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TRADE IN SERVICES AND WTO*

S.K. Verma"

It is indeed a matter of great pleasure to deliver a lecture in honour of Professor S.R.Bhansali with whom I enjoy an association since 1987, when I first met him at Nagpur at a Seminar organized by the University. Incidentally, there too I spoke on the trade in services and now I am speaking on this topic again after a gap of seventeen years. I was deeply impressed by Professor Bhansali's personality and ideas on different issues. It is also a coincidence that I met Professor N.L.Mitra for the first time at Nagpur. When Professor Mitra contacted me for delivering this lecture, I readily agreed to speak in honour of a person whom I hold in high esteem. Among the legal academicians in our country, I initiated the discussion on trade in services in 1985. Since then significant developments have taken place in this important area.

In September 1986, the Uruguay Round of Multilateral Trade Negotiations (MTNs) on Goods and Services, started at Punta del E'ste, with an ambitious agenda of 15 sectors to negotiate including the trade in services. The decision to include trade in services in the MTNs was a natural culmination of a controversy centred around the issue of services started with the 1982 Ministerial meeting of the GATT, when the United States identified services as one of the future areas for trade negotiations among GATT signatories.

Inclusion of services along with intellectual property rights and investment measures, however, created an unprecedented

* Professor S. R. Bhansali lecture delivered on March 27, 2004 at the National Law University (NLU), Jodhpur, chaired by Prof. (Dr.) N.L.Mitra, Vice Chancellor, NLU and graced by Prof. S.R.Bhansali.

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controversy and confusion in the GATT negotiations. The Uruguay Round ended in the adoption of an Agreement on World Trade Organization, 1994 which included a multilateral agreement on services - the General Agreement on Trade in Services (Annex IB).[1] The GATS is an integral part of the WTO and is *ipso facto* binding on all the members of the WTO.

The GATS is one of the most significant agreements of the WTO. It has put the service sector on the agenda of the policy planners of the Member countries because of its importance. Not only do services comprise a growing proportion of international trade overall, but the ways in which services are supplied provide potential to undermine the economic sufficiency, political sovereignty and cultural identity of the locality. Services, particularly those with intellectual content, carry far deeper messages than goods. They traverse fields clearly connected with social relations - professional, financial and communications fields that are likely to shape the structure of a global society. Services provide means to introduce fresh, foreign perspectives, construct cross-border transactions and affiliations, question the value of parochial knowledge and custom, and undermine the competence of local regulation.

Yet many services retain distinctive geographical, temporal and personal features. While international suppliers will use various strategies to try to overcome these particularities, the provision of services is likely to remain tied into their local contexts. In many services sectors, effective supply still depends on being able to establish a presence in the locality, to be there at the right time, and to demonstrate familiarity with the local ways of doing things. But the suppliers who seek to obtain competitive conditions of access behind the border encounter a host of regulatory legalities that run counter to their own legalities of operation. As a consequence, both the suppliers and the locals become involved in attempts to reconcile these legalities.

The other multilateral agreements adopted along with GATS are: the TRIPS Agreement (Annex IC); Agreement on Trade in Goods (Annex 1A); the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2); and the Trade-Policy Review Mechanism (Annex 3).

The GATS is the first full-fledged multilateral agreement on services. Services was to be a new field for the GATT which was previously occupied with barriers to trade in goods. The essential approach taken by the GATT was to assimilate those trade barriers to a common measure of tariffs and then to seek reductions in these quantitative impositions on trade in goods. Services can be incorporated in goods, but often the real action on the supply of services is expressed through personal relationships between providers and users. It can be more difficult to keep track of services supply than it is trade in goods. Certainly, a wider range of domestic measures might be implicated by the application of trade norms to the supply of services. This lack of comparability between trade in goods and trade in services initially provided an argument for not making a trade agreement for services under the Uruguay Round and developing countries, led by India, Brazil and Yugoslavia, were particularly opposed to it. It was also to raise questions about the suitability of extending many of the GATT concepts to the GATS; one such example is the provision for anti-dumping procedures and remedies.

The GATS produced a broad framework for negotiations over the liberalization of trade in services. It comprehends all possible modes of service supply. It then subjects the regulation of these supply activities and modes to the norms of national treatment and market access. Regulatory arrangements operating deep behind the border and representing all sorts of economic, political and cultural concerns may become barriers to trade. But then all countries reveal strengths and weaknesses exposing their services sector to the competition of international trade.

NATURE AND ROLE OF SERVICES IN INTERNATIONAL TRADE

For services no common definition exists. Generally, the term is related to all economic activities other than agriculture, mining, manufacturing, construction and utilities. It is a heterogeneous

[2] Christopher Arup, *The New World Trade Organization Agreements*, 97-98 (Cambridge University Press, 2000).

group of economic activities. Services in trade, for the most part, deal in intangibles, which include banking, insurance, transportation, communication and data processing, retail and wholesale trade, advertising, accounting, construction, design and engineering, management consultancy, real estate, professional services, entertainment, education, health care and tourism. Exceptions are the motion pictures and computer industry where service is embodied in tangible goods.

