitution.[2] This aspect of freedom of press brings one tete-a-tete with many fundamental questions as to whether the press enjoys unrestrained freedom? Whether freedom to spread information means a license to speak and disclose everything? Should reporting include reporting of judicial proceedings and if so, should press be allowed to

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1 Justice Bhagwati's observation in *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 578 (640), Para 77: " It was possible that a right does not find an express mention in any clause of Article 19 and yet it may be covered by some clause of that Article; freedom of press is one such right."

2 The National Commission to review the working of the constitution (also referred to as the Constitution Commission or NCRWC) was appointed by the President on 23 February2000. Completion of Fifty years of the working of the constitution was considered an appropriate occasion to take stock of the situation –of its successes and failures. As its name indicated, the brief of NCRWC was to review the working of the Constitution. To assess whether the objectives of the great founding fathers , as enshrined in the Constitution ,had been fulfilled during the half century (1950-2000), the Commission was expected to act independently and objectively, without fear or favour and in the spirit of serving the best interests of the country and thereby helping the Government and Parliament to consider desirable reforms. After more than two years' deliberations, the Commission submitted its final report to the Government on 31 March 2002. It contained nearly 250 recommendations- some of them of vital importance for the survival of democratic polity and free institutions and for ushering in an era of good citizen-friendly governance. Some of the positive and welcome recommendations in regard to Fundamental Rights were for the inclusion of freedom of press and other media and of information.

start up a parallel trial of the accused? The questions may be many and well-founded as well, however, it is important to state here that since the freedom of Press flows from the freedom of expression which is guaranteed to all "citizens" by Article 19(1) (a), the press stands on no higher footing than any other citizen, and cannot claim any privilege unless conferred specifically by law.[3] Similarly it cannot be subjected to any special restrictions which are otherwise not warranted by the Constitution. Thus, the press, in India, is subjected to the constitutional limitations laid down under Clause (2) of Article 19[4] which also limits the freedom of speech and expression under Article 19 (1).

1.2 Trial by Media: Print Media and Electronic Media

Freedom of expression comprehends not only the liberty to propagate one's views but also the right to print matters which have either been borrowed from someone else or are printed under the direction of that person.[5] It also includes the liberty of publication and circulation[6], through any medium of expression, including printing[7].The importance of media in spreading information cannot be undermined ,similarly , its overstepping of the constitutional limits cannot be overlooked.

In this regard, it is significant to mention that the extensive coverage of crime and information about suspects, accused, victims and witnesses, both in the print as well as in electronic media prompts a person to go into the legal nuances of trial by media. When a sensational criminal case comes to be tried before the court, public curiosity experiences an upsurge. Newspapers –most of them- compete with each other, in publishing their own version of the facts. Some of them employ their own reporters, to unearth the details not otherwise available. Besides, the coming of electronic media has created even a more wide circulation of information, generating more and more public opinion about an issue which is sub-judice. This enthusiasm is understandable. The thirst for sensational news is a natural human desire. However, investigatory journalism has its risks. The law does not prohibit it in abstract. But the law does require the players in this activity to keep within certain limits. These limits primarily flow from:[8]

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3 *Sakal Papers* v. *Union of India* (1962) 3 SCR 842, (862).

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

5 *Express Newspapers* v. *Union of India* (1959) SCR 12.

6 *RomeshThapar* v. *State of Madras* (1950) SCR 594 (607).

7 *L.I.C.* v. *Manubhai*, AIR 1993 SC 171.

8 P.M. Bakshi, *The Constitution of India* (2005), p. 43.

(a) the right to reputation;

(b) the right to privacy; and

(c) the law of contempt of court.

Right to reputation requires that an allegation casting an adverse reflection on the character of an individual should not be published unless the publication falls within one of the exceptional situations, recognized in this regard by the law. If the situation does not fall within this list of "privileged" or protected situations, then the publisher would be guilty of defamation. Similarly, right to privacy of one's self, family, procreation etc. is an important right read into Article 21 of the Constitution[9] and one has to be extremely cautious so that the reporting of certain information must not infringe the other's "right to be let alone".

The law of Contempt of Court operates on a slightly different plane. The paramount considerations here are- dignity of the court and fairness of trial. Hence, it follows that once a case has reached the court, no one is allowed to publish his own version of the facts because such an attempt often interferes with the basic legal premise on which the criminal legal philosophy is based i.e. presumption of innocence of the accused until proved guilty. Violation of this rule amounts to contempt of court because the protection of fair administration of justice is the prerogative of the Contempt of Courts Act, 1971.[10]

1.3 Trial by Media: Issues Involved

In view of the foregoing considerations, it becomes imperative to consider the importance of the freedom of press and the media, its possible abuse and the required safeguards. It is well established that in a democracy, the freedom of speech and of the press is indispensable. The framers of our Constitution recognized the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective citizenry. In the political scenario, an informed citizenry is a precondition for meaningful governance, similarly in the societal attitudes; a culture of open dialogue must be promoted.[11] However, the likelihood of abuse of a freedom also can't be ignored and there is always a possibility that if left unbridled, freedom of speech can do more harm than good. It should be pointed out that when there is a conflict between the public interest behind free press and any other competing interest, it is for the courts to strike the balance between the two interests. But in the present context,

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9 *R. Rajagopal* v. *State of T.N.* (1994) 6 SCC 632.

10 The punishment for contempt of court, that is, scandalisation of a judge individually or the administration of justice, in general, is contained in Section 12 of the *Contempt of Courts Act*, 1971.

11 Dr. B.S. Chauhan, J., in *S. Khushboo* v. *Kanniammal*, (2010) 5 SCC 600 para 45.

the court has to safeguard its own interests vis-a-vis a free press. Thus, it requires a holistic analysis of the system.

To begin with, the possibility of state monopoly of the media has to be ruled out because it would mean state's control over one's mind which is the very antithesis of democracy. In the words of Pt. Jawahar Lal Nehru,

"I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or a regulated press."[12]

It is noteworthy that because of the press and the media, in a democratic India, we boast of being an informed electorate. The media has always kept the people well informed about the issues of the day. It is an open truth that had media not brought up the important cases of the murders of Jessica Lal, Aarushi Talwar, Nitish Katara, Priyadarshini Mattu etc. to the knowledge of the common people, justice would have been almost denied to them.

The other possible safeguards to curtail the abuse of the freedom of press would be censorship and finally punishment. Such a remedy is contained firstly, within the Constitution i.e. Article19 (2) and subsequently, in the legislations passed within the ambit of the Constitution e.g. Contempt of Courts Act, 1971. Thus, an attempt is seen to bring the tug of war between freedom of media on one hand, and free trial on the other, to an end.

1.4 Trial by Media: Social Implications

In modern times, due to increase in the literacy rate, there is a rapid increase in readership of newspapers and magazines and hence they have a wide circulation. An increasing demand of newspapers gives to the media organizations a coveted role of shaping the popular beliefs and opinions. This leads one to apprehend that whether these organizations, at all times, are carrying on their work conscientiously. There may be many factors playing their roles, be it political influences, commercial interests or personal gains. In such a scenario, it becomes all the more important to put a bridle on such a freedom.

Today is an era of liberalization wherein private players have also entered the market and the competition is increasing. In such a corporatization of the mass media, what is essential is that even if a few large establishments hold an upper hand in the market for disseminating news, it is essential to protect the rights of smaller players, especially those who represent dissenting views.[13]

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12 D.D. Basu, *Law of Press* (2002), p.48.

13 K.G. Balakrishnan, "Reporting of Court Proceedings by Media and the Administration of Justice", (2010) *PL* July 10.

The second dimension is that of preventing a "race to the bottom" in the standards of reporting which may occur in an atmosphere of intense competition between media establishments. It has been noted that in the race for grabbing the attention of viewers and readers, reporting often turns to distortion of facts and sensationalisation. The pursuit of commercial interests also encourages intrusive newsgathering methods which frequently impede upon the privacy of the people who are the subject of such coverage.

In respect of court proceedings, the problem finds its worst manifestation in the coverage of sub judice matters where the reporting can be clearly prejudicial to the interests of the litigating parties. This problem is heightened in instances of high profile criminal investigations and trials, especially in matters involving celebrities wherein media reporting can shape popular sentiments and hence create undue pressure on judges and lawyers. In such a scenario, there is an utter need for the members of the press to respect the balance between the constitutional guarantee of "freedom of press" on the one hand and the "right to fair trial" on the other.[14]

1.5 Trial by Media: Constitutional and Legal Safeguards

Like the freedom of speech, the media is also subjected to the restrictions given under clause (2) of Article 19. Consequently, "contempt of court" as a reasonable restriction on the freedom of speech affects media also, both print and electronic, in a like manner. In relation to the freedom of speech and expression, there are three sorts of contempt of court: (a) one kind of contempt is scandalizing the court itself; (b) there may be likewise a contempt of court in abusing parties who are concerned in causes in the Court: (c) there may also be a contempt in prejudicing mankind against persons before the cause is heard. But the above classification is by no means exhaustive.[15] Broadly speaking, it consists of any conduct that tends to bring the administration of justice into disrespect or to obstruct or interfere with the due course of justice.[16] However, there is another important proposition which has to be reconciled with the strict interpretation of contempt of court, which provides that "Justice" and not judge should be the keynote and creative journalism and activist statesmanship for judicial reform cannot be jeopardized by an undefined apprehension of contempt action.[17] Moreover, the positive aspects of reporting of judicial proceedings by the media cannot be overlooked completely. Therefore, in this regard, it is important that the notions of contempt of court, fair trial and media trial are well postulated.

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14 *Ibid.*

15 *Id.*, p. 100.

16 The proposition is codified in Section 2(b) (iii) of *Contempt of Courts Act*, 1971.

17 K. Iyer, J., *Mulgaonkar (in re:)*, AIR 1978 SC 727.

The expression "contempt of court" comprises of two kinds of contempt, - civil and criminal[18] and since Article 19 (2) of the Constitution lays down a limitation on the freedom of speech, it is obvious that Article 19 (2) refers to criminal contempt only because where civil contempt deals only with wilful disobedience to any judgment, order etc. of the court or wilful breach of any undertaking given to a court, criminal contempt means the publication (whether by words, spoken or written, or by signs or by visible representation or otherwise) of any matter or the doing of any other act whatsoever which:[19]

(a) scandalizes or tends to scandalize or lowers or tends to lower the authority of any court; or

(b) prejudices or interferes or tends to interfere with, the due course of any judicial proceeding; or

(c) interferes or tends to interfere with or obstructs or tends to obstruct the administration of justice in any other manner.

The liability of the media for criminal contempt rests on the premise that where any communication is likely to interfere with the administration of justice, anybody who is responsible for publishing such matter will be liable for contempt of court unless he can come under any of the defences provided for in the Act. [20] It is pertinent to note here that do publications in the media affect the judges?

The American view appears to be that judges are not liable to be influenced by media publication, while the Anglo-Saxon view is that judges, at any rate may still be sub-consciously influenced and because certain members of the public may think that judges are influenced, therefore, such a situation attracts the principle that 'justice must not only be done but must be seen to be done'.[21] The Anglo Saxon view appears to have been accepted by the Supreme Court as can be seen by a close reading of the judgment in *Reliance Petrochemicals* v. *Proprietor of Indian Express.*[22] Thus, every care must be taken by the media so that any reporting by it of a matter pending before a court must not result in a trial by public, instead of by the court whose function is to administer justice.

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18 Section 2(a)-(c) of the *Contempt of Courts Act*, 1971.

19 *Ibid.*

20 *Supra* note 12.

21 The 200th Report of the Law Commission of India on "Trial by Media- Free Speech and Fair Trial under the *Criminal Procedure Code*,1973" (New Delhi- August 2006), p. 46.

22 1988 (4) SCC 592.

1.6 Trial by Media: Judicial Attitude

An unprecedented growth in the powers and role of Judiciary in recent years has, infact, pushed it into the public glare. It is the people themselves who repose their faith in the judiciary for every issue, be it a matter of admission of children in schools or banning smoking in public places etc by filing public interest litigations. However, so much intervention by the Judiciary into the domains of the Executive and the Legislature has often led to sharp confrontation between the judiciary and the public (often members of the media) which has, in turn, prompted the courts to invoke the contempt jurisdiction.[23]

The law of contempt requires the balancing of two vital but ,often, competing democratic values- the right to free speech and the necessity to preserve public confidence in the judicial system. In a democracy where individuals have a freedom of speech and expression, even the Judiciary, like any other institution, is not free from criticism. The right to criticize judgments has been many times recognized.[24] However, there is also a need to protect the judiciary from indignity so that the public continues to repose its faith in the judicial system.

The principle test applied by the courts in India in matters of criminal contempt, thus, was the test of erosion of public confidence whereby a distinction was drawn between a personal attack upon a judge which amounts to libel as distinguished from contempt of court.[25] However, in *D.C. Saxena* v. *Hon,ble Chief Justice of India*[26] this distinction became blurred as the Apex court held that libel against a judge can constitute criminal contempt if the imputation is of such a gravity that it erodes public confidence in the system.

Sometimes, invoking of contempt jurisdiction, which is actually meant to protect the dignity of the judiciary, has, in fact, attracted adverse publicity for the judiciary as happened in *Arundhati Roy's* case[27] and, therefore, it is submitted that the true objective of the law of contempt would be achieved only when it is used to safeguard the interest of the public rather than being used as a shield by judges against personal criticism. It has been quite rightly pointed out in the instant case by Bharucha , J.,

"... the Court's shoulders are broad enough to shrug off their comments and because the focus should not shift from the resettlement and rehabilitation of the oustees."[28]

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23 Madhavi Goradia Diwan, *Facets of Media Law*, 2006, pp. 65-66.

24 *Sheela Barse* v. *Union of India*, (1988) 4SCC 226; *Re, Roshan Lal Ahuja* (1993) 4 SCC 446; *Rajendra Sail* v. *M.P. High Court Bar Association*, (2005) 6 SCC 109.

25 *C.K. Daphtary* v. *O.P.Gupta* (1971) 1 SCC 626.

26 (1996) 5 SCC 216.

27 *Narmada Bachao Andolan* v. *Union of India* (1999) 8 SCC 308.

28 *Ibid.*

It is pertinent to note here that even the media is bound by its constitutional responsibilities and is accountable to the public. If the media demands greater freedom to criticize the administration of justice, there is also a corresponding duty on the media to report with a much greater degree of responsibility.[29] In *Rajendra Sailv. M.P. High Court Bar Association,*[30] the Supreme Court held that criticism must always be dignified and that motives must never be attributed.

It is submitted that the most important virtue in a democracy is the public interest and it shall be equally affected whether there is an undue curtailment of freedom of press as it shall be when there is an unreasonable criticism of the judicial system.

In this regard, a reconciliation seems to have been achieved by the apex court when it has recently maintained that though judges are human beings, not automatons, but it is imperative for a judicial officer, in whatever capacity he may be functioning, that he is not guided by any factor other than to ensure that he shall render a free and fair decision, which according to his conscience is the right one on basis of materials placed before him.[31] Further, the courts are only bound by law and its own judicial conscience. Till today, media cannot influence the decision making process. Indian courts and judicial system is very strong. If media is able to influence the judgments of the Indian courts, then there cannot be independence of judiciary. The courts work on the basis of legal evidence available on record. Nobody should apprehend that media trial can influence the decision of the courts.[32]

1.7 Conclusion

Every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained.[33] Trial by media should be avoided, particularly, at a stage when the suspect is entitled to the constitutional protection. Despite the significance of the print and electronic media in the present day, it is not only desirable but least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly, does not prejudice the right of defence of the accused in any manner whatsoever. Article 19(1) (a) of the Constitution has to be carefully and cautiously used and there is a need that all modes of media must extend their

29 *Re, Harijai Singh* (1996) 6 SCC 466.