Most services operate on a contractual basis and, therefore, focus on fees, royalties, premia and margins. Some, such as tourism, provide output inside their respective nations to non-residents. Others offer parts of their services from their home country. Most depend heavily on the establishment of an overseas presence since, by their very nature, many services cannot easily be shipped or transported across national boundaries. Thus, while some services are related more to investment, requiring strong local presence, e.g. banking, communication, tourism, etc., others can be traded (applying the IMF definition that "trade" constitutes a transaction between residents and non-residents).

The GATS Agreement embraces all but a narrow category of services and does not give any elaborate definition of services except stating that term "services" includes "any service in any sector except services supplied in the exercise of governmental authority."[3]

A number of services have well-defined international markets like shipping, air transportation, banking and motion pictures. Others, such as consulting services, do not. Government regulations also vary greatly among different services, being strongest in the areas of banking and insurance. But in most cases government regulation of trade in services is greater than that exists in merchandise trade for reasons of sensitivity. Many services sectors touch on areas of national security (transportation, telecommunication), financial stability (banking) or cultural identity (motion pictures and television programming).

[3] GATS, Art. I:3(b).

Although service industry is generally regarded as being labour-intensive, there is substantial variation within the group. Accounting, management, consulting, architectural and engineering services are all labour-intensive and the labour involved is more skill-intensive, hence it is high cost labour. On the other hand, reinsurance is capital-intensive industry.

Trade barriers for services are very different from trade barriers that affect goods. For services, herder controls are are no tariffs and quotas are very difficult to maintain. Rather, services are subject to a myriad of domestic regulations, often very sector-specific. Some service areas, such as telecommunications, are maintained as state monopolies. Some sectors are the subject of investment restrictions. For some professional services, such as doctors and attorneys, there are competency standards. In all areas, there are restrictions on immigration. Regulatory patterns differ greatly state-by-state.

Consequently, trade liberalization in services is largely a negotiation based on divergent domestic regulations. In a sense, the GATS story resembles that of the GATT after border protection had been substantially dismantled: if the process of liberalization requires first dismantling border controls and then negotiating regulatory barriers, the GATS did not miss much by coming into force 45 years after the GATT.

Services, as a group, was never considered to be an issue before 1978, when the United States under the pressures of its aviation and insurance industry, brought it before the Trade Committee of the Organization of Economic Development and Cooperation (OECD)[4] Inclusion of services under the WTO is a reflection of growing share of services in national economies world over. They accounted for around two-thirds of both GDP and employment, while manufacturing and agriculture played a minor role.[5] Currently they account for more than 50 per cent of world output

[4] Ronald K. Shelp, *Beyond Industrialization* 174 (1981).
[5] Shyoraj Singh Parmar, Trade in Services and WTO, 30 *Journal of the Legal Studies* 137(1999-2000).

whereas their share in world exports is around 25 per cent. The developed countries have the dominant share in traded services and the United States occupies the prime position. It is further to be noted that though services do not account much in the world trade, they have dominated the GDP in most countries, particularly in developed countries with 67% share in the GDP compared to 40% of the developing countries. Similarly, services share in employment has also increased tremendously in most of the countries in recent times. The services comprise more than 50% share of India's GDP.

These developments in the services-sector had their resultant impact on the international economic and political arena. The developed countries became concerned and started insisting upon having a common policy and more free trade in services since late seventies. On the other hand, for developing countries, though services were less significant in GDP and employment, many of them were integral part of import substitution policies. Various financial services such as banking and insurance and others such as communications, utilities and advertising are areas in which most developing countries seek to build-up their national industries and they are also part of nation building and development planning. National control of these industries is considered to be the symbol of economic development and independence from industrial world. Foreign participation in them was restricted till recently because not only it is considered to be non-conducive to national objectives like earning foreign exchange, transferring technology, redistributing wealth but to ensure that socio-political, cultural and national security goals are achieved. It should, however, be noted that such views are reinforced by developed countries that regulate and limit foreign participation in some of these sensitive industries. In the United States, for example, foreign investment in communications and advertising is restricted.[6] But the generally held view is that developing countries are more conscious of the need to limit service imports and this is understandable since they are the net importers of services except in the area of manpower, which is subject to immigration laws of developed countries.

[6] Ronald K. Shelp, *supra* note 4. at 77-78.

Liberalizing international transactions in services is commonly considered to be a North-South issue with expected gains from trade for industrialized countries at the expense of the developing countries.[7] However, within industrial countries also, well-established producers on protected domestic markets have expressed concern.[8]

Whatever definition of services one uses and whatever confidence one reposes in one set of statistics or another and whatever reservation one may have to the liberalization of services trade, it is now well entrenched in the world trade because of the GATS, which is binding on all Members, who are obliged to implement it.

THE ISSUES IN TRADE IN SERVICES

As already stated, it is difficult to define "services" and more so to define "trade in services". Trade in services cannot simply be equated with international transactions in services and still less so with international services "activities". It involves both trade and investment. Consequently, it is imperative to draw a distinction between tradable and non-traded services, internal and international trade in services, trade-production and distribution, between market access conditions and the right to establishment, and between the purely trade issues and those relating essentially to foreign direct investment in services trade. This is a complex issue and a distinction is required to be made between trade and investment in this context.

An important characteristic of services that has far reaching implications for marketing of services is their inseparability, i.e., services cannot be separated from their providers, whether they are persons or machines. But all services do not require physical proximity of the provider and user. In this context, there are two broad categories of services:

[7] Andre Sapir, North-South Issues in Trade in Services, *The World Economy,* (March, 1985); Randhawa, Punta del E'ste and After: Negotiations on Trade in Services and the Uruguay Round, 21 *JWTL* 163 at 164 (1987).
[8] Henning Klodt, International Trade, Direct Investment and Regulations in Services, 12 *World Competition* 47 (1988).

1. *Those that necessary require the physical proximity of the provider and the user*

Those that necessary require the physical proximity of the provider and the user, and the services where physical proximity is essential fall into three categories:

(a) The Mobile Provider and Immobile User: the mobile provider and immobile user characterize The Jirjgj, category. This involves cases where the mobility of the beneficiary to the place of the provider is not physically feasible. For example, an Indian firm which has a construction contract abroad will have to send the manpower required to the construction site for carrying out the work, or a technician may have to go to a plant abroad to rectify a problem with the plant.

(b) The Mobile user and Immobile provider: This category consists of services, which involve some key elements, which are not normally transferable to the user's location. For example, certain experiments can be done only in those laboratories equipped for them or a patient who wants an open-heart surgery will have to go to a hospital where the required facilities are available.

(c) Mobile user and Mobile provider: In this category, proximity may be achieved by either the provider going to the user or the user going to the provider such as professional services.

2. *Services for which physical proximity is not essential are known as long distance services*

Services for which physical proximity is not essential are known as long distance services. Examples of this category include transmission 'over the wire' and communication services. In advanced countries, traditional banking and insurance fall into this category since loans or insurance policies can be secured by mail or phone. The scope for long distance transactions may increase without advancement in technology.

Even in respect of many long distance services, however, physical proximity between the provider and user may help to increase the efficiency of the service. A large number of service firms would, therefore, like to have places of business in countries with sufficient market. The 'right to establish' is an important aspect of free trade in services, which also involves the right to employ peqple, without restrictions on the nationality. International trade in many services involves international factor mobility, such as capital and labour. There are number of international transactions involving temporary factor relocation services such as those requiring temporary residence by foreign labour to execute service transaction.

International trade in services, thus, involves intricate issues like right to establish and factor mobility. These are special problems in liberalizing trade in services compared to trade in goods. Because of the special characteristic and the socio-economic and political implications of certain services, they are generally subject to various types of national restrictions. Protective measures include visa requirements, investment regulations, restrictions on repatriation, marketing regulations, restrictions on the employment of foreigners, compulsion to use local facilities etc. Heavily protected or restricted services in different countries include financial services, i.e., banking and insurance; transportation; motion pictures; transportation and communication etc.

There is a generally held misconception that developing countries are against negotiations in services. In fact, some developing countries are increasingly aware of the potential of services in the improvement of their overall economic development. The reasons for lack of enthusiasm among them are: the way the services are generally understood to include principally financial services such as banking and insurance, and the belief, which is based on trade facts, that the comparative advantage in services lies with developed countries, which cannot be narrowed down easily. Their major pre-occupation has been the preponderant role of MNCs in services, particularly by services conglomerates in banking and finance, telecommunications, insurance, advertising and other business services. These services fro MNCs are also accompanied with monopolistic and restrictive business practices, which developing countries find difficult to curtail. Developing countries see this pressure particularly in so far as it is directed towards dismantling or modifying national regulatory framework as a threat to their economies and sovereignty, particularly financial services are part of national strategy of economic growth. These countries are concerned about their infant industries, balance of payment difficulties and the crucial role of services in infrastructure. This requires a differential and special treatment for them.