30 (2005) 6 SCC 109.

31 *Nahar Singh Yadav* v. *Union of India* (2011) 1 SCC 307.

32 As per Additional District and Sessions Judge Gurbir Singh in "It was battle of unequals: Court", reported by *The Tribune*, 26 May 2010, p.22. The observations were made in the context of judgment delivered in *Ruchika* case in which a teenage girl was molested by a former Haryana DGP.

33 *Sidhartha Vashisht* v. *State (N.C.T. of Delhi)*, AIR (2010) SC 2352 (2357).

cooperation to ensure fair investigation, trial, defence of accused and non-interference in the administration of justice in matters sub-judice.[34] It will serve the dual purpose of upholding one's freedom of speech, on the one hand, and promoting the administration of justice, on the other.

Thus, in the ultimate analysis, it may be maintained that respect for the law of the land is a virtue that needs to be inculcated and practiced by every individual. Our Constitution rests on the principles of checks and balances. The people enjoy fundamental rights as well duties. There is separation of powers amongst various organs of the state and everything is ultimately bound together in the common framework of our great Constitution. Statutory laws are there, the only need is to implement and interpret them in their true spirit.

Freedom of speech as well as control by the judiciary is both important facets of our system. What is required are self constraint and a balanced approach from both these important institutions in order to maintain the basic features of the Constitution i.e. free press, an independent judiciary and above all a democraticpolity.

34 *Ibid.*

PLEA BARGAINING IN INDIA

Gurneet Singh*

1.1 Introduction

In legal terminology 'Plea' means simply an answer to a claim made by someone in a criminal case. Bargain means to exchange a thing for something. Under the concept of plea bargaining an accused person agrees to plead guilty in exchange of some concession from the prosecutor. The concession includes pleading guilty to some charges and in exchange the prosecutor will withdraw the remaining charges. Under traditional criminal system, the accused by pleading guilty waives his right for further trial of charged offence, but under Plea Bargaining concept, he gets some concession for doing so. The concept of plea bargaining is a significant part of criminal justice system in the United States of America and a vast majority of criminal cases are settled under this plea rather than by regular trial. In United Kingdom and Australia also this plea is used in the disposal of criminal cases, but to some extent differently than in America.

To reform the criminal justice administration, the Central Government of India has introduced this concept incorporating a few major changes as recommended by the Law Commission of India and the Malimath Committee. An endeavour has been made to evolve the system entirely different from that prevalent in Western countries. Provision relating to firstly the release of offenders on probation of good conduct and secondly to compound the offences have been added. The imprisonment undergone is set off as provided under Section 428 of the *Code of Criminal Procedure*, 1973. Moreover provision for compensation has also been made under this concept for payment to victim to minimize the effect of excesses committed against him.

The United States of America has a long history of the practice of Plea Bargaining for over hundred years and there are numerous cases wherein the concept has been discussed and interpreted by the Supreme Court of America. Plea Bargaining is the norm rather than an exception. This, weak criminal cases ended in conviction by taking recourse to this concept without any delay. Time thus saved is utilized in the disposal of other important cases. In 1991 The Law Commission of India in its 142nd report considered Plea Bargaining to overcome problems of delay and mounted arrears of

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compensation and to reach at a mutually satisfactory disposition. The concept of 'Plea Bargaining' is not available in respect of each and every offence. The legislature has categorized the application of the provisions of this chapter to cases where the offence is punishable with a term of imprisonment not exceeding seven years with a rider that this chapter will not be applicable to offences against a woman or a child under fourteen years of age and to socio-economic offences. The system of 'Plea Bargaining' is new to India. However it has been in operation in the United States of America and Canada for quite a long time. As many 95% criminal cases are disposed off in the United States of America under the concept of 'Plea Bargaining'. The accused pleads guilty to some charges and the prosecutor drops the remaining. The courts of Western Countries consider the plea as an essential feature of the criminal justice system. The Supreme Court of America also held the Plea Bargain as constitutionally valid.

Justice N. Pradeep, Judge of Delhi High Court while speaking at a legal discourse, organized by the Law College of Bharti Vidyapeeth, deemed University' convocation said, "*Plea Bargaining can help in working out a mutually satisfactory agreement between the accused and the prosecutor in a case*". He further pointed out that in Western countries, there were three facets to Plea Bargaining- charge bargaining-fact bargaining and sentence bargaining of which only one-sentence bargaining is applicable in India. In India, the concept has itself provided that in exchange of guilty Plea by the accused he shall be given benefit of probation or even release after admonition under Section 360 of the *Code of Criminal Procedure*, 1973 or under the provisions of *the Probation of Offenders Act*, 1958 as the case may be. It has further been provided that where benefit of probation cannot be given, and the relevant Section contained provision for minimum sentence then one half of the minimum sentence fixed for the offence is to be awarded and where there is no provision for minimum sentence then one fourth of the maximum sentence fixed for the offence can be given. The scheme is definite and clear. The right to withdraw the 'Plea Bargaining' is absolutely ruled out. The benefit of set off regarding period of detention already undergone in the same case is also available vide Section 428 of the *Code of Criminal Procedure*, 1973.

1.3 Why Plea Bargaining?

The object and purposes for the introduction of the concept of Plea Bargaining in the Indian criminal system is as follows:

(1) To curtail delay in the disposal of cases through summary procedure,

(2) The Judgment of trial court shall be final and no appeal shall lie in any court against such judgement except Special Leave Petition in the Supreme Court and a writ petition in the High Court,

(3) The delay is the root cause of other ills which have crept into the criminal justice system of India,

(4) The Hon'ble Supreme Court of India in Hussainara Khatoon v. State of Bihar[4] held that, "*Even a delay of one year in the commencement of the trial is bad enough, how much worse it could be when the delay is as long as three or five or seven or even ten years.*" It was further held about accused persons languishing in jails, "*The offence with which some of them are charged are trivial, which even if proved would not warrant punishment for more than few months, perhaps for a year or two and yet these unfortunate specimen of humanity are in jail...for a period ranging from three to ten years without even as much as their trial having commenced.*",

(5) Justice delayed is justice denied. Confidence of public is required to be restored for which Plea Bargaining concept would be very useful,

(6) This concept would give relief and incentive to all concerned i.e. prosecution case ends in conviction trial, Magistrate is relieved from over burden of pending cases. The victim gets compensation and the accused gets light punishment even released after admonition or on probation under Section 360 of the *Code of Criminal Procedure*, 1973,

(7) The Scheme is applicable to first offenders only so that the first beneficiary may not repeat the commission of the same crime time and again,

(8) Persons who are charged with serious offences punishable with more than seven years of imprisonment or offences against women or children under fourteen years of age or economic offences have been excluded from this scheme,

(9) The scheme would reduce the backlog of pending cases at all levels,

(10) The burden of over crowding jails will also be relieved. Tihar jail of Delhi has noticed a reduction of nearly two thousand inmates as a result of using Alternative Disputes Resolution systems including Plea Bargaining for deciding cases for the period from 2006 to 2007 and 2008,

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4 AIR 1979 SC 1360.

(11) Similar provision regarding the introduction of conciliation and mediation mechanism is already in operation since 1st July 2002 in the shape of Section 89 of the *Civil Procedure Code*, 1908 for the settlement of the civil disputes outside the court by way of arbitration, conciliation, Lok Adalat and mediation.

The Plea Bargaining concept is used vigorously in order to give benefit to the poor persons accused of minor crimes by getting their cases decided without any delay. Under traditional system trials are prolonged and untold harassment to the accused is caused but under this concept the burden of trial is lessened and speedy disposal of cases is ensured. Plea Bargaining can help further in working out a mutually satisfactory agreement between the accused, prosecutor and the victim. The accused gets minor punishment even released after admonition or under probation, case of prosecution ends in conviction and the victim gets compensation. The Chief Minister of Orissa has issued order to bring down substantial number of cases pending in the courts by taking benefit from the concept of Plea Bargaining. Karnataka Government has also initiated this system quite enthusiously to bring down the number of cases pending in various courts which can be decided under this concept provided the Public Prosecutor, the accused and the victim all agree to a mutually satisfying disposition. There is a great need to protect the victim and the accused from exploitation and corruption at the hands of unscrupulous elements. The significance of the study lies in the fact to verify as to how many cases are decided under this concept and what relief has been provided to the parties. It is also to be seen that how the enforcement mechanism can be made more effective and less time consuming.

An ever increasing amount of litigation in India has led to the courts becoming overburdened at all levels and jails becoming overcrowded. Criminal trials in courts often take years, decade or even quarter of a century for conclusion and the accused have to languish in jails for a long time because after conclusion of trial, appellate/revisional courts also take quite longer time for disposal of appeals/revisions. Delay in the dispensation of justice, adversely affect all concerned i.e. the Judge and Prosecutor are over burdened due to pendency of criminal cases and decrease in the percentage of conviction. The accused persons languished in jails for a long time because in many cases criminal trials did not commence normally for three to four years which in many cases exceeded the maximum punishment which can be awarded to them in case they are found guilty of charged offence against them. The victim did not get justice for a long time and in case of acquittal of accused due to abnormal delay, he is adversely affected second time. Consequently due to delay in dispensation of justice some persons take law into their own hands and create a law and order problem for the Government. Under these circumstances general public also lose confidence in the judiciary and the judicial system.

Under the instructions of the Government, the Law Commission of India has been endeavouring for a long time to tackle the problem of delay in the dispensation of criminal justice. Consequently the Law Commission recommended alternative dispute redressal measures and 'Plea Bargaining' concept is one of them. The United States of America and other Western Countries have been using 'Plea Bargaining' for a longer period. These countries therefore have succeeded in curtailing delay in dispensation of criminal justice by adopting this concept. In the United States of America, 'Plea Bargaining' is the norm than an exception in the disposal of criminal cases and therefore percentage of conviction in criminal cases has increased to a large extent. In India we have not copied this concept as is prevalent in the United States of America, but have evolved our own system by inserting necessary changes to make it beneficial under Indian environment. Most accused persons and victims in India are illiterate and belong to poor families. The concept is, therefore, made beneficial so that the accused persons are not exploited by unscrupulous persons. In order to avoid public criticism, necessary safeguards have been introduced in this concept.

1.4 Certain Features of Plea Bargaining Under Indian Criminal Justice System

1.4.1 Application of Plea Bargaining

The privilege of Plea Bargaining is available to the accused persons on the below mentioned grounds: (a) that the report under Section 173 of the *Code of Criminal Procedure*, 1973 has been forwarded to the court by the officer in charge of the police station or in a complaint case, process under Section 204 of the said code has been issued, (b) that the offence for which the accused is charged is punishable with imprisonment for a term not exceeding seven years, (c) that the accused is not a previous convict of the same offence, (d) that the application of the accused for 'Plea Bargaining' is in the specified form and contained brief description of the case relating to which the application is filed including the offence to which the case relates. It shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred the application after understanding the nature and extent of the punishment provided under the law for the offence and that he has not been previously convicted by a court in a case relating to the same offence, (e) That the application has been filed in the court before which the offence is pending for trial.

1.4.2 Non-application in Case of Certain Offences

The privilege of Plea Bargaining is not available to the accused, if (a) the offence is punishable with death, (b) the offence is punishable with life imprisonment,(c) the offence is punishable with imprisonment exceeding seven years, (d) the offence relates to the socio-economic condition of the country to be determined

by the Central Government by notification, (e) the offence is against a woman or a child under fourteen years of age, (f) the accused is a previous convict of the same offence for which he is again charged, (g) the application is found to be involuntarily made.

1.4.3 Compensation to the Victim

Compensation and other expenses as agreed upon in the mutually satisfactory disposition shall be awarded by the court for payment to the victim by the accused.

1.4.4 Finality of the Judgment

The judgment delivered by the court under Section 265-F of the *Code of Criminal Procedure*, 1973 shall be final and no appeal except Special Leave petition under Article 136 of the Constitution of India and a writ petition under Article 226 and 227 of the Constitution shall lie in any court against such judgment.

1.4.5 The Concept of Set Off

The period of detention undergone by the accused shall be set off under Section 428 of the *Code of Criminal Procedure*, 1973. So no chance is left which leads to the exploitation of the accused.

1.4.6 Protection to the Accused

The accused who made any statement or disclosed any fact during the proceedings of Plea Bargaining shall be protected and such statement or disclosure shall not be used for any other purpose except for the purpose of 'Plea Bargaining'.

1.4.7 Non-Application to Juveniles

The provision relating to 'Plea Bargaining' shall not apply to any juvenile or a child defined under Clause (k) of Section 2 of the *Juvenile Justice (Care and Protection of Children) Act*, 2000.

1.4.8 Enforcement Mechanism

An accused person, who is not a previous convict, charged with an offence punishable for a term not exceeding seven years except socio-economic offences or offences against a woman or child under the fourteen years of age, may file a written application for taking benefit of the scheme of 'Plea Bargaining' in the court where the case is pending for the trial. Before doing so it is mandatory that the charge sheet in the case has been filed by the officer in charge of the police station under Section 173 of the *Code of Criminal Procedure*, 1973 and if it is a

complaint case, then process under Section 204 of the Code have been issued by the court. The application must contain the detail of offences charged and brief facts of the case along with an affidavit sworn in by the accused person that he has filed the application voluntarily and that he was not a previous convict of the same offence for which he is now charged. Thereafter the court shall issue notice, to the Public Prosecutor and in complaint case to the complainant and the accused person, to appear on the date fixed for the hearing of the case. The court shall examine the accused in camera and no party to the case will be present to satisfy that the application for 'Plea Bargaining' has been voluntarily filed without any coercion from any side.

The court will accept the application of 'Plea Bargaining' if the application is found to have been filed voluntarily and give time to (a) the Public Prosecutor or the complainant as the case may be, (b) the accused person, (c) the victim, (d) the investigating officer, to work out a mutually satisfactory disposition including compensation and other expenses to be paid by the accused to the victim. The court shall satisfy that the disposition is voluntary. The disposition shall be prepared by the court and signed by the above mentioned persons and the presiding officer of the court. The court shall reject the Plea Bargaining application if it is found to be made involuntarily. Similarly if no satisfactory disposition is worked out, the court shall record such observation and proceed further to try the case in accordance with the provisions of the *Code of Criminal Procedure*, 1973 from the stage of the application. If a satisfactory disposition has been worked out, the court shall dispose of the case by awarding compensation to the victim as agreed and hear the parties on the quantum of punishment or release the accused on probation of good conduct or after admonition under Section 360 of the said Code. If it is found that minimum punishment has been provided, the court may sentence the accused to the half of such punishment otherwise sentence the accused to one fourth of the maximum punishment provided for the offence.[5]

The procedure prescribed for disposal of cases under the concept of 'Plea Bargaining' is very expeditious and beneficial to all concerned. The accused obtains speedy disposal of the case and in exchange for guilty plea gets light punishment including benefit of probation and in some cases even release after admonition. The case of the prosecutor ends in conviction. The court also gets relief due to early disposal of the case and time saved can be utilized for disposing of other important cases. The victim gets compensation which is not payable under the traditional criminal justice system. There is no such provision under Section 320 of the *Code of Criminal Procedure*, 1973 which related to compounding of cases. Compensation payable under Section 357 of the said Code out of fine imposed on the accused is also negligible. Sections 320 and 357

5 Suman Rai, *Law Relating to Plea-bargaining*, Orient Publishing Company, New Delhi (2007).

of the said Code need amendments, to add provisions for the payment of reasonable compensation to victims. The recommendation of the Law Commission to make Section 498-A of the *Indian Penal Code*, 1860 compoundable is also worth consideration. The law makers have adopted an extra cautious approach to remove the apprehension of the misuse of the concept of Plea Bargaining. Consequently the scheme has been made so tight and rigid that there is no scope of any exploitation even at the hands of clever and unscrupulous persons.