SERVICES UNDER THE INTERNATIONAL TRADE ORGANIZATION (ITO) AND THE GATT

The origin of GATT can be found in the Charter of ITO (or the Havana Charter), which was envisioned as the principal international trade institution to be established after the Second World War. The echo of the trade in services could be heard in the ITO Charter, though the scope was limited. At the first session of the preparatory committee of the U.N. Conference on Trade and Employment, held under ITO's auspices, the view was expressed that the section on restrictive business practices would have no meaning if it failed to include services such as shipping, insurance and banking. Consequently, Article 50 in Chapter V (Restrictive Business Practices) was incorporated, which stated:

> The members recognize that certain services, such as transportation, telecommunications, insurance and banking are substantial elements of international trade, and that any restrictive business practices in relation to them may have harmful effects.—

These practices were to be dealt in accordance with the mode enumerated therein. The special provisions with respect to restrictive business practices (RBPs) in services remained in the final draft of the Havana Charter as well. The extension of the

Charter to services was supported by developing countries and opposed by the major maritime powers. It is, however, to be noted that the Havana Charter, while included a provision on services, contained elaborate rules on restrictive business practices. In fact, services were discussed in the context of RBPs. On the contrary, WTO does not contain any special provisions on restrictive business practices and leaves this aspect principally to Members. The Code on restrictive business practices, adopted by the United Nations General Assembly in 1980 covers the activities of MNCs and extended to trade in goods and services, is voluntary in nature.

The Havana Charter also included general investment provisions, which, of course, extended to service investments also. Article 11 obligated members not to take unreasonable or unjustifiable action injurious to the international investments of other members. Article 12 obligated members to give reasonable opportunities for investments and adequate security for existing and future investments. Members were to negotiate commercial treaties on request, with the right to set up the terms with respect to the ownership of existing and future investments. The Charter did require, however, that these terms be "just and reasonable." It also allowed for the discussion of investment issues in the ITO and, at the insistence of any member, in the ICJ.[10]

These efforts to liberalize services went in vain because the efforts to establish the ITO failed. Only section of the Charter dealing with commercial policy survived and became the basis for GATT, which lacked the broad scope and the organizational and procedural provisions of its progenitor, the ITO.

SERVICES IN THE GATT

The GATT was designed particularly to apply to goods and was not intended to cover services. Except for motion pictures, there was no provision specifically dealing with services. In the area of

9 The Set of Multilateratly Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, UN Doc. TD/RBP/10, Annex (1980), cited in XIX 1LM 813 (1980).

10 UN Docs EPCT/C.ll/25 at 4 (1946); EPCT/C.11/48 at 1 (1945); Ronald K.Shelp, supra note 4, at 151.

motion pictures, restrictions were allowed in the form of quotas. Article IV prescribed the form such quotas should take and seeks to prevent the screen time reserved for domestic films from being increased after 1947. It asserted that quotas are "subject to negotiations for their limitation, liberalization or elimination." Apart from this provision, the subject of motion pictures was never being dealt within the GATT. In fact, it was never discussed by the Contracting Parties except that there was a mention of motion picture restrictions in the list of non-tariff barriers, prepared for the Tokyo Round of Negotiations.

Notwithstanding this express provision for motion pictures, the real focus of the GATT in services was confined to transport insurance. Except for the freedom of transit (Art. V), the GATT did not expressly cover transportation matters also. Trade in services, for the first time, were comprehensively dealt under the Uruguay Round of GATT negotiations.

THE FRAMEWORK OF GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

The immediate objective of negotiations, under MTN was the "expansion of trade in services" and not liberalization *per se*, though the expansion of trade was aimed at progressive liberalization. While vowing to free trade in services from existing restrictions, it recognized the regulatory concerns of Member countries. The Punta del E'ste Declaration stipulated that such a multilateral framework for trade in services "shall respect the policy objectives of national laws and regulations applying to service." Accordingly, the national laws and regulatory framework applying to services are clearly not being put up for negotiations. Generally speaking, these regulations govern for the most part of internal aspects of services sectors. Only where regulations impinge upon trade at the border, they would be looked at, but never with a view to questioning the objectives. The GATS "applies to measures by Members affecting trade in services."[11] It must be read with other documents contained in the Ministerial

"GATS, Art. 1:1.

Declarations and Decisions of the final Act, most importantly, the Understanding on Commitments in Financial Services.

During the Uruguay Round negotiations, WTO Members negotiated, in principle, on everything (with the notable exception of the difficult issue of rights in air transport).[12] There was, in principle, no decision to conduct negotiations on specific sectors. Sector-specific negotiations were, however, conducted on financial services, telecommunications, and maritime transport after the WTO Agreement entered into force. Currently negotiations are underway on educational services.