1.5 Grey Areas on the Concept of Plea Bargaining in India

The critics of this concept have pointed out some of the flaws which are as mentioned next: (1) Most of the accused persons are poor and illiterate and therefore they can be easily coerced to plead guilty even if they are innocent. (2) Investigating officer has wrongly been included in the dispensation committee. He may pressurize the accused to plead guilty and exploit the victim to get share from the compensation amount. (3) Proceedings in chamber of the court are also objected to by many. However in Indian law most of the above lacunas have been removed. Further the advantages gained from this concept in terms of expeditious disposal of cases are more beneficial than a minor lacuna if any which can be removed by the court which supervised the working of this concept.

Necessary changes and safeguards to make the 'Plea Bargaining' provisions suitable to Indian conditions were made. However, there remained some defects in the concept of Plea Bargaining incorporated in chapter XXI-A of the *Code of Criminal Procedure*, 1973 which are: (1) there is no provision to name an independent judicial authority to receive, assess and allow the Plea Bargaining applications. The trial judge may be interested in the early disposal of the case. He may become biased after the application is rejected, (2) most of the accused persons are illiterate and belong to poor families and therefore cannot engage defence counsel to get proper advice as to whether to apply for Plea Bargaining or not. In such cases free legal aid be provided to the accused person, (3) the examination of the accused person in the chamber by the court may lead to public distrust in the scheme and there may be likelihood of poor and innocent accused persons pleading guilty to get out of the jail because they feel that they have no other choice of getting out of the situation, (4) there is no provision to cast duty on the court to satisfy that the accused understands the implications of entering into 'Plea Bargaining'. It may lead to injustice because in many cases the accused persons may not be able to engage a counsel, (5) Involving the police in bargaining process may invite coercion or corruption. Pressure of police or prosecution may also lead to the innocent pleading guilty, (6) Plea Bargaining involves waiver of (a) the right of accused for fair trial, (b) right to confront adverse witnesses, and (c) privilege against self incrimination.

1.6 Applicabilityof Plea Bargaining in India

The scheme of 'Plea Bargaining' made applicable in India is basically different from that prevailing in Western Countries. The important areas of difference are:

(a) There will be no contact between the Public Prosecutor and the accused for the purpose of invoking this scheme. The Public Prosecutor will have no role to play. There is no apprehension of pressure of any kind from prosecution.

(b) The decision to accept or reject the application of the accused for 'Plea Bargaining' will rest safely with the judicial officer functioning as a plea judge; the public prosecutor is not involved at this stage.

(c) The concept will be applicable in respect of offences punishable with imprisonment for less than seven years only.

(d) The plea once made will not be allowed to be withdrawn and accused will not know what the judicial officer will do. Accused will only submit an application for concessional treatment as would be appropriate and the decision to give relief shall be with the plea judge.

(e) There will be no risk of underhand dealings or for coercion or inducement by the Prosecutor because the sole arbiter in deciding to accept or reject the application or to impose the sentence of imprisonment will be the Plea Judge. The aggrieved party and the Public Prosecutor will have a right to be heard only.

(f) The bargaining in this scheme relates only to the quantum of compensation and other expenses to be decided by the victim, Public Prosecutor, accused and the investigating officer and there is no bargaining on any other point at any other stage.

(g) The risk of an innocent person pleading guilty is also taken care of in the modified system is made applicable to India, since a judicial officer would apply his mind to the material on the file and would be required to reject the application if there is prima facie no material spelling out the offence with which the accused has been charged.

In *State of Gujrat* v. *Natwar Harchanji*,[6] a Division Bench of the Gujrat High court dealing with concept of 'Plea Bargaining' observed, "*Although hitherto, as a part of colonial legacy "Plea Bargaining" has not been recognized, so far, in our system and criminal jurisprudence. However keeping in mind the huge arrears and*

[6] (2005) Cri. LJ 2957 (Guj.)

long time spent in trials and resultant hardship to parties and particular to the accused and the victim of crimes, the benefit of "Plea Bargaining" as an alternative method to deal with the dispute or question of offence, requires serious consideration which would not be admissible and available to habitual offenders." The concept of 'Plea Bargaining' is an alternative method of dispute resolution to deal with huge arrears of criminal cases and add a new dimension in the realm of judicial reforms. Such a procedure will also reduce congestion in jails and bring about considerable saving at the state level in the administration of criminal justice.

This concept was generally discarded by the Indian judiciary. The Supreme Court of India in *Hasam Bhai Abdul Rehman Bhai Shekh* v. *State of Gujrat*[7] held:

> It is obvious that some convictions based on plea guilty entered by the applicant as a result of plea bargaining cannot be sustained. It is our mind contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty on an allurement being held out to him that if he enters a plea of guilty he will be let off very lightly. Such a procedure would be clearly unreasonable, unfair and unjust and would be in violation of Article 21 of The Constitution. It would have the effect of polluting the pure foundation of justice because it might induce an innocent accused to plead guilty to suffer a light and inconsequential punishment rather than go through a long and arduous criminal trial.

In *Madan Lal* v. *State of Maharashtra,*[8] the appellant had been convicted of the offence of cheating. The High Court adjourned the appeal and gave the accused the opportunity of tendering his share of amount to compensate for the losses caused with the assurance that the question of reduction of sentence would be heard after amount was deposited. The Supreme Court condemned the High Court for such a cause of action and held that it was wrong for a court of law to enter into a bargain of this character. In *Murlidhar Meghraj Loya* v. *State of Maharashtra,*[9] the Supreme Court gained an impression that the defendant pleaded guilty. The Supreme Court felt that the plea must have been entered pursuant to an informal inducement on holding out the prospect of lighter sentence. The court held that practice of 'Plea Bargaining' could not be sustained especially in context of economic crimes and food offences. However, the recommendation of the Law Commission of India and the Malimath Committee are suited to Indian conditions and therefore have been implemented by the Parliament after inserting chapter XXI-A in The *Criminal Procedure Code*, 1973.

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7 AIR 1980 SC 834.
8 AIR 1968 SC1297.
9 AIR 1976 SC1939.

1.7 Conclusion

To sum up the above discussion, it would be clear that quick decision without any delay under the concept of 'Plea Bargaining', serves a better public purpose than a punishment awarded after a decade of litigation, when both sides tired and thereby public confidence in the criminal justice system is almost shaken. 'Plea Bargaining', if implemented properly, will do wonders for the criminal justice delivery system by reducing the back breaking delays, which are responsible for the overburdening of the criminal courts and for overcrowding of jails. It will offer great relief to under trail prisoners languishing in jails waiting firstly for the trial to commence and secondly after commencement to its end. Though there is some truth in the apprehension that innocent and poor people might be forced by the circumstances to plead guilty, in order to avoid the cumbersome trial process. However, the fault does not be with the concept of 'Plea Bargaining' but the courts are required to ensure that the accused makes the Plea voluntary and not under any compulsion or threat of any kind. The court has the power to reject the application if it is found to be involuntary or the accused is found a previous convict.

The 'Plea Bargaining' is undoubtedly a great concept for Indian criminal system, further we have no other choice but to adopt it, in order to reduce the burden of pending cases on the courts as well as overcrowding and congestion in jails. The Law Commission of India in its 120th report of 1987 observed that strength of judicial officers is far less than in a number of other countries. The situation may become lot different if criminal cases and appeals are decided speedily by the courts by adopting alternative dispute resolution techniques including the concept of 'Plea Bargaining'. The concept of 'Plea Bargaining' originated in the United States of America, most probably towards the beginning of the 20th century. According to Canadian Law Commission it is an agreement by the accused in exchange for promise of some benefit from the prosecution. The nature and extent of this concept made applicable in England indicates that the plea must not be transplanted from United States of America to other countries but also necessary changes and safeguards must be made according to their local requirements. The Indian concept of 'Plea Bargaining' is inspired from the doctrine of 'Nolo Contendere' which means not to contest. Indian criminal justice system has been ineffective to provide speedy and inexpensive justice. The courts are flooded with backlog of pending cases because the period of trial is inordinately prolonged resulting in low percentage and high expenses. The Supreme Court of India did not approve this concept till the law was enacted and chapter XXI-A added in the *Code of Criminal Procedure*, 1973.

RIGHTS AND CLAIMS OF INDIGENOUS PEOPLE UNDER INTERNATIONAL LAW: MATCHING THE UNITED NATIONS STANDARDS

Ivneet Walia*

The debate on indigenous rights has revealed some serious difficulties for current international law, posed mainly by different understandings of important concepts. This article explores the extent to which indigenous claims, as recorded in the United Nations fora, can be accommodated by current international law. Indigenous rights are currently at the forefront of the international human rights agenda. It is widely recognized that indigenous peoples are amongst the most marginalized and vulnerable around the world and their human rights situation is in need of urgent attention. International bodies have undertaken the challenge to help improve the situation of these communities. However, opinions differ about the relevant policies of states, the measures that must be taken and, ultimately, the rights that must be recognized as vested in these communities.[1]

Although dispersed around the world, their common characteristics and common history of oppression, discrimination and disrespect have led to shared claims at the international level. These communities would seem in the first instance unlikely protagonists of an international movement, because of their vulnerability, their scarce resources and the often limited modes of communicating with other communities due to different languages and poor transport. Yet, since 1977 when over 150 indigenous representatives attended a United Nations conference on discrimination against their communities, indigenous peoples have been increasingly active at the international level.[2] Through cooperation, they have succeeded to bring the claims of their communities to the forefront of the international agenda and to actively involve international organizations in their struggle. This is exactly what indigenous peoples are trying to do. In their quest for justice, indigenous representatives have placed a lot of faith in the United Nations and its international law. Through tight cooperation, intense lobbying and deep knowledge of the system, they have used openings in the organization and have created new opportunities for their participation and further influence of the decision-making processes. Grounding their demands on the existing

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1 International Labour Office, 'Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries', Geneva (1953).

2 A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge (2004), p. 8.

applicable human rights principles, they have articulated a vision for their communities that is different from other actors; a vision they have firmly framed in the language of international law.[3]

This wave of support has been an important factor for the establishment of several United Nations fora on indigenous issues. The most enduring has been the Working Group on Indigenous Populations (WGIP), widely viewed as a great success of the United Nations system. Established by the Sub-Commission in 1982, just after the Cobo study reported that indigenous peoples are separate peoples who have been denied their rights, the WGIP has been the first body in the international arena entrusted to review developments pertaining to the human rights of indigenous peoples and to give attention to the evolution of standards concerning indigenous rights[4].

Increasing awareness of indigenous issues strengthened the argument that a permanent platform for discussion and elaboration of indigenous issues was essential. The idea of a permanent forum, initiated by indigenous representatives, members of the WGIP and many member states of the United Nations, was put forward by the Vienna World Conference and was adopted by the United Nations General Assembly. In April 2000, the Permanent Forum on Indigenous Issues (Permanent Forum) was established as a subsidiary body of the Economic and Social Council. Contrary to both working groups, the Permanent Forum is a permanent body of the ECOSOC (thus very high in the United Nations hierarchy), whose mandate goes beyond human rights to include issues such as economic and social development, culture, the environment, education and health. The Forum has satisfied claims for sui generis status of indigenous peoples in the United Nations, claims justified on the basis of past injustices that such peoples have suffered and the scale of their cultural differences measured against the populations living in the same states.[5]

As indigenous peoples are not merely groups organized around particular issues, but longstanding communities with historically rooted cultures and distinct political and social institutions, it was argued that they should be entitled to have a presence in their own right in the international arena, rather than as representatives of a segment of the civil society. The Permanent Forum consists of eight independent experts appointed by the governments and eight selected by indigenous peoples themselves; this makes the

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3 A. Brysk, "Turning Weakness into Strength: The Internationalization of Indian Rights" *Latin American Perspectives* (1996), pp. 38–57.

4 "Future Role of the Working Group", Working paper submitted by Miguel Alfonso Martinez, Member of the Working Group, UN Doc.E/CN.4/Sub.2/ AC.4/1993/10.

5 W. Kymlicka, "Theorizing Indigenous Rights", *University of Toronto Law Journal* (1999), pp. 281–93.

Permanent Forum the first United Nations body whose membership extends beyond governments and independent experts. All these attributes create a valid argument for the Permanent Forum being the most significant step taken so far by the United Nations to recognize indigenous peoples' real status.[6]

Certainly, the Permanent Forum has made important recommendations on indigenous health; prior informed consent and participatory research guidelines; indigenous children and youth; collection of data; indigenous women; and matters related to poverty and development goals. However, it has been argued that the real difference this body could make would be in coordinating and evaluating all indigenous activities within the United Nations. Such focus would address fears about duplication, conflicting programmes and waste of UN resources. The Permanent Forum works closely with the United Nations Special Rapporteur on the question of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen. Since the establishment of his post in 2001, the Special Rapporteur has reported on issues close to indigenous peoples' hearts. These include the impact of development projects; human rights issues in the administration of justice; education and language; and the implementation by member states of legislation related to indigenous peoples by the member states. Also, more so than in other fora, the Special Rapporteur has been able to address particular situations in countries, an opportunity linked to his several visits to member states. The plethora of bodies on indigenous issues demonstrates the importance that the United Nations, and ultimately the international community, currently places on the protection of these communities. This is also reflected in the growing relevant academic literature that tackles indigenous issues in political theory, specific regional indigenous situations and domestic indigenous cases.[7]

In all such analyses, international law has been used to prove violations, to support arguments located in the realm of political theory, to analyse specific rights and even to offer a radical vision of indigenous rights.[8]

The International Labour Organisation (ILO) showed its interest in the situation of indigenous and tribal peoples early on, shortly after its creation in 1919. In 1921, the organization undertook studies on the situation of indigenous workers and subsequently in 1926 the Committee of Experts on

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6 J. Debeljak, "Barriers to the Recognition of Indigenous Peoples' Human Rights at the United Nations", *Monash University Law Review* (2006), pp. 159–94.

7 S. Chakma, "Permanent Forum on Indigenous Issues: Chasing the Mirage' in The Indigenous World 1999–2000", *IWGIA*, Copenhagen (2000), pp. 402–19.

8 P. Havemann, *Indigenous Peoples' Rights in Australia, Canada and N. Zealand*, Oxford University Press, Oxford, (1999), p. 67.

Native Labour was established to set up standards for the protection of indigenous workers. The work of this committee formed the basis of several conventions. In 1953, the ILO published an important study concerning the living and working conditions of indigenous and tribal populations in all the parts of the world. During the same year, the United Nations launched the Andean Indian Programme,[9] in which the ILO had an active part. Convention No. 107 was the first international convention that focused specifically on the rights of indigenous peoples. One of the main positive aspects of Convention No. 107 is its binding nature: its provisions established for the first time in international law specific state obligations towards indigenous peoples. On 26th June 1989, the International Labour Conference adopted the Convention concerning Indigenous and Tribal peoples in Independent Countries (Convention No. 169), which came into force on 5th September 1991[10].

One of the most powerful arguments for the recognition of indigenous self-determination is the 'historical and rectificatory justice' argument which puts the state's authority over indigenous groups in doubt. Indigenous peoples perceive there cognition of their right to self determination as a formal proclamation of denouncing the policies of destruction and assimilation that they have experienced in the past and an acknowledgment that they can determine their life without interference by states. Indigenous identity, it is argued, can only be protected by indigenous control over the matters that affect them. Indigenous peoples have been excluded from participating in the formation and evolution of international law. Since the early 1980s, they have been pushing for their own interpretation of international law concepts. Notions of respect, freedom and autonomy are paramount in their understanding of self-determination; the inherent and in alienable nature of the right is also important rather than providing self-determination, states can only recognize it.[11]

Indeed, as a principle, self-determination does not set out specific legal consequences for non-compliance, being more abstract and general. It is related to the freedom that peoples should have to determine their lives and destinies and as such, it incorporates political, economic, cultural and social claims of all kinds. It does not give a specific result, but is yet another fact or that must be seriously considered, when reaching a decision, possibly

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9 Aimed at integration and development, the Andean Indian Programme involved other international bodies, such as FAO, UNESCO, WHO and later, UNICEF, with the ILO being responsible for its general management. It began in Bolivia, Ecuador and Peru and later included Argentina, Chile, Colombia and Venezuela. During later stages, administration was transferred to national governments.

10 R. John Connell, Philip Hirsch, *Resources, Nations and Indigenous Peoples: Case studies from Australasia, Melanesia and South East Asia*, Oxford University Press, Oxford (1996), p. 78.

11 R. Falk, *On Humane Governance, Toward a New Global Politics*, Polity Press, Cambridge (2005), pp. 199–200.

together with other principles of international law including territorial integrity, national sovereignty and respect for the rights of others. In contrast, as a human right, self-determination is much more definite and clear, provides its beneficiaries with a specific claim and dictates a specific result. The principle of self-determination is related to a wide range of claims, which can be based on a range of other rights, such as the right to a culture, the right to education, the right to language; in contrast, claims based on the right to self-determination must be directly related to that concept and cannot be better accommodated by recourse to such other rights. Organizing self-determination into compact internal versus external spheres is distorting in today's world of multiple human associational patterns. Instead, he distinguishes between constitutive self-determination, which is relevant to the occasional procedures leading to the creation of or change in the institutions of government, and ongoing self-determination, relevant to the form and functioning of the governing constitutional order. Unfortunately the majority of states do not have special arrangements; some do not even include indigenous individuals on their electoral roll. In some cases, indigenous individuals cannot vote as they do not enjoy citizenship rights.[12]

Indigenous protection of their cultural rights, as with all indigenous rights, comes from three different– yet overlapping–systems of human rights protection: general human rights instruments; minority instruments; and instruments specifically for the protection of indigenous rights, i.e. the ILO Conventions. The international human rights system protects cultural rights mainly through minorities; general human rights instruments do not attempt an in depth protection of the right to a culture. The International Covenant on Economic, Social and Cultural Rights recognizes a general right to freely participate in the cultural life of the community, together with the right to enjoy the benefits of scientific progress and its applications as well as the benefits of authorship of scientific, literary of artistic production. Prima facie this provision does not appear to be of great help to indigenous peoples, who strive for more than mere participation in main stream culture. However, the Committee on Economic, Social and Cultural Rights (ESCR Committee) has covered this apparent gap by agreeing that the right to participation in cultural life also includes 'the right to benefit from cultural values created by the individual or the community'.[13]

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12 'Comments by the Aboriginal and Torres Strait Islander Commission concerning a Definition of Indigenous Peoples in Information Received from Indigenous Peoples' Organisations', UN Doc.E/CN.4/Sub.2/AC.4/1996/2/Add.1,1.

13 United Nations Sub-Commission, "Indigenous Peoples Preparatory Meeting: Comments on the First Revised Text of the Draft Declaration on Rights of IndigenousPeoples", July1989,UNDoc.E/CN.4/Sub.2/AC.4/1990/3/Add.2.

Although numerous instruments offer protection to cultures and recognize cultural rights, international law is still not well-equipped to deal with cultural rights of indigenous peoples. This is largely due to three elements: first, a substantial difference between the indigenous and non-indigenous understandings of culture; second, the prevalence of the concept of cultural property inscribed in international law; and third the focus on states, rather than groups, as beneficiaries of its protection of cultural objects. The protection of individuals who create culture does not substantially advance the protection of indigenous cultures. Indigenous understandings of culture underline that it cannot be created by a sole individual; the community entrusts to the individual the representation of their culture.[14]

Recent years have witnessed the further development of abusive practices. States and transnational corporations have been expanding their activities to areas previously considered remote and inaccessible, areas where indigenous peoples live. Renewed interest in indigenous cultures has also brought renewed interest in acquiring products of indigenous art and indigenous traditional science.[15] A new wave of tourism has disrupted indigenous historical and archaeological sites and has brought about the commercialization of indigenous cultures. Biotechnology and the demand for new medicines have also intensified the interest in traditional botanology and medicine. These factors have lead to the unregulated use of aspects of indigenous cultures by various entities, such as states, international corporations, pharmaceutical companies and individuals, for their own agendas.[16]

Indigenous cultural claims are not fully accommodated by current international law. Although the over whelming majority are either consistent with existing instruments or represent a logical evolution of those instruments' standards, several claims seem quite radical. A great obstacle to indigenous claims lies in the different understanding of culture contained in many general international instruments, which treat culture as property owned by the state or by the individual. Thus, they ignore to a large degree indigenous control and ownership of their cultures. Although several minority instruments protect the right of indigenous peoples to a culture, they do not address specific indigenous concerns.[17]

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14 C. Taylor, Philosophical Arguments, Harvard University Press, Harvard (1995), pp. 127-45.

15 J. Johnson, "Why Respect Culture?" *American Journal of Political Science* (2002), p. 405.

16 W. W. Borah, *Justice by Insurance: The General Indian Court of Colonial Mexico and the Legal Aides of the Half Real*, University of California Press, Berkeley (1983), pp. 6-24.

17 W. Kymlicka, *Liberalism, Community and Culture*, Oxford University Press, Oxford (1991), pp.151-152.

A closer look at the United Nations monitoring bodies, the statements during the working groups relevant to indigenous peoples and the reports of the UN Special Rapporteurs reveals only the tip of the iceberg of abuses of indigenous cultural rights. Patterns of cultural violence include the seizure of traditional lands, the expropriation and the commercial use of indigenous cultural objects without permission from indigenous communities; the misinterpretation of indigenous histories, mythologies and cultures; the suppression of indigenous languages and religions; the denial of indigenous education; even the forcible removal of indigenous peoples from their families and the denial of their identity.[18]

It was not until the latter part of the twentieth century that efforts were made to seriously consider land claims of indigenous peoples and to work towards their resolution. For some indigenous communities, land rights are the central claim in their struggle for more protection. Largely, this is because of their special relationship with the land on which they live, a relationship confirmed by the UN Human Rights Committee, the UN Special Rapporteur on Indigenous Issues and ILO Convention No. 169. Land rights often have ramifications for the physical survival of the group. These communities are amongst the poorest in the world and control over their lands alleviates many of the financial problems they face and, consequently, contributes to the elimination of social problems. Burger believes that 'unless indigenous peoples can reassert their right to control their own development and future and win back sufficient lands and resources, there can be no real progress in their standards of living'. The importance of recognizing indigenous land rights also underlies claims for equality and non-discrimination. Many states have taken measures that provide lesser protection to indigenous land rights than to the rest of the population. The UN Committee on the Elimination of All Forms of Racial Discrimination has repeatedly highlighted such cases.[19]

In any case, indigenous peoples have not yet been recognized as beneficiaries, neither of the right to self-determination, nor the right to development in international law. In addition, land rights per se have not been the focus of international human rights. For indigenous peoples, most helpful are undoubtedly ILO Conventions No. 107 and No.169. Unfortunately, few states are parties to these two instruments. Nevertheless, the Conventions have acted as an important political tool for the development of indigenous rights. Property rights are notably absent from both the International Covenants. Other universal instruments only protect the individual right to property; consequently, they are not helpful to indigenous

[18] M. Mc Donald, "Should Communities have Rights? Reflections on Liberal Individualism," *Canadian Journal of Law and Jurisprudence* (1991), pp. 217–37.

[19] J. Rawls, *The Theory of Justice*, Harvard University Press, Cambridge (1971), pp.139–42.

claims. The United Nations bodies have side stepped the difficulties that self determination and development pose and have covered the legal gap in the protection of land rights by applying general human rights, especially provisions on the prohibition of discrimination, minorities' right to their culture and the right to property. Indeed, although not addressing directly collective land rights, the UN's ICCPR and ICESCR and the UN International Convention for the Elimination of All Forms of Racial Discrimination contain important provisions relevant to indigenous land rights. For example, the Human Rights Committee has repeatedly been using Article 27 of the ICCPR to deal with violations of indigenous land rights.[20]

The Committee on the Elimination of All Forms of Racial Discrimination (CERD) has also encouraged states to 'recognise and protect the right of indigenous peoples to own, develop, control and use their communal lands, territories and resources; the Committee has urged states where indigenous have been deprived of their lands and territories without their free and informed consent, to take steps to return these lands and territories. States are also bound by the standards set in the UN Declaration on Minorities. Apart from human rights instruments, protection to indigenous land rights is also provided by instruments on environment and development, especially the Conventionon Biological Diversity, the Rio Declaration and Agenda 21.[21]

The doctrine of *terra nullius*, a legal construction used by states in the past to legitimize colonization and dispossess indigenous peoples from their lands has now been rejected both at the national and the international level. *Terra nullius* was allowed by international law, as affirmed by the decision of the Permanent Court of Justice in the (1933) Eastern Greenland case. In 1975, the International Court of Justice ruled in the *Western Sahara case*[22] that the doctrine of *terra nullius* had been erroneously and invalidly applied, because indigenous tribes inhabited the territory at the time of arrival of new settlers. More recently, in *Mabo v. Queensland*[23] (No.2) the Australian High Court discussed the legal and other effects of the doctrine of terra nullius. The case concerned a claim by members of the Meriam people to rights in land in the Murray islands in the Torres Strait, off the Queensland coast. The Australian High Court held by a majority that when the Imperial Crown acquired sovereignty in 1879 over the islands, the land rights of indigenous peoples survived the change of sovereignty and were not extinguished. The Court also rejected the view that the Aboriginal peoples were so low in the scale of

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20 C. Taylor, "The Politics of Recognition" in A. Gudmann, *Multiculturalism*, Princeton University Press, Princeton (1994), pp. 25–74.

21 Commission on Human Rights, Report of the Working Group established in accordance with Commission on Human Rights Resolution 1995/32,UNDoc.E/CN.4/1997/102, para 108.

22 *Western Sahara Case*, ICJ Reports (1975), p. 12.

23 (1992) 107 A.L.R. 1.

COMBATING TERRORISM

Purnima Khanna*

1.1 Introduction

Terrorism has been a dark feature of human behaviour since the dawn of recorded history. Great leaders have been assassinated, groups and individuals have committed acts of incredible violence and entire cities and nations have been put to the sword- all in the name of defending a greater good.[1] Terrorism is the biggest challenge the country faces today. It is also the biggest challenge for most of the world. Terrorism has been part of the security scene for decades, but after the terrorist attacks of 9/11 in USA, it has assumed global dimensions. It had a profound effect on international, regional and national security. Consequently, strategic planning of many countries, including India, has been affected.[2] The present article deals with the issue of terrorism. The article has been divided into eight parts. The first part is the introductory part. The second part discusses definition of terrorism given by various scholars and establishments. The third part focuses on various causes of terrorism. The fourth part highlights the impact of terrorism. The fifth part analyses the recent trends in terrorism. The sixth part discusses India's stance against terrorism. The seventh part discusses measures to combat terrorism followed by the concluding remarks.

1.2 Defining Terrorism

The word 'terrorism' was first used in reference to the reign of terror during the French Revolution. A 1988 study by the United States Army found that more than one hundred definitions of the word exist and have been used.[3] In November, 2004, a United States Security Council Report described terrorism as any action "intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organisation to do or abstain from doing any act."[4]

US Department of Defence defined terrorism as, "The calculated use of unlawful violence or threat of unlawful violence to inculcate fear, intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally

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1 Gus Martin, *Understanding Terrorism: Challenges, Perspectives and Issues*, Sage Publications, New Delhi (2003), p. 2.

2 Vijay Oberoi, "Countering Terrorism: Intelligence is the Key", in *Combating Terrorism-The Indian Experience*, P.C. Dogra (ed.), Abhishek Publications, Chandigarh (2005), p.119.

3 Yuvacharaya Lokesh and Anil Dutta Mishra, *Terrorism : A Global Challenge*, Regal Publication, New Delhi (2009), p. 1.

4 Yuvacharaya Lokesh (2009), pp. 1-2.

political, religious or ideological." Within this definition there are three key elements – violence, fear and intimidation; and each element produce terror in its victim."[5]

The FBI uses this, "Terrorism is the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population or any segment thereof, in furtherance of political or social objective."[6]

The United Nations produced this definition in 1992, "An anxiety inspiring method of repeated violent action, employed by (semi) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby – in contrast to assassination – the direct targets or violence are not the main targets."[7]

The Encyclopaedia of Social Sciences defines terrorism as a method whereby an organised group or party seeks to achieve its avowed aims chiefly through the systematic use of violence.[8]

The common features of most formal definitions include[9]:

- The use of illegal force
- Subnational actors
- Unconventional methods
- Political motives
- Attacks against civilian and passive military targets
- Acts aimed at purposefully affecting an audience[10]

1.3 Causes of Terrorism

It is very difficult to ascertain all causes of terrorism since the causation of human action has as yet been most incompletely explained by modern psychology, genetics, sociology and related disciplines. Terrorism may be a cause effect of one factor or a set of factors at one place and another factor or a set of factors at another place. Generally, terrorism has its origin in diverse causes, viz. colonialism, communalism, racialism, obscurantism, political persecution, human rights violation, economic exploitation, unemployment, alienation, communication gap and an overall moral decay of society.[11] Studies

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5 *Id.*, p.2.
6 *Ibid.*
7 *Ibid.*
8 Hajira Kumar," Youthful Unrest to Global Terrorism", *Terrorism the Global Perspective*, in A.S. Narang, Pramila Srivastava (eds.), Kanishka Publishers, New Delhi (2001), p. 132.
9 Gus Martin (2003), p. 2.
10 *Ibid.*
11 Ranjit K. Pachnanda, *Terrorism and Response to Terrorist Threat,* UBS Publishers Distributors Ltd., New Delhi (2002), p. 9.

on terrorism emphasised that terrorism is the product of many factors which contribute to an environment propitious for terrorism.[12] The important factors responsible for terrorism are as follows[13]:

(i) Social, economic and political tensions and injustices in the modern industrial societies;
(ii) Perceived injustice, inequality, discrimination and persecution;
(iii) Deep rooted ethnic, ideological and religious divisions;
(iv) Ineffective security forces;
(v) Availability of support, training and encouragement by overt and covert sources; and
(vi) Terrorism may be used as a substitute for full-scale warfare.[14]

1.4 Impact of Terrorism

In the modern era, the impact of terrorism that is, its ability to terrorise- is not limited to the specific locales or regions where the terrorists strike. In the age of television, the internet, satellite communications, and global news coverage, graphic images of terrorists incidents are broadcasted instantaneously into the homes of hundreds of millions of people. Terrorist groups understand the power of these images, and they manipulate them to their advantage as much as they possibly can.[15]

Terrorism is not simply about deaths, however tragic, or of incidents, however spectacular. Terrorism is about a slow erosion of the might of a country, the threatening of its core ideals and above all, a psychological war that is aimed at wearing away even the most battle hardened troops in a war where the enemy is often invisible and where the victims are always their own people. The target of terrorism is the state itself, and the objectives it espouses today appear increasingly close to that usually sought to be achieved by conventional war.[16]

Terrorism breaks down the social, economic, political and legal structures of the countries affected and the entire process of development comes to a halt. Socio-cultural mosaic goes to rack and ruin, and an economy suddenly becomes a shambles. The rule of law and human rights crumble and people suffer terribly.[17]

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12 S.K. Shiva, *Terrorism in the New Millennium,* Authors Press, Delhi (2001), p. 10.
13 Ranjit K. Pachnanda (2002), p. 10.
14 *Ibid.*
15 Gus Martin (2003), p. 2.
16 S.K. Shiva (2001), p. 1.
17 Panna Kaji Amatya, "International Terrorism: Threat to Global Security", in *Terrorism the Global Perspective*, A.S. Narang, Pramila Srivastava (eds.), Kanishka Publishers, New Delhi (2001), p. 163.