The Agreement in all has six parts. The opening section deals with the scope and definition. Part II (the longest), sets out the general obligations and disciplines, i.e., the rules that apply to all services and all members. Part HI provides rules governing the specific commitments in schedules. Part III states rules governing the specific commitments in schedules. Part IV concerns with future negotiations and the schedules of specific commitments. Parts V and VI cover institutional and final provisions. The Preamble to the Agreement provides insights into the intentions of negotiators **and** puts the reform process in perspective. It reflects the concerns of developing and least developed countries. It also sets out the long-term objectives of the agreement against the background of equitable and balanced economic development.

The GATS is primarily an enabling agreement, which creates a legal framework for trade in services and allows countries to specify the actual commitments to be undertaken in the schedule of commitment.

SCOPE AND COVERAGE OF THE GATS

The GATS covers all manner of services except those supplied in the exercise of governmental authority, i.e., any service which is supplied neither on a commercial basis, nor in competition with

''' Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, Chap. 11 (trade in services), (2d ed. 1999). [13] Art. I:3(b).

one or another service suppliers. Four modes of trade in services are identified: cross border (Mode I), consumption abroad (Mode II). commercial presence in the consuming country (Mode III), and temporary movement of natural persons (Mode 4).

(1) "Cross border" services are where both provider and user remain in their home territory (e.g., services provided generally by facsimile, e.mail, phone, or other means of communication); (2) In. "consumption abroad", services provided to the user who travels to the territory of the provider (e.g. tourist or student joining an education institution abroad); (3) In "commercial presence", services are provided where the provider establishes a commercial presence in the territory of the user (e.g., a UK bank, insurance, or financial services company establishes a branch or subsidiary in India). This is supposed to be the most important mode of supply of services, at least in terms of future development, and also raises the most difficult issues for host governments and for GATS negotiations. Under the investment laws, the supplier must belong to the country of consumption. WTO breaks new ground here compared to GATT which confined itself to trade in goods, originating in a foreign country; and (4) By "movement of natural persons", services are provided when a natural person - the provider of services temporarily travels to the territory of the user (e.g., an attorney, interpreter, or teacher travels to another country to consult or lecture). The national governments have power to regulate this mode of service supply by regulating the entry through visas to the prospective service providers.

The GATS disciplines, therefore, are relevant for not only services but also services suppliers (both natural and legal persons). Viewed from this angle, mode 3 essentially amounts to an international agreement to liberalize investment: for example, by allowing foreign banks to sell banking services under mode 3, a WTO Member is *de facto* opening up to foreign investment in the banking sector. However, it is mode 4, in which developing countries are particularly interested and to which developed countries are particularly apprehensive. As the services sector is

[14] GATS Art. 1:2.

mainly labour-intensive and most of developing countries have labour in abundance, they are naturally interested in the mode. But entry of the natural persons has been made subject to "Economic Needs Test" by developed countries, that is, depending on their economic needs the entry of natural persons would be allowed under mode 4.

The GATS applies to any "measure" taken by governmental bodies or non-governmental associations exercising delegated authority affecting any of these modes of trade in services.[15]

The broad scope of the GATS outlined above poses certain conceptual problems. First, the outer boundary of what is "services" for purposes of the GATS is not sharply defined. Services trade is defined more in terms of categories of transactions (the modes of supply) rather than substantive categories. Thus, although services can in most cases be distinguished from goods based upon the idea that services are simultaneously provided and consumed, but goods are storable for later use or enjoyment. There may nevertheless be overlap between the international rules for services and those for goods, especially given that GATS applies to all measures that "affect" services. Second, because trade in services is defined in terms of transactions, services trade under the GATS will inevitably involve more than just the bare services supplied. The transactional notion of services in the GATS means that services trade will also implicate in some instances certain international factor flows, notably (1) information; (2) technology; (3) capital or investment; and (4) labour or immigration.

The GATS obligations are divided into three major parts: (1) general obligations; (2) specific commitments, and (3) commitments relating to specific sectors, namely, financial services (banking and insurance), telecommunications, air **transport and** movement of labour (natural persons).

[15] W. Art. 1:1.

GENERAL OBLIGATIONS

The explicit rules that are considered the foundation of the GATT are well known: the granting of non-discriminatory (mostfavoured-nation MFN) treatment for goods of other contracting parties at the border (Art. I) and according national treatment to imported goods (Art. III). GATS incorporates these principles of MFN (Art. II) and National Treatment (Art. XVII) under specific commitments. The MFN clause makes it obligatory on GATT members to grant each other treatment as favourable as they give to any other country in the application and administration of import and export duties and charges. The aim of this rule is to make the extent of protection clear and to encourage as much competition as possible. In case of services, a Member must accord "immediately and unconditionally" to other Members no less favourable than the treatment they accord to like Services and service suppliers of any other country (Art. 11:1).