1.5 Recent Trends in Terrorism

The September 11, 2001, terrorist attacks on the US homeland were seen by many as a turning point in the history of political violence. In the aftermath of these attacks journalists, scholars, and national leaders repeatedly described the emergence of a new international terrorist environment. It was argued that within this new environment, terrorists were now quite capable of using- and very willing to use- weapons of mass destruction to inflict unprecedented causalities and destruction on enemy targets. These attacks seemed to confirm warnings from experts during the 1990s that a New Terrorism[18], using "asymmetrical" methods, would characterise the terrorists environment in the new millennium.[19]

The lethality of attacks has increased dramatically in recent years. Suicide and car bomb attacks are also increasingly being used. Terrorism as a tool in political and ethnic conflicts has now spread to new areas and its use has intensified.[20]

The Internet and computer networks are used as a propaganda tool as well as a means of communication between members of terroristsorganisations. It is possible to penetrate the telecommunication and computer system of nations and private organisations and inject different computer codes that would cause systems to go haywire or fall under the control of the intruder. The cyber terrorists could divert funds electronically and also create havoc with a nation's air traffic or power control systems.[21]

Terrorism is likely to escalate to new, monstrous proportions, especially by resorting to the use of unconventional weapons.[22] Violence with nuclear, biological or chemical weapons are the most commonly mentioned grave danger of future terrorism.[23] The likelihood of the use of weapons of mass destruction (WMD) by terrorists is low but the consequences of such an event are so grave that they warrant investing great resources in prevention and in preparing crisis management and damage control procedures for this kind of incident, no matter how unlikely its occurrence may be.[24]

The apprehension concerning new terrorist weapons has been coupled with the fear of inauspicious changes in the cast of perpetrators, especially the rise of fanatic religious terrorism.[25] It has been widely reported that the new breed of

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18 Walter Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction*, Oxford University Press, New York (1999), quoted in Gus Martin (2003), p. 2.

19 Gus Martin (2003), p. 2.

20 Vijay Oberoi (2005), p. 121.

21 Prakash Singh, "Terrorism of the Future," *Terrorism the Global Perspective*, in A.S. Narang, Pramila Srivastava (ed.), Kanishka Publishers, New Delhi (2001), p.19.

22 S.K Shiva (2001), p. 9.

23 *Id.*, p. 15.

24 *Id.*, p. 17.

25 *Id.*, p. 9.

highly motivated religious terrorist groups are desperately seeking weapons of mass destruction. It includes nuclear devices, germ dispensers, poisonous gas weapons and even computer viruses to intimidate states, governments and societies.[26]

Narco-terrorism is yet another sinister dimension. There are instances of terrorist and insurgent groups taking to illicit trafficking in drugs to finance their operations. Afghanistan is the most glaring example of link between armed conflict and illicit drugs. The country is by far the leading producer of opium in south west Asia.[27] Drug trafficking has financed the secessionist movement of Liberation Tigers of Tamil Eelam (LTTE), according to the Government of Sri Lanka.[28]

1.6 India against Terrorism

The 13 major UN instruments[29]relating to specific terrorist activities remain fundamental tools in the fight against terrorism. India is a Party to all the 13 major legal instruments. India welcomed the adoption in 2006 of the UN Global Counter Terrorism Strategy that recognizes the need to express solidarity with innocent victims of this scourge and specifically addresses victims of terrorism.[30]

India is a Party to the SAARC Regional Convention on Suppression of Terrorism. It provides for extradition of persons accused of terrorist activities within the SAARC member countries. To facilitate extradition in the absence of a bilateral agreement, the Indian Extradition Act, 1962 has provisions for treating an international convention as an extradition treaty to which India and a foreign State concerned are parties in respect of the offences dealt under that convention.

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26 Carter et. al., "Catastrophic Terrorism-Tackling the New Danger," *Foreign Affairs*, Vol. 77, No. 10, Nov-Dec., p.81. quoted in Bibhuti Kalyan Mahakul, "Politics of Terrorism", *The Indian Police Journal*, Vol. LVIII, No. 2, April-June (2011), p. 36.

27 Prakash Singh (2001), p. 17.

28 *Id.*, p. 18.

29 Vienna Convention on Diplomatic Relations 1961, Vienna Convention on Consular Relations 1963, Convention on Offences and Certain Other Acts Committed On Board Aircraft (Tokyo Convention, agreed 9/63—safety of aviation) 1963, Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), 1970 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) 1971, Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention) 1979, Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988, Convention on the Marking of Plastic Explosives for the Purpose of Identification 1991, International Convention for the Suppression of Terrorist Bombings 1997, International Convention for the Suppression of the Financing of Terrorism 1999, International Convention for the Suppression of Acts of Nuclear Terrorism 2005.

30 Available at <http://www.un.int/india/india_counter_terrorism.html> (Last accessed on 18 February 2012).

In addition India has entered into bilateral extradition agreements with several countries.[31]

The necessary legal, regulatory and administrative framework for combating money laundering and financing of terrorism is also in place. The specific legislations to prevent financing of terrorism include: (a) Foreign Exchange Management Act, 1999, (b) Narcotic Drugs and Psychotropic Substances Act, 2003; and (c) Prevention of Money Laundering Act, 2003 of 1967 as amended in 2004. A Financial Intelligence Unit-India is already in operation and is the nodal agency responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions to intelligence and enforcement agencies.[32]

India finally has a National Counter Terrorism Centre (NCTC)-an overarching counter-terrorism agency with immense power to tackle terrorism.[33] The NCTC has been envisaged as an umbrella organisation, which would exercise control over agencies like the National Investigation Agency (NIA), the National Technical Research Organisation (NTRO), the Joint Intelligence Committee (JIC), the National Crimes Record Bureau (NCRB) and the National Security Guard (NSG). It will now be placed under the Intelligence Bureau (IB) and the existing Multi-Agency Centre (MAC) will be subsumed in it.[34] The NCTC has been given wide sweeping powers. The body has legal authority to carry out arrests, seize terror related property and cash. For the first time, a body under the IB will have powers to arrest. It can seek documents, call records and financial details of suspects from all other agencies. It is given power to requisition the services of the National Security Guard or any other special forces. It will also maintain a data base of terrorists, their associates and of terror modules.[35] However, the setting up of the NCTC has been opposed by Chief Ministers of eleven states. The Chief Ministers feel they should have been consulted and taken into confidence first. They object to the IB acquiring the legal authority to search, arrest and carry out surveillance operations. They are not convinced that the NCTC Standing Council, which will have representatives from all states, is sufficient safeguard against arbitrary action. They are also apprehensive that the Government at the Centre will be tempted to use the IB and NCTC against political rivals in the states.[36] Some of these objections should be looked into. But it would be great folly to stall such a move for a few relatively minor issues which can be sorted out.[37]

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31 *Ibid.*
32 *Ibid.*
33 The Tribune, 7 February 2012, p. 1.
34 The Tribune, 20 February 2012, p. 8.
35 *Supra* note 33.
36 The Tribune, 5 March 2012, p. 9.
37 *Supra* note 34.

According to N. N. Vohra, the Governor of Jammu and Kashmir," National security concerns are no longer confined to either physical security or to the boundaries of the States or even the nation. With States having failed, by and large, to contain the threats, the urgency for a better system cannot be overstated. ...Time has come to arrive at clear arrangements, within our federal arrangements, to lay down the respective responsibilities of the Union and the States for effective security management.[38]

1.7 Conclusion and Suggestions

After the foregoing discussion it is concluded that terrorism is a serious threat to the world peace and order. Unless the problem of terrorism is resolved, mankind will never rest in peace. United and co-ordinated efforts of all the nations are required to fight and resolve the issue of terrorism. Contemporary terrorists are using most sophisticated technologies. Lethality and impact of attacks have increased. There is a need to reform the anti-terrorist strategies keeping in mind the latest technological developments. Some of the important measures, which can be helpful to tackle the menace of terrorism are discussed as follows:

1. It is high time that all the states should realise that a combined commitment to fight terrorism is the ultimate need of the hour. All the states should unitedly stand against nations sponsoring terrorism in their neighbourhood. United Nations should impose strict legal and economic sanctions against such states.

2. There are a number of international conventions against terrorism. A major problem in the existing legal framework is that conventions tend to favour action by national authorities and provide no extra-territorial jurisdiction. If a state decides not to extradite persons or groups accused of offences in another state to that jurisdiction for prosecution, the forms of recourse open to the prosecuting state are few.[39] The problem of the non-extraditing states should also be addressed.

3. The general nature of the conventions leaves states a large measure of discretion in interpretation and application. This weakens the text's utility in terms of global security which could be enhanced through setting out overriding imperatives.[40]

4. In the digital age, information is recorded and transferred in forms that can be intercepted, altered and destroyed. Bank accounts, personal records and other data are no longer stored on paper, but instead in digital databases. Terrorist movements that maintain or send electronic financial and

38 The Tribune, 2 March 2012, p. 11.
39 *Id.*, p. 289.
40 *Ibid.*

personal information run the risk of having that information intercepted and compromised. Thus, new technologies have become imaginative counter terrorist weapons.[41]

5. Establishment of any efficient intelligent network takes times and resources. But, once it gets going, there is not upper limit of what it can achieve in fighting terrorism and no government should run shy in spending money for intelligence.[42]

6. Normally terrorists and various organisations keep spreading false propaganda which embarrasses and harms the interests of the government. Hence, all steps must be taken to counter this fake propaganda, which is, many a time, backed by false propaganda from abroad.[43]

7. Counter measures should be designed to reduce terrorist resources, their propensity to strike and the damage they intend to cause. Border security should be improved. Infiltration and exfiltration should be checked.[44]

8. Media can also play an important role in fight against terrorism. It is the most effective medium to create public awareness against terrorism. It can also be used to educate the youth of the country against the false propaganda of the terrorist organisations.

41 Gus Martin (2003), p. 358.
42 Ranjit K. Pachnanda (2002), p. 166.
43 *Id.*, p. 179.
44 *Id.*, p. 182.

INTERNATIONAL CRIMINAL COURT: AND US CONCERNS

Shouvik Kumar Guha*

1.1 Introduction

After years of negotiation, the Statute of the International Criminal Court,[1] was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,[2] on 17th July, 1998. Though International Criminal Court (hereinafter referred as ICC) was slated to be the greatest judicial body for criminal responsibility, such a position was not warmly accepted by all states.[3] The United States, in particular, has strong reservations about the ICC. In the last few years it has taken all steps possible including 'unprecedented diplomatic, legislative, and executive measures designed to diminish the effectiveness of the Court.'[4]

The question sought to be addressed in this paper is why the United States who was known to be a promoter and an ardent supporter of the international criminal jurisdiction, suddenly changed its stance to a diametrically opposite one in which it vehemently opposes the jurisdiction of the court over its subjects as well as goes to any extremes to prove that the court is not effective in the international scenario. The following segments will try to provide such an explanation, but first we need to delve into the evidence proving clearly that United States indeed reserves hostility to the ICC.

1.2 Evidence of United States Hostility to the International Criminal Court

There is clear evidence that the United States reserves hostility to the International Criminal Court. This can be reflected in the nature of United Nations Security Council Resolutions to block off prosecutions by the court, usually adopted in response to US threats to sabotage humanitarian missions by the use of the veto power, bilateral treaties to shelter US nationals from the

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1 *Rome Statute of the International Criminal Court*, 2187 UNTS 90, *entered into force* July 1, 2002.Text available at http://untreaty.un.org/cod/icc/statute/english/ rome_statute(e).pdf (Last accessed on 1 July 2012).

2 *See* Ruth Wedgewood, *The International Criminal Court: An American View,* 10 *European Journal of International Law* 93, 94 (1999), available at http://ejil.oxfordjournals.org/content /10/1/93.full.pdf (Last accessed on 1 July 2012).

3 *See* Wedgewood, *supra* note 2.

4 *See* Mark D. Kielsgard, "Cutting Edge Issues in Public Interest Lawyering: War on the International Criminal Court", 8 *New York City Law Review* 1 (2005).

threat of transfer to the Court, domestic legislation the US to use military force to obstruct the operations of the Court.[5] The notion of *'triggering'* the ICC's jurisdiction by the Security Council, which was believed to be the greatest possible future use to bring cases before the ICC, can now be construed as simply theoretical in most cases, due to the position of United States in the Security Council.[6] In the corresponding segments, these clear evidences indicating United States hostility to the ICC shall be discussed.

1.2.1 The Passing of the Controversial Resolution 1422

On 12th July, 2002, the United States managed to bring about a Security Council Resolution,[7] which would exempt United States troops and soldiers who were involved in United Nations Peacekeeping or Peace enforcement missions, especially in Bosnia and Herzegovina, from the jurisdiction of the International Criminal Court. The original draft was intended to protect only United States forces, but due to the massive international criticism that followed, made the Council adopt the current resolution, which extends protection to all non-member countries of the Rome Statute from the jurisdiction of the ICC. Thus, the resolution exempts current or former officials or personnel from a non-party State contributing to UN Peacekeeping missions from the provisions of the Rome Statute, that is from standing trial before the ICC for a renewable one-year period. There is also an extension clause for one year every time, which was invoked only once, effectively extending the deferral until 30th June, 2004. The important provision that follows through this is that the ICC Prosecutor is also prevented from commencing or continuing an investigation or prosecutes troops as per Articles 6, 7 and 8 of the ICC Statute.[8]

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5 William A. Schabas, *United States Hostility to the International Criminal Court: Its all about the Security Council,* 15(4) *European Journal of International Law* 702 (2005), available at http://ejil.oxfordjournals.org/content/15/4/701.full.pdf (Last accessed on 1 July 2012).

6 *Ibid.*

7 *See* United Nations Security Council Resolution, *United Nations Peacekeeping,* S/RES/1422 (2002), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement (Last accessed on 1 July 2012). The resolution clearly says that under Chapter VII of the UN Charter, the Security Council decides the follows:
"1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
2. Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary."

8 It was argued that such a resolution would 'rewrite' an international treaty, the Rome Statute, and argued that, despite Articles 25 and 103 of the U.N. Charter, the Security Council does not possess such authority.

1.2.2 Article 98 Agreements: Bilateral Treaties

Apart from the above resolution, the United States began actively pursuing completion of what is informally called under international law as *Article 98 agreements,* with other foreign nations.[9] The United States has clearly mentioned that they respect the decisions of States which have chosen to join the ICC, and have taken a stance with respect to such states by means of such bilateral agreements.[10]

The United States actions clearly showed a tendency towards concluding bilateral agreements with both State parties to the Rome Statute as well as States which were non-signatories, leading to the express criticism that the result of such agreements were not merely to protect the United States service-members, but also to undermine the status of the ICC in the eyes of the international community.[11] Some of the agreements extended to more than the ambit stated by the United States, and often interpreted the term *'US nationals'* in a manner which included both those on official business as well as foreign contractors within its ambit.[12]

1.2.3 American Service-members Protection Act, 2002

Right after the ICC came into force, the United States brought out a legislation which forbids cooperation with the ICC or the use of U.S. funds, directly or indirectly, in support of the ICC. This was in the form of the American Service-Members' Protection Act,[13] which was established to prevent service members from coming under the provisions of the Rome Statute. Basically five main limitations were placed on US interactions with ICC and its State parties by the ASPA. *First,* any cooperation[14] by any US court (federal or district) with the

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9 *See* ASIL, 'US Policy to the International Criminal Court: Furthering Positive Engagement', *American Society for International Law* (Report of an Independent Task Force) 5, available at www.asil.org/files/ASIL-08-DiscPaper2.pdf (Last accessed on 1 July 2012). *Also see,* Jennifer K. Elsea, 'U.S. Policy Regarding the International Criminal Court', CRS Report for Congress RL31495, available at http://www.fas.org/sgp/crs/misc/RL31495.pdf (Last accessed on July 1, 2012).

10 *See* Marc Grossman, Under Secretary of State for Political Affairs, 'American Foreign Policy and the International Criminal Court', Remarks to the *Center for Strategic and International Studies,* Washington, D.C. (6 May 2002), *available at* http://www.iccnow.org/documents/USUnsigningGrossman6May02.pdf (Last accessed on 1 July 2012).

11 *See* ASIL, *supra* note 9.

12 *Id.,* These agreements generated criticism from some quarters, including from European allies, that they were inconsistent with the partner State's obligations under the Rome Statute.

13 American Service-Members' Protection Act, available at http://www.state.gov/t/pm/rls/othr/misc/23425.htm (Last accessed on 1 July 2012).Hereinafter *ASPA.*

14 *See* ASIL, *supra* note 9. Forms of prohibited cooperation included responding to requests for cooperation from the Court, providing support, extraditing any person from the United States to the ICC or transferring any U.S. citizen or permanent resident alien to the ICC, providing funds to assist the Court, and permitting ICC investigations on U.S. territory.

ICC was prohibited.[15] *Second,* it said that the United States could participate in UN Peacekeeping operations only when mandate by the UN has some acknowledgement that the members of the US armed forces shall be exempt from the jurisdiction of the ICC.[16] *Third,* direct or indirect transfer of any classified national security information and law enforcement information to the Court is prohibited under this legislation.[17] *Fourth,* any military assistance to States party to the ICC is prohibited.[18] *Fifth,* and most controversially, the legislation allows the President of the United States to use *'all means necessary and appropriate'* to free any of its service-members as well as other people, including *'allied persons'* detained or imprisoned by or on behalf of the ICC.[19] The above legislation is thus also known as the *'Hague Invasion Act'* , as it grants the President permission to use *"any means necessary"* to free US citizens as well as allies from the jurisdiction of the ICC.[20]

However, under section 2003 it is provided that under certain conditions, there may be a general presidential waiver of the restrictions and prohibitions established under the Act.[21] Also, under section 2015, the legislation shows benevolence pledging assistance to international accountability efforts, providing that *'nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.'*[22]

1.3 Supports for International Justice

The United States were always known for their historical support of the idea of a permanent criminal court to enforce international justice. However, this

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15 *See* ASPA, *supra* note 13, Section 2004.

16 *See* ASPA, *supra* note 13, Section 2005. The only exceptions to this requirement are if no State in which U.S. troops will be present is a party to the Rome Statute; if the State Party has entered into an agreement with the United States, in accordance with Article 98 of the Rome Statute, preventing the ICC from exercising jurisdiction over U.S. service-members; or when U.S. national interests justify participation.

17 *See* ASPA, *supra* note 13, Section 2006.

18 *See* ASPA, *supra* note 13, Section 2007. The only exception to this section is if President deems it *'important to the national interest of the United States to waive such prohibition'* or the concerned State has entered into an Article 98 agreement with the United States. This provision does not, however, apply to NATO countries and major non-NATO allies.

19 *See* ASPA, *supra* note 13, Section 2008.

20 Coalition for the International Criminal Court, *ASPA,* available at http://www.iccnow.org/?mod=aspa (Last accessed on 1 July 2012).

21 *See* ASPA, *supra* note 13, Section 2003. It clearly says that *'the President is authorized to waive the prohibitions and requirements of sections 2004 and 2006 to the degree such prohibitions and requirements would prevent United States cooperation with an investigation or prosecution of a named individual by the International Criminal Court.'*

22 *See* ASPA, *supra* note 13, Section 2015.

support has only moulded over time, and we need to look at the position of the United States at each juncture of international importance with relation to the framing of the Rome Statute and their subsequent unsigning.

1.3.1 Post World War I

Even before World War I, the United States government requested the drafting of the Lieber Code, which laid the foundations for the development of international humanitarian laws vide the Hague Conventions of 1899 and 1907.[23] After the conclusion of the First World War and the Treaty of Versailles, the United States had a cautious approach with respect to criminal prosecutions, and though they did not think that accountability for war crimes was necessary, they supported the recommendation of the establishment of a *'high tribunal'* which included representatives of the United States in order to prosecute.[24] They were opposed to the establishment of an international criminal tribunal against humanitarian crimes as they felt that the focus was digressing from a legal to a moral basis.[25]

1.3.2 Post World War II

All of these apprehensions changed by the end of the second world war, where the United States were strongly supportive of the establishment of the International Military Tribunals at Nuremburg and Tokyo, and championed the cause of prosecution against *'crimes against humanity'* and *'crimes against peace'*.[26] The United States also actively participated in the adoption of the Genocide Convention of 1948.[27] However they opposed the universal jurisdiction for genocide, as they regarded such universal punishment to be the most dangerous and unacceptable of principles.[28] However, by the 1980, after the cessation of the Cold War, the US was ready to accept the position on the universal jurisdiction.

1.3.3 Post Cold War Period

The idea of an international tribunal with jurisdiction over such crimes as aggression and hostage-taking, was supported by the United States, to deal with the Iraqi invasion of Kuwait, but the capture of Saddam Hussain change this

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23 John P. Cerone, 'Dynamic Equilibrium: The development of US Attitude to the International Criminal Court and Tribunals', 18 *European Journal of International Law* 277, available at http://ejil.oxfordjournals.org/content/18/2/277.full.pdf+html (Last accessed on July 1, 2012).

24 *See* Schabas, *supra* note 5. *See also,* Cerone, *supra* note 23, p. 281.

25 *Ibid.*

26 *See* also, Cerone, *supra* note 23, p. 282.

27 Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, available at http://www.un.org/millennium/law/iv-1.htm (Last accessed on 1 July 2012).

28 *See* Schabas, *supra* note 5.

perspective.[29] The United States also took initiative on a Security Council Resolution to establish an inquiry commission to look into violations of international humanitarian law, after the war in Bosnia-Herzegovina in 1992.[30] The United States was the driving force behind the establishment of the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).[31] Gradually, the international community became certain that the ad hoc approach could not be continued and a permanent international criminal tribunal allowed much more benefits, a view which was shared by many members of the United Nations, among whom was the United States.[32]

1.3.4 US and the Drafting of the Rome Statute

There was active participation by the US in the drafting of the Rome Statute, and its help was important in the successful drafting of the statute. The United States stance on death penalty for instance was fundamental in framing the Rome Statute which excludes death penalty from its ambit.[33] But the process of drafting never showed an United States' inclination to disrupt the process. From the above analysis, it seems to be clear that the United States thus in principle supported the establishment of the ICC. However there was one subtle difference- The United States wanted the court not to have jurisdiction over American nationals- at least not as far as crimes against humanity and war crimes are concerned.

In light of the above requirement, it is clear why the United States favoured a Security Council controlled court. This is because under the Security Council, the members of the United States, would receive a virtual immunity, because of the ability to use the veto power. However, circumstances around which the Rome Statute revolved changed and during negotiations, there was insufficient support for a Security Council controlled Court. A compromise was reached, whereby the Security Council would have the power to temporarily defer an ongoing investigation or prosecution by a period of 12 months.[34]

The stance of the United States thus drastically changed towards the end of the Rome conference, and their delegation therefore sought methods to achieve American support for the ICC Statute, which was focused preventing the ICC

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29 *Ibid.*

30 *Ibid.*

31 *See* Cerone, *supra* note 23, p. 282.

32 *Id.*

33 *See* Schabas, *supra* note 5.

34 This is listed under Article 15 of the Rome Statute, which says,
'Deferral of investigation or prosecution: *No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.'*

from exercising jurisdiction over US personnel and officials. Several suggestions were made by the US in this regard[35], *firstly,* the exercise of jurisdiction of the Court had to be made dependant on the approval of both the territorial state of the alleged crime and the state of nationality of the alleged perpetrator in case either was a non-state party to the ICC Statute,[36] or, *secondly,* the ICC should be denied jurisdiction over acts committed by officials or agents of a non-state party to the Rome Statute in the course of official duties and acknowledged by the state as such unless that state had consented to the jurisdiction of the ICC.[37] These proposals were however not appreciated by the majority which forced the US to call for a vote, wherein it was overwhelmingly defeated.

From the above discussion we see that the current situation seems dramatically different from that of 1945, where US was the champion of promotion of fair trials at Nuremburg and Tokyo, and also the process leading to the establishment of the ICTY, ICTR, Special Court at Seirra Leone and the ICC.[38] Thus, there remains no doubt that accountability for Human rights violations lies at the heart of US foreign policy, which is further supported by the fact that two out of four ICTY presidents are US and so was the prosecutor for the Special Court.[39]

1.4 Unsigning of the Statute and Reasons Claimed

The US unsigned the ICC statute in 2002, citing that it did not want to submit its citizens to the jurisdiction of the court.[40] However, it is unclear why there has been a sudden change in stance by the US and a hostility towards the ICC when it itself promoted it. This is because the court does not exercise jurisdiction over third parties, and its jurisdiction extends only over nationals of third parties for crimes committed with the territory of states. Thus, exclusion of US nationals from the jurisdiction of the court was not the objective of the US. Further arguments were made, like Art 124 allows parties to opt out of jurisdiction over war crimes, excessiveness of the prohibition of reservations under Art 120, violation of the US Constitution.[41] Such arguments are either too feeble or technical or meaningless to be the force behind such hostility. Even when the

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35 *See* Bartram S. Brown, 'U.S. Objections to the Statute of the International Criminal Court: A Brief Response', 31 *International Law and Politics* 863, available at http://www.pict-pcti.org/publications/PICT_articles/JILP/Brown.pdf (Last accessed on July 1, 2012).

36 *Ibid.*

37 *Ibid.*

38 *See* Schabas, *supra* note 5.

39 *Ibid.*

40 *Ibid.*

41 Joel F. England, 'The Response of the United States to the International Criminal Court: Rejection, Ratification or Something Else?', 18 (3) *Arizona Journal of International and Comparative Law* 941, 945 (2001), available at http://www.ajicl.org/AJICL2001/vol183/EnglandNote.pdf (Last accessed on 1 July 2012).

International Law Commission submitted its draft,[42] which formed the basis for the Rome Statute, to the UN General Assembly, the US was well-disposed to the proposal of the international criminal court.[43]

However, as we have noticed from the deliberations involved in the framing of the Rome Statute, the United States has always focused on a permanent international criminal court with the support of the Security Council, to prosecute serious violations of humanitarian law. It has always promoted the importance of the Security Council in the work of the Court, and has maintained that the Security Council does not taint the independence of the judicial body. At the outset of the Rome Conference, US made a declaration that a permanent court has to be a part of the international order, of which the Security Council is a vital part, and that the Council must play an important part in the functioning of the Court. The ICC on the other hand, does not function under the supervision of the Security Council, and thus according to the US, is removed from the will of the sovereign states. The US probably sees this as a usurpation of the Security Council's established position in international law.

1.5 The Real Background and the Elite Role of US in the Security Council

As we have seen above, the US was in favour of an international criminal court, whose gatekeeper would be the Security Council. However, such a demand did not fall well with the other members during the course of the negotiations of the Rome Statute. The reasons for the US giving such a primary position to the Security Council are cited below.

1.5.1 Veto Power

The initial draft made by the ILC viewed the Security Council as a gatekeeper to the Court, and said that no prosecution could be started from a situation being dealt by the Security Council, unless Security Council otherwise decides.[44] The Rome Statute under Art 16 on the other hand says that only if the Security Council requests the ICC not to prosecute, then the ICC is prohibited from starting for a period of 12 months.[45] The presence of the veto power thus meant

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42 *Report of the International Law Commission on the Work of its Forty-Sixth Session*, UN Doc.A/49/10, text available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20 articles /7_4_1994.pdf (Last accessed on 6 November 2011). Hereinafter *ILC Draft.See* James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 AJIL 404 (1995), available at http://www.jstor.org/pss/2204214 (Last accessed on 1 July 2012).

43 Schabas, *supra* note 5.

44 *See* ILC Draft, *supra* note 43, Article 23(3) which says, *'No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.'*
Rome Statute, *supra* note 1, Article 16 says, *'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security*

that the United States could use it to their advantage to only allow cases they thought eligible before the ICC.[46] Such a provision was dropped by the Rome Statute, on the grounds that the provision signified a serious encroachment of judicial independence, as if the Security Council was indeed made gatekeeper, such a provision would politically influence decisions and interfere with judicial freedom, which is the core of Art 16 of the Rome Statute.[47] The nine-member majority and the acceptance of the five permanent members make it difficult to abuse the power to defer prosecution.

1.5.2 Prosecutor

The US has also disapproved Art 15 which provides for an independent prosecutor.[48] The Statute created, in spite of repeated objections by the US, a prosecutor with certain *propriomotu* powers, which allow the prosecutor to begin an investigation on his/her own authority or in response to information received from a State, independent citizen, or organizations.[49] This prosecutorial authority, which is subject to the supervision and approval of an ICC Chamber,[50] raised concerns as it was feared that a prosecutor who was politically motivated and aggressive could cause a tremendous impact, a fact that was seen with fearful eyes by the United States. There was no such *propriumotu*provision in the ILC Draft.

1.5.3 Aggression

Art 5 of the Rome Statute refers to aggression,[51] and unlike the ILC draft which said that a complaint relating to aggression cannot be brought before the court unless the Security Council has decided whether aggression has

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Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.' There is no mention of express prohibition of prosecution into any Security Council matter.