A Member can seek exemption from MFN treatment through the WTO waiver procedures over and above the Annex II exemptions (from Art. II: 1). Article II: 2 permits WTO Members to "maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of the Annex on Article II Exemptions." WTO Members can give advantages to its adjacent countries under regional trading arrangements (Art. II: 3). There is also an exception for national security (Art. XIV *bis).* These exemptions can be maintained for up to ten years, although they are subject to periodic review and negotiation. This means that MFN in the GATS is conditioned to prevent "free-riding" in the markets of more open WTO Members. No new exemptions can be added to the original ones unless recourse has been made to the waiver provisions of the WTO Agreement.[1]

GATS obligates Members to maintain transparency by publishing promptly all relevant measures of general application, which pertain to or affect the operation of this agreement. However,

[16] Annex on Art. II Exemptions enlist the exemptions granted on different grounds to various members.

certain confidential information may be withheld, the disclosure of which may unpede law enforcement, or would be against public policy or may affect legitimate commercial interests of particular enterprises (Art. Ill *bis).* Besides, international agreements relating to services must also be published. Members are also required to inform the Council for Trade in Services (CTS) promptly and at least annually of any new, or any changes to existing laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments (Art. III).

GATS allows Members to enter into agreements resulting in integration of service markets as long as that agreement has substantial sector coverage and provides for elimination of substantially all discrimination between the parties in the covered sectors (Article V). It also allows Members to agree for full integration of the labour markets between them (Art. V: *bis).* It requires Members to adopt domestic regulations to ensure that they are based on objective and transparent criteria such as competence to supply the services; they are not more burdensome than necessary to ensure the quality of the service; and in the case of licensing procedures, they are not a restriction on the supply of the service. The CTS can establish and develop "necessary disciplines" for domestic regulations (Article VI). Members may adopt criteria for recognition of the education or experience obtained in another country as long as such recognition does not operate as a means of discrimination between countries (Article VII). Such recognition may be based upon an agreement between the countries.

There are two provisions on anticompetitive practices that may undermine services liberalization. Article VIII does not prohibit national service monopolies, but prohibits "abuse" of a monopoly position and requires WTO Members to ensure that national monopolies do not operate in a manner inconsistent with GATS obligations. If "business practices" restrain or restrict trade in services, Article IX requires "consultations" at the request of any WTO Member and "full and sympathetic consideration" to complaints. This, however, "is not a mandatory obligations and no follow-up action is provided, if the consultations" fail to resolve the issue.

GATS allows countries exemptions from their scheduled commitments for balance of payments reasons (Article XII). Additional exemptions are provided to enable a Member to protect its national security and for purposes of protecting public order, human, animal or plant life or health, prevention of fraudulent and deceptive practices, preventing or reducing double taxation and inequitable imposition of taxes and protection of privacy. Payments and transfers of capital must be open with respect to a Member's commitments.[17] Subsidies affecting services are subject to negotiation with a view to eliminating their trade distorting affects.[18]

Economic and market-to-market integration agreements are permitted to operate within the context of a Member's GATS commitments.[1] There is provision for emergency safeguard measures[2] and government procurement is exempt. ' It also provides for negotiating on subsidies affecting services, and on the countervailing duties to compensate for the subsidy.

The GATS also provides for progressive liberalization of services trade through future negotiations (Part IV). Article XIX mandates: "Members shall enter into successive rounds of negotiations... with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access." The Council of Trade in Services (CTS) is entrusted to carry out an assessment of trade in services with a view of drawing guidelines

[17] GATS Arts. XI and XVI.
[18] *Id.* Art. XV.
[19] *Id.* Arts. V and VI.
[20] GATS Art. X.
[21] *Id.* Art. XIII.
[22] Art. XV.

and procedures for negotiations. The increasing participation of developing countries is encouraged.[23]

The concerns of developing countries are addressed through two requirements: (1) Members must negotiate specific commitments to benefit developing countries (Art. IV: 1); and (2) developed Members must establish "contact points" to facilitate access of developing countries to information (Art. IV:2).

SPECIFIC COMMITMENTS

The general obligations assumed in the GATS do not, by themselves, guarantee market access. Any Member can, in principle, respect the MFN obligation and keep its market completely inaccessible to foreign services and service suppliers.

Hence, specific commitments have to be made by Members related to market access and national treatment. The relevant provisions of the GATS in this regard are: Article XVI-related to market access, Article XVII - the national treatment obligations, and Article XVIII - additional commitments. Members are required to accord market access through different modes of supply, identified in Art. I, to a service and service provider of any other Member a treatment no less favourable than that provided under the terms, limitations and conditions agreed and specified in its Schedule. The "national treatment" rule is intended to ensure that a country must accord Foreign Service provider the same treatment as domestic service suppliers.