46 Schabas, *supra* note 5.

47 *Ibid.*

48 Rome Statute, *supra* note 1, Article 15 says, *'The Prosecutor may initiate investigations propriomotu on the basis of information on crimes within the jurisdiction of the Court.'*

49 *Id.*, at para 2, which says that the Prosecutor shall analyze the seriousness of the issue taking into account, *'..additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources...'*

50 *Id.*, para 3.

51 Rome Statute, *supra* note 1, Article 5, which says *'The jurisdiction of the Court shall limited to the most serious crimes of concern to the international community as a whole. Court has jurisdiction in accordance with this Statute with respect to the following crimes. (d) The crime of aggression.'*

been caused or not,[52] the Rome Statute which does not speak of any preliminary Security Council intervention.

1.5.4 Non-Party State

Also, another US objection is the referral to the ICC by a non-party state, which is allowed by 12(3) of the Rome Statute, and a state which is a non-party can submit to the jurisdiction of the ICC, thus affecting US manoeuvres in Iraq and Cuba.[53] Before and at the Rome Conference the United States had maintained the position that the Statute should exclude non-party States' nationals from ICC jurisdiction except when a matter is referred by the Security Council or the non-party State gives consent.[54]

1.6 Conclusion

The United States has always considered the Security Council to be the real centre of all business in the United Nations, and its permanent status there allows it to mould international law. However, the adoption of the Rome Statute saw the US being outsmarted by small and medium powers, with respect to the priority to the Security Council. The role of the Council in prosecution matters regarding international law has indeed been cut short after the passing of the Rome Statute, and this is the root of the hostility of the US to the ICC.

Such hostility has constantly been featuring in United States foreign as well as domestic policy, and shows a clear disregard for international norms and ethics. An ardent supporter of a permanent court of international crime, it backed out and turned itself on the process, when its priority position in the Security Council could not be used to its advantage. The Rome Statute probably offers the greatest equality standards with respect to lesser political intrusion, and lesser compromising on independence by the Security Council. Politicizing the law does not lead to satisfactory conclusions, and the position of the United States in this regard is purely motivated by it.

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52 *See* ILC Draft, *supra* note 42, Article 23(2), which says *'A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.'*

53 Schabas, *supra* note 5.

54 *Ibid.*

RELEVANCE OF CONTENT ANALYSIS AS A RESEARCH TECHNIQUE IN TAXATION LAW

Vipan Kumar*

1.1 Introduction to Taxation Law

Taxation Law is a fine blend of the subjects relating to law and economics. From the perspective of economics, we refer to the subjects of Accounting and Financial Management. As far as subject of Accounting is concerned, an assessee while computing taxable income[1], exempted income[2] and deductions[3] is required to have elementary knowledge of accounting principles and policies. The income from business and profession is calculated after deducting all the revenue expenses from the revenue receipts. Revenue receipts and revenue expenses are accounting concepts which involve recording of the day to day accounting entries. If the income or turnover of the assessee's business exceeds a prescribed limit, the account books of a tax payer have to be audited by a qualified chartered accountant[4]. Here the accounting standards promulgated by the Institute of Chartered Accountants of India also assume importance[5]. The other incomes like income from salary receipts, rental income, capital gains and other sources also require an elementary knowledge of accounting practices on part of the taxpayer.

Apart from the computation of taxable income, exempted income and deductions available to an assessee, a tax payer is expected to lower his tax bills by legalised way of tax planning which is a part of Financial Management. Here a difference should be made with respect to 'tax avoidance' and 'tax evasion'. Tax avoidance is a legalised form of tax planning whereas tax evasion is an illegal way to evade the payment of taxes[6]. The financial managers try to take benefit of different tax

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1 *Income Tax Act, 1961*, Chapter IV: Computation of Total Income.

2 *Id.*, Section 10.

3 *Id.*, Chapter VI - A: Deductions to be made in Computing Total Income.

4 *The Chartered Accountants Act, 1949*, Section 2:
"Chartered Accountant means a person who is a member of the institute of Chartered Accountants of India "

5 For details, visit www. icai. org / new _ post . html ? post _ id = 2805 & c _ id = 221

6 Erich Kirchler, Boris Maciejovsky and Friedrich Scheinder, "Everyday representations of tax avoidance, tax evasion, and tax flight: Do legal differences matter," *Journal of Economic Psychology*, Vol. 24 (4), August 2003, p. 535.

schemes promulgated by the Union of India and other state governments to avoid payment of taxes in a legalised manner like establishment of plants and units in Special Economic Zones[7], shifting of units to places where tax holiday has been declared or where various subsidies are available. Therefore, the role of financial management is indispensable to increase the profitability and competitiveness of a business concern from a taxation point of view.

From legal perspective, we refer to the constitutional[8] and statutory law[9], subordinate legislation[10], administrative and judicial organs[11]. The seventh schedule of the Constitution provides for the authority to levy and collect taxes on various subject matters to the Union and the state governments in accordance with the Union list and State list respectively. The main purpose of such laws is to compute, assess and collect taxes relating to different subject matters. For example, the subject matters of Income Tax, Service Tax and Excise Tax are income, services and production of goods respectively. The statutory law like Income Tax Act, Value Added Tax (VAT) Act, Service Tax and Central Excise Act provide for a detailed mechanism relating to assessment, computation and collection of various taxes in form of provisions and procedural rules. Such laws are administered by the revenue authorities like IRS and PCS officers who are given wide and discretionary powers of assessment and collection of taxes. However, such powers are subject to various remedies and judicial checks provided under the statute itself (Appeal, Revision and Review) and under the Civil / Constitutional Law (Suit and Writ Petition).

Thus, from the above discussion, we can conclude that the taxation law is multi-disciplinary in nature which includes a blend of law and economics.

2.1 Content Analysis as One of the Research Techniques

Content Analysis as defined by Bernard Berelson[12] means a research technique for the objective, systematic and quantitative description of the manifest content of communication. Another well known and apparently similar definition by

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7 *Supra* note 1, Section 10AA.

8 the *Constitution of India*, Article 265:
"No tax shall be levied or collected except by the authority of law"

9 *Supra* note 1, Chapter V of Finance Act (1994), Central Excise Act (1944), Value Added Tax Act.

10 Notifications, Circulars, Press Releases issued by the Central Board of Direct Taxes and Central Board of Excise and Customs.

11 Commissioner (appeals), Tax Tribunals, High Court and Supreme Court.

12 Bernard Berelson, *Content Analysis in Communication Research*, Free Press, New York, United States, 1952, at p. 1.

Holsti[13] is "Content analysis is any technique for making inferences by objectively and systematically identifying specified characteristics of messages". Both the definitions contain a reference to two qualities: objectivity and being systematic. The technique is objective in the sense that different people agree on the categories developed and get similar results. The term "systematic" in the definition means that the content analysis is not used haphazardly[14]. In other words, content analysis can be defined as "an approach to the analysis of the documents and texts that seeks to quantify content in terms of pre determined categories and in a systematic and replicable manner"[15]. This technique has been used for various purposes. Berlson has classified its uses into three categories namely (1) Characteristics of communication content (2) Causes of content and (3) consequences of content. The major advantages of using content analysis are:

i Can be used with any type of communication and applicable in many situations.

ii Usually free from response bias because analysis of communications are usually done without subject's awareness.

iii Can usually be carried out at researcher's convenience as the communication is usually recorded.

iv Can be easily checked for accuracy, if recorded.

v Useful for prediction when direct observation is not feasible.

vi Appropriate for analysing open ended items.

vii Can be used with existing data or data generated for the purpose[16].

This technique of content analysis was till 1930 mainly used by journalists, the only exception being a few sociologists. The growth and development of mass media made this technique popular. In legal research, there are various aspects where one can make use of this technique. The various steps involved in

13 Ole R. Holsti, *Content Analysis for the Social Sciences and Humanities*, Addision-Wesley, Masachusetts, 1969, at p. 1.

14 For details, see Surendra Kumar Gupta, "Application of Content Analysis in Legal Research", S K Verma and M. Afzal Wani (eds.), *Legal Research and Methodology*, Indian Law Institute, New Delhi, 2006.

15 For details, see Alan Bryman and Emma Bell, "Content Analysis", *Business Research Methods*, Oxford University Press, New Delhi.

16 For details, see G.L. Ray and Sagar Mondal, "Data Collection including PRA Technique", "*Research Methodology in Social Sciences*", Kalyani Publishers, Ludhiana.

conducting content analysis would be explained with the help of an example in the following section of this paper.

3.1 Applicability of Content Analysis in Taxation Law - An Illustration

Before propounding upon an illustrative example of applicability of content analysis in taxation law a reader should keep the principles relating to "reasoned orders" in mind. In *Assistant Commissioner vShukla Brothers*[17] the Apex Court highlighted the concept of "reasoned judgments". The Court laid down the following grounds behind the rationality of recording reasons in a judgment/order:

i Providing of reasons in orders is of essence in judicial proceedings.

ii The judgment of the lower court must speak for itself to enable the higher court to do complete and effective justice between the parties.

iii Recording of reasons is an essential feature of dispensation of justice.

iv It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach.

v The rule requiring reasons to be given in support of an order is, like the principle of audialterampartem, a basic principle of natural justice.

vi The order of the administrative authority must be supported by the reasons of rationality. The distinction between writing of an order by an administrative or quasi judicial authority has practically extinguished and both are required to pass reasoned orders.

vii Reasons are soul of orders. They are the heart beat of every conclusion and without the same it becomes lifeless.

viii Reasons are the links between the materials on which certain conclusions are based and actual conclusions.

ix Reason is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action.

x Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision.

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17 (2010) 36 PHT 1 (SC).

The full bench of the Apex court has reiterated this importance of reasoned orders in *JCIT v Saheli Leasing Industries*[18]. The Supreme Court is the highest in the judicial hierarchy and its guidelines are binding on all the courts, quasi judicial bodies and administrative authorities in India.

Now keeping these principles in the background, the present researcher has made an endeavour to find out that whether reasoned orders are passed by all the courts, quasi judicial bodies and administrative authorities related to Punjab Value Added Tax (PVAT). The step by step analysis is as follows:

3.1.1 Step One: Defining the Universe and Selecting a Sample

The universe of this study consists of the reported judgments and orders published in Punjab Haryana Taxes and the orders procured from office of Deputy Excise and Taxation Commissioner, Appeals [DETC (Appeals)]. While selecting the sample, the following judgments/orders were excluded:

- Merits of the case were not discussed due to non payment of pre deposit for entertaining appeals.
- Petitions were dismissed as no substantial question for consideration arose.
- Matters which were covered by an earlier judgment/order.
- Merits of the case not considered as alternative remedy was available.

Five latest judgments/orders for each authority/court i.e. first appellate authority (DETC Appeals), PVAT Tribunal and High Court were selected in which merits of the case were considered.

3.1.2 Step Two: Categorisation

The selected content was categorised under the heads of (1) Facts of Case (2) Contentions of the Appellant (3) Contentions of the Respondent (4) Reasoning / Ratio of the Case.

3.1.3 Step Three: Units of Analysis

The most appropriate recording unit for this study was a *line* and the context unit was selected as a *paragraph*. The context in which these lines were used was the categories of this study.

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[18] (2010) 36 PHT 267 (SC) (FB).

3.1.4 Step Four: Coding and Analysis

All the recording units, that is, lines were counted for quantification. Half line was considered as one. The quantified data was presented in tabular form for further analysis as follows:

TABLE

Categorisation of Quantified Data

	TOTAL LINES	FACTS OF CASE %age	APPELLANT's CONTENTIONS (%age)	RESPONDENT's CONTENTIONS (%age)	RATIO / REASONS (%age)
HIGH COURT	**1291**	**16**	**5**	**3**	**76**
PVAT TRIBUNAL	**476**	**32**	**16**	**9**	**43**
D.E.T.C. APPEALS	**265**	**31**	**29**	**26**	**13**

Note: The first column is in number where as the other four columns are in percentage of the total lines.

Analysis of the captioned tabular presentation reveals the following conclusions:

i Part of the content devoted to the ratio/reasoning of the judgment/order is directly related to the hierarchy of the authority. The high court being on top devotes maximum part of the judgment to reasoning/ratio (76%) where as the Deputy Excise and Taxation Commissioner (Appeals) being the lowest in hierarchy devotes least part on reasoning (13%).

ii The length of the judgments increases with increase in hierarchy. 265 lines (DETC) to 1291 lines (High Court).

iii Recording of contentions of both the representatives as part of content is inversely related to hierarchy. Contentions form 55% of DETC (Appeals) order as compared 25% of Tribunal and 8% of High Court's judgment.

iv Further microscopic analysis of the content reveals that the DETC (Appeals) has made no reference to earlier judicial pronouncements and provisions of

the relevant sections where as High Court has discussed them at length in light of the facts in hand.

4.1 Concluding Observations

Therefore, use of research techniques like Content Analysis can help in making various suggestions for improving administrative competencies. Apart from the above mentioned illustration, some of the suggestive areas for applicability of content analysis in taxation are as follows:

i Analysis of Parliamentary debates while passing of Annual Budget.

ii Analysis of Parliamentary debates while amending different statutes relating to taxation law.

iii Analysis of social impact of mass media due to a particular tax benefit/change proposed in finance bill.

iv Analysis of the judgments pronounced by different Tax Authorities, Tax Tribunals, High Court and Supreme Court on a particular subject of taxation.

However, this list is illustrative only and not exhaustive. The subject of taxation from its very nature is multi disciplinary in approach. It opens plethora of gates for use of research techniques like content analysis in future. The manner and context in which this technique is used will depend on the choice and ability of a researcher.

PERSONALITY PROFILE OF CYBER-OFFENDERS

Kamalpreet Kaur*

1.1 Introduction

The internet is undoubtedly a boon in every sense. It gives us access to infinite and valuable information, widens our knowledge and allows us to come closer to people all around the world. Computer technology is indeed an expeditiously developing field. While this progress is helping mankind in all spheres, the threats linked with it are rapidly raising their ugly heads. This technology has brought to the fore immense opportunities for the criminal-minded, to take advantage of. In fact, Pittaro calls the internet 'a fertile breeding ground for an entirely new and unique type of criminal'.[1] Almost every law agency in the world has a separate branch to deal with cyber-crime.

Cyber-crime is getting more and more advanced and complex with each passing day. This is making it very difficult to trace, nab and implicate cyber-offenders. Hence, new methods are directly needed to defeat them. An example of one such method is the personality profiling of such offenders. The idea of creating a profile to help identify criminals first began after the heinous Ripper Killings in London in 1888. This method is unconventional and research in this arena is pacing ahead in leaps and bounds. While a cyber-offender can hide his name and face, he cannot hide his personality traits that will show through his technique.

1.1.1 Personality Profiling

Creating a personality profile is essentially developing a list of traits that a certain type of offender may display. One cannot be sure that a suspect if guilty solely on the basis of his similarity to the list, nevertheless, the profile, if used wisely, can help to narrow down the list of suspects, substantially. We see a lot of personality profiling going on in crime based television shows such as CSI, The Mentalist, etc. while it is an exaggerated and dramatized version of what really goes on, nonetheless, these shows give a brief idea of what it is and how it helps.