National treatment distinctly limited under the GATS and extends only to service sectors inscribed in an individual WTO Member's Schedule of Specific Commitments, and even commitments with respect to these service sectors can be conditioned and qualified. A WTO Member may protect certain service sectors or modes of supply from national treatment by omitting it from its Schedule. However, with respect to market access in those sectors liberalized

[23] *Id.* Art. IV.
[24] Art. II GATS.

under a particular Member's Schedule, six measures are, in principle, prohibited, unless otherwise specified in its schedule measures:

1. Limits on the number of service suppliers,
2. Limits on the value of transactions or assets,
3. Limits on the total quantity of service output,
4. Limits on the number of natural persons that can be employed,
5. Limits on the type of legal entity that can be used, and
6. Limits on participation of foreign capital or investment[25]

In addition, WTO Members may negotiate commitments with respect to service sectors not covered by national treatment or market access Schedule commitments. It is important to note that, if India agrees to market access concessions, it cannot limit foreign equity participation in the sectors specified unless specified in its schedule. Members may make additional commitments regarding qualifications, standards or licensing matters affecting trade in services.

Closely related to "national treatment", there is a serious conceptual problem with respect to the "country of origin" of services since they are produced and consumed simultaneously (in high technology goods, storing is possible). All that can be identified is the entity, whose nationality may not always be easy to establish and could quickly change with the corporate takeovers. Hence, considerable efforts and imagination would be required to fit such a trade within the WTO system of reciprocal concessions.

Art. XVI.

However, the developing countries' interests may be affected without proper safeguards (like a legally binding code on restricted trade practices at the international level). Furthermore, national treatment can only be a function of a degree of economic integration and homogeneity of economic structure and polices which cannot be predicated when it comes to a multilateral framework, like GATS, to developed and developing countries alike.

Views have been expressed that these rules of GATS will lead to illogical ends when they are applied in the context of less apparent but even more fundamental basic expectations of major trading countries, signatories to the WTO, which although inherent in the Agreement, are less explicit. These are mutuality of benefits, reciprocity of obligations and increasingly, an expectation that other major contracting parties will seek to minimize barriers to trade, even if they are not obligated to do so.[26]

Observance of reciprocity is central to the functioning of the WTO/GATT and its breach by one party would lead to nullifying or impairing the benefits due to the other under the dispute-settlement procedure. Should reciprocity become a central theme in negotiations about services, there would almost certainly be some spill over to goods and to negotiations when a Member which refuses to extend national treatment to a foreign bank risks retaliation in the form of withdrawal of tariff concessions on textiles or orange juice. Such an approach would certainly open up a virtual pandora's box of coercion and retaliation as the other side of the coin would be to penalise foreign-owned firms in retaliation for trade measures, e.g. countervailing duties, imposed by the home-country under DSU.

A Member's Schedule of Specific Commitments is intended to be progressively liberalized,[28] but commitments may also be

[26] See William Jr. Diebold and Helena Stalson, Negotiating Issues in International Services Transaction, in W. R. Cline (ed.), Trade Policy in the 1980's56I (1983). " GATS Art. XX. [28] *Id.,* Art. XIX.

modified and withdrawn. Disputes are resolved according to the WTO Dispute Settlement Understanding.[30] Article XIX dealing vith negotiations of specific commitments directs Members to 'iold successive rounds of negotiations no later than 5 years from he date of entry into force of the Agreement. The negotiators will pay due respect to the national policy objectives and take note of relative development of Member countries. The developing countries will be given more flexibility in undertaking market access and liberalization commitments. Once the member makes any commitment it becomes binding (just like under Art. XXVIII of the GATT in relation to goods) and can be modified at any time after three years from the entry into force of the agreement in terms of Article XXI. Specific commitments refer to the degree of liberalization that each WTO Member deems optimal for its own market. WTO Members are free (subject of course to negotiating pressure from their trading partners) to open their services market in the sectors where they wish to do so and with the caveats they deem appropriate. Specific commitments are, consequently, sector specific. In such a case, a Member may restrict the area in a sector to be open for Foreign Service providers. For example, currently negotiations are underway on educational services. The Government of India has kept the primary and secondary education outside its purview. In the higher education, the legal services have been kept out and the Government is ready to make commitments only in the areas where the country has a competitive edge. The commitments will be made on reciprocal basis.

SPECIFIC SECTOR-WISE COMMITMENTS

There are separate Annexures attached to GATS on Financial services, Telecommunications, Air transport and Movement of natural persons, after negotiations were held and specific commitments made by Members thereto. Sector-specific commitments have been made by countries with limitations to market access and national treatment. Developed countries made commitments on two-thirds of all service activities - a coverage

Id. Art. XXI.
Id. Arts. XXII and XXIII.

ratio that climbs to over 80% - once audiovisual, postal, courier and basic telecommunication services, and transportation services are excluded.

Transition economies made commitments covering just over one-half of the 149 service activities. For them coverage ratio climbs to two-thirds for the sectors directly concerned with the Uruguay Round negotiations. Developing countries as a group have scheduled a much smaller share of activities than developed or transition economics - only 16% of the 149 activities that are covered.

Activities where commitments have been made by most developing countries included the tourism-related services of "hotels and restaurants," reflecting the current importance of this sector in foreign exchange earnings of many developing countries. Insurance services have been the subject of commitments by one-half of developing countries; one fifth have made commitments in banking. India has also allowed entry of Foreign Service provider in this sector, limiting the equity to 26%. In addition, several developing countries made commitments on basic telecommunications services and maritime transport, on an autonomous basis, since these sectors were generally considered to be excluded from the scope of final commitments.

MOVEMENT OF NATURAL PERSONS

This was an area of great interest to developing countries and so to India. A separate annex was attached to the GATS, which is applicable to measures affecting natural persons who are service suppliers of a Member.

GATS allows Members to apply immigration laws to regulate the entry of persons into their territories and protect the integrity of national borders as long as these measures are not applied as to nullify the benefits accruing to a Member under the terms of a specific commitment. Members are specifically allowed to apply visa requirements selectively to some countries and not to others. However, GATS allows Members to enter into agreements outside the GATS for integration of labour markets as long as these agreements result in exemption of citizens of parties to the agreement from residency and work permit requirements. Generally, such integration would provide citizens a right of free entry to the employment markets of the parties (Article V). In addition, GATS established a negotiating group to discuss further liberalization of movement of labour after the conclusion for the Uruguay Round. This negotiating group was to submit a report to the Council on Trade in Services by January 1996. Commitments resulting from these negotiations shall be inscribed in a country's schedule of commitments.

Movement of natural persons has remained a very contentious and thorny area to negotiate. Practically all the countries (including developing countries) have made it subject to "economic needs test" or subject to quota. Only a limited number of developing countries have made specific commitments on movement of natural persons, with certain limitations.

What is important to remember is the 'Annex on Movement of Natural Persons,' appearing at the end of the agreement, lays down the basic limitations on the scope of possible negotiations in this area. It clearly states that "the agreement shall not apply to measures affecting natural persons seeking access to the employment market nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis." It clarifies that the agreement shall not prevent a member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory. Thus the scope for negotiations on export of labour and personnel is rather limited. Moreover, the regulation often tries, as part of the immigration regime will continue to operate as an effective limitation. This is not to speak of the specific conditionalities that will be attached to a particular sector or sub-sector of services by the country offering

See Annex on Movement of Natural Persons. This kind of selective application of commitments is permitted under the GATS. [32] *Ibid.*

such opening a possibility explicitly recognized in the agreement itself.

Developed countries, on the other hand, attach foremost importance to supply of service through commercial presence. While being liberal on commercial presence they have evinced iittle interest in the movement of natural persons. In other words, regime for movement of natural persons is more restrictive than that for foreign enterprises. Further, self-employment by Foreign Service has been, by and large, effectively precluded.

It is also noticeable that in striking contrast to the rather narrow and hedged-in scope for negotiations on movement of labour, the provisions regarding movement of capital are generously liberal. The agreement lays down (Article XX) explicitly that in sectors where market access commitments are undertaken, the members shall not maintain measures which restrict or require specific types of legal entity of joint venture through which a foreign service supplier may supply a service. Also, no limitations will be prescribed on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment. Furthermore, if a member gives a market access commitment in relation to supply of a service across the border and if movement of capital is essential part of supply of such service, the member shall be committed to allow such movement of capital. Similarly, if a service is being supplied through commercial presence in a member's territory, that member will have to permit the movement of capital necessary to establish such commercial presence. Note that by these clarifications, the agreement has established a 'right of establishment' for capital. But the 'right of residence', which is the corresponding equivalent in the case of labour or labour-intensive services, has been scrupulously excluded.

If access commitments are carried out, the developing countries may be affected by severally losing their right to control foreign firms, control of equity participation or expansion, restrictions on number of experts etc. In addition, there would be no state monopoly, de-nationalization in sectors like banking and insurance, as in the case of India.

THE WTO MODEL FOR LIBERALIZATION OF TRADE IN SERVICES

The GATS is based on the principle that trade in services will be progressively liberalized. In this respect, the GATS echoes the GATT tradition. In the GATT, no date for the launching of a multilateral round of negotiations is specified. The GATT provides that "[t]he CONTRACTING PARTIES may therefore sponsor [tariff] negotiations *from time to time'.'* In the GATS, however, the point in time when new negotiations must start is specified. The GATS provides that "[i]n pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, *beginning not later than five years from the date of entry into force of the WTO Agreement."**

The GATS, therefore, required WTO Members to initiate negotiations on trade in services in January 2000. It was not until March 2001, however, that guidelines