Creating such a personality profile is not done by solely using one's instincts or common sense. It is much more than just an educated guess. While this method has been criticised by many for being extremely stereotypical or too generalised,

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1 Michael, L. Pittaro, "Cyber Stalking: An Analysis of Online Harassment and Intimidation," *International Journal of Cyber Criminology*, Vol. 1, No. 2 (2007) 180.

a lot of empirical research is being carried out in this area, thus giving us scientific support and near-accurate findings.[2]

There are basically two ways to help create an offender's personality profile. If a criminal is caught, various psychological assessments can be used to delineate dominant traits. This list can be compared with other criminals of the same kind. A list of common traits will emerge which can be used to create a profile, which can help identify and nab similar offenders in the future. Secondly, qualified personnel can study the offence committed, the offender's style of carrying out the act and the consequences of the offence, etc. to make inferences about his/her personality. Thus, analysis by a skilled professional can help identify distinct personality traits, motivations, emotional states and even the age (maturity) and cultural background of the offender.

To understand the motive behind a cyber-crime, one must start from the victim and the method. For example, if the victim is an organisation from which data has been stolen and probably sold to another organisation, then the motivation behind the act is likely to be monetary. But if a virus was planted to destroy the company's data base, the motive could be emotional, such as revenge or rivalry. However, this is not as simple as it sounds. A lot of other factors must be considered before reaching to a valid conclusion.

But why should anyone spend precious time and money to research and understand the personality of any type of criminal or offender? Identifying the personality profile of an offender can provide important cues that can help catch and prosecute the criminal. Knowing the personality profile of an offender can also help predict his next step, which is otherwise nearly impossible in this face-less, border-less field of cyber-crime.

1.2 Personality of Cyber-Offenders

When we talk about cyber-offenders, it can't be done in one general category. Cyber-offenders can range from young adolescents who download data illegally (most do so even without realising that it is an offence, such as downloading pirated movies) to hardened white-collar criminals. Similarly, even the personality profile of cyber-offenders will vary depending on which category they fall in. For the purpose of this paper, cyber-offenders have been divided in four categories: Cyber-bullies, Cyber-stalkers, Sexual-offenders and Computer-hackers. A future category of cyber-terrorism has also been briefly discussed.

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2 M. Rogers, "The Role of Criminal Profiling in the Computer and Forensic Process," *Computer and Security*, Vol. 22, No. 4 (2003) 526.

But before we go into a category-wise discussion of personality profiles, there are some traits that are likely to be exhibited by all kinds of cyber-offenders.

First of all, emotions play a large role as the driving force for cyber-offenders. They are likely to be high on a personality trait called neuroticism which is characterised by negative feelings such as anger, fury, hatred, vengeance, frustration, dejection, jealousy etc. We have all heard of cases where a disgruntled employee hacked into the company's account and sold the data to a rival company.

Paying discreet attention to all details is another trademark of a cyber-offender. Especially white collar criminals are seen to be highly organised and thorough about their work. This is one reason why they are difficult to catch. They cover their tracks quite well and it can be very hard to trace them.

Another common trait of cyber-offenders is that they view themselves as invincible and feel they can easily evade the law.[3] In fact, they show a certain degree of disregard for law. They also easily come up with justifications about why they are breaking the law (for example, the law is useless or it doesn't apply to me).

It has also been observed that cyber-offenders tend to be rebellious towards figures of authority and have a high need to feel superior to others.[4] Literature has also linked disorders like dyslexia, dyscalculia and Asperger's syndrome to cyber-offenders.[5]

Agreeableness and conscientiousness are two of the five major traits as described in the Big-Five model of personality. Agreeableness is characterised by feelings of kindness, compassion, cooperation, sympathy, etc. Conscientiousness is characterised by honesty, reliability, self-discipline, self-control, etc. Cyber-offenders are seen to score low on both these traits. Breaking rules, disregarding superiors, having conflicts with people in authoritative positions, etc. are some corresponding behaviours seen in cyber-offenders.[6]

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3 D. L. Shinder, and E. Tittel, *Cyberprzestezosc*, Gliwice, Helion (2004).

4 R. Chiesa, S. Ducci, and S. Ciappi, *Profiling Hackers: The Science of Criminal Profiling as Applied to the World of Hacking*, New York, CRC Press (2009).

5 W. Ziegler, and C. Fotinger, *Understanding the Hacker's Mind- A Psychological Insight into Hacking of Identities*, Krems, Danube University (2004).

6 D. Dorozinsky, and Hakerzy, *TechnoanarchisciCyberprzestrzeni,* Gliwice, Helion (2001).

Research also shows that cyber-offenders lack in basic social skills. They have difficulties in maintaining family relations;[7] feel lonely and isolated[8] and are largely incapable of forming any kind of close interpersonal bonds.[9]

1.2.1 Cyber Bully

A small percentage of cyber-offenders include a population that does not constitute of criminals, but their offence still harms others. Cyber-bullying, that is, using computer technologies to carry out acts of aggression, bullying, alienating, hate, etc. against peers, is being increasingly observed in children these days.

Such cyber-bullying has been closely linked to negative peer relations. A recent study by Schoffstall and Cohen showed that children who engage in such acts rate high on loneliness and low on self esteem. They also have deficits in areas such as peer optimism, mutual friendships, social acceptability and popularity.[10] Cyber-bullies are also seen to be low on self-control and high on emotionality.[11] They are usually aware of the fact that their acts are emotionally hurting their victim, but they either can't or don't get affected by this concern.[12] Research also shows that children, who indulge in cyber-bullying show a lack of concentration at school, are hyperactive and rarely engage in helping behaviours.[13]

1.2.2 Stalker

Another type of cyber-offender is the cyber-stalker. A cyber-stalker is one who typically uses cyber-space to target and follow victim/s in cyber-space, harass

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7 *Ibid.*

8 M. Rogers, *A Social Learning Theory and Moral Disengagement Analysis of Criminal Computer Behaviour: An Exploratory Study*, Manitoba, University of Manitoba (2001).

9 E. Shaw, "The Role of Behavioural Research and Profiling in Malicious Cyber Insider Investigation," *Digital Investigation*, Vol. 3 (2006) 20.

10 Corrie L. Schoffstall, and Robert Cohen, "Cyber Aggression-The Relation between Online Offenders and Offline Social Competence," *Social Development*, Vol. 20, No. 3 (August 2011) 587.

11 A. D. Pelligini, M. Bartini, and F. Brook, "Scool Bullies-Victims and Aggressive Victims: Factors Relating to Group Affiliation and Victimization in Early Adolescence," *Journal of Educational Psychology*, Vol. 9, No. 2 (1999) 216.

12 E. Menesini, V. Sanchez, A. Fonzi, R. Ortega, A. Costabile, and G. L. Feudo, "Moral Emotions and Bullying: A Cross-National Comparison of Differences between Bullies, Victims and Outsiders," *Australian Journal of Psychology*, Vol. 37, No. 1 (2003) 49.

13 R. Nauert. "Psychological Profile of Teen Cyberbullies" *Psych Central* (2010) http://psychcentral.com/news/2010/07/06/psychological-profile-of-teen-cyberbullies/15344.html (20 June 2012).

and threaten them thereby causing dread, fear and anxiety to the victim. Cyber-stalkers engage in pre-meditated and aggressive acts that may or may not be sexually driven. In fact, research literature shows that stalking is usually motivated by interpersonal aggression and hostility, which may or may not be precipitated by the victim's actions. Sexual or monetary motives are rarely present.[14] What further encourages a cyber-stalker is that he has little or no risk of being identified. Moreover, most cyber-stalking offences go unreported.

The cyber-stalker is usually a person who has trouble dealing with power and control issues. They are usually emotionally distant and lonely and derive pleasure from the attention that their offences receive.[15] The power and control that the stalker feels over the victim, reinforces his behaviour.

Studies show that cyber-stalkers are likely to have a prior criminal record. They are also likely to be involved in some kind of substance abuse. Most cyber-stalkers also suffer from some kind of personality disorder, which is the underlying cause of their antisocial acts.[16]

Studies focussing on the behaviour and antics of cyber-stalkers show symptoms of paranoia and delusional disorders.[17] While traditional stalkers are in some kind of relationship with their victims (present or past; real or perceived), cyber-stalkers tend to choose their victims randomly.[18] Stalkers may also suffer from an erotomanic disorder, known as Clerambault's syndrome, in which the stalker believes that he is in a close relationship with the victim and thus justifies his actions to himself.[19]

One technique that cyber-stalkers use is 'cyberstreaming' which refers to the posting of intimate, embarrassing information of the victim on a public forum

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14 E. E. Mustaine, and R. Tewksbury, "A Routine Activity Theory Explanation for Women's Stalking Victimizations," *Violence Against Women*, Vol. 5, No. 1 (1999) 43.

15 S. Hutton. "Cyber Stalking," *National White Collar Crime Center*, (2003http://www.nw3c.org (20 June 2012).

16 *Ibid.*, See also, J. Reno. "1999 Report on Cyber Stalking: A New Challenge for Law Enforcement and Industry," *United States Department of Justice*, 1999http://www.usdoj.gov (18 February 2006).

17 P. E. Mullen, M. Pathe, R. Purcell, and G. W. Stuart, "Study of Stalkers," *The American Journal of Psychiatry*, Vol. 156, No. 8 (1999) 1244.

18 P. Bocij and L. McFarlane, "Seven Fallacies about Cyber Stalking," *Prison Service Journal*, Vol. 149, No. 1 (2003) 37.

19 *Ibid.*

on-line (for example, a rejected lover may put up the victim's intimate pictures on the web) to emotionally hurt, defame or belittle the victim.[20]

1.2.3 Sexual Offender

Cyber-offenders who indulge in sexually oriented crimes use the internet for various purposes such as viewing/selling child pornography, contacting and luring children or adolescents for sexual interactions (for example, exchanging chats or videos) or even arranging meetings for the same. Anonymity, as in other cyber-offences, is a strong reinforcer here as well. One study revealed that 61% of cyber-sex-offenders are male, between the ages of 26 and 39.[21]

Surprisingly, it has been seen that most cyber-sex-offenders often have no prior history of sexual offence. However, they may suffer from a range of psychological problems such as paraphilias (sexual deviancy, for example, paedophilia), hypersexual disorders, obsessive compulsive disorders, sexual addictions and even depression, loneliness, emotional isolation, etc.[22] In some cases where the individual is under some major stress (such as divorce or loss of employment), it is seen that the sufferer resorts to inappropriate sexual activity to cope with the dissatisfactions in his/her own life.

Most cyber-sex-offenders are highly addicted to such acts. They will progressively start spending lesser time to complete daily chores and exhibit withdrawal symptoms (like high irritability, mood swings, anxiety, etc.) when not online.

1.2.4 Computer Hacker

'Hacker' is not a term that was originally used to describe a kind of cyber-offender. In the cyber-world, it was actually used to describe what one can call 'a clever programmer' or a computer expert. But this term has grown to mean (with ample push from the media) a person who tries to break into computer systems (without permission, of course) with the use of one's knowledge of computer technology. For the purpose of this paper, the word 'hacker' shall be used in the latter context.

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20 *Ibid.*

21 K. Mitchell, J. Wolak, and D. Finkelhor, "Police Posing as Juveniles Online to Catch Sex Offenders: Is it Working?" *Sexual Abuse: A Journal of Research and Treatment*, Vol. 17, No. 3 (2005) 241.

22 J. Fabian, "The Risky Business of Conducting Risk Assessments for those already Civilly Committed as Sexually Violent Predators," *William Mitchell law Review*, Vol. 32, No. 1 (2006) 81.

Jacob Lickiewicz prepared a 'hacker profile model' based on an analysis of existing literature. The main elements included in this model are 'high intelligence, a specific configuration of personality traits, low social skills, high technical skills and dependence on (or addiction to) the internet'.[23]

Technical knowledge, of course, is seen in all hackers for obvious reasons. They have higher than average intelligence and good problem solving abilities. They score relatively higher on tests measuring the ability to reason and analyse. Logical reasoning is another one of their strengths.

Computer hackers are seen to have a high need for risk-taking. They thrive on the thrill they experience when crossing risky boundaries. Such offenders feel a high sense of satisfaction when they think they have outfoxed others. The fact that they manipulated someone and duped him/her, gives their self esteem a large boost. They also seem to be highly open to new experiences. They display a sense of curiosity and use immense creativity and unconventionality while breaking all kinds of technological security barriers.

An interesting observation that emerged from studies with computer hackers is that the cause/motive behind their crime may not always be one the classics (such as money, political or religious beliefs, etc,). They may engage in such acts purely out of boredom or just for the sake of fun or even just to show off to others that they are capable of pulling off something like this. Their intent may not be to harm anyone, but their acts do cost others severely.

Hackers who join an organisation with the intent of espionage or sabotage exhibit certain common traits such as 'maladaptive reactions to stress, financial and personal needs leading to personal conflicts and rule violations, chronic disgruntlement, strong reactions to organisational sanctions, concealment of rule violations and a propensity for escalation during work-related conflicts'.[24]

1.3 Cyber Terrorism - the Future Threat

Perhaps the gravest form of cyber-offence is cyber-terrorism. Political and religious beliefs are what drive a cyber-terrorist. Where the world has benefited from the wonders of information technology, terrorists can't be far behind. They have already been using the internet to convey their threats, communication, spread their propaganda. While a full blown cyber attack has not yet occurred,

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23 Jacob Lickiewicz, "Cyber Crime Psychology- Proposal of an Offender Psychological Profile," *Problems of Forensic Sciences*, Vol. 87 (2011) 242.

24 S. Band, D. Cappelli, L. Fischer, A. Moore, E. Shaw, and R. Trzeciak, "Comparing Insider IT Sabotage and Espionage: A Model-Based Analysis," *Software Engineering Institute Technical Report CMU/SEI-2006-TR-026,* Carnegie, Mellon University (2006).

their rapid invasion into cyber space makes it a matter of deep concern. Today, a lot of terrorist websites have also cropped up. This has greatly widened their audience. Now, virtually anyone can view the agendas and influencing messages of these extremist organisations.

Terrorists can use the internet for various purposes. They can use it for recruitment and training. The advantage in this method is that the terrorist organisation can attempt to recruit someone without physically approaching that person. Cyber technologies can also be used to sabotage computer system of an organisation. In the worst form they may debilitate a nation's defence forces and intelligence agencies or to infiltrate the system and plant wrong and misleading information. This will not only misdirect the authorities but also paralyse any defence measures that may be taken.

While not much is currently known, it will be highly beneficial to conduct empirical research and outline what characteristics and motivations can define a cyber-terrorist. This information can help devise a strategy to abate any such future attacks.

1.4 Conclusion

To conclude it can be said that cyber-crime is an emerging field of criminal liability, which is expanding every day in its content and form. The Internet has changed the way people, interact and communicate with each other and do their work. Traditional concepts of criminal behaviour are inadequate and different from the perception and modus of culpability in cyber-crime.

It is no longer enough to use traditional methods to catch such criminals. Years of psychological research has now equipped us with a powerful weapon to identify criminals, that is, personality profiling. Not using it to societal benefit will only help the anti-social elements. Further developments in the field of personality profiling of cyber-offenders will hugely benefit people from all walks of life: the Government Agencies; Business Organizations; Academic Community; and even the common man. The generalisations made in this paper are just introductory to understand the scope and ambit of this emerging area of professional study. This could prove to be an effective tool and technique in detection of cyber crime and treatment of cyber criminals. Therefore, a meaningful research needs to be progressively undertaken in this area. Perhaps, it is a start, but a start that needs to be rigorously followed.

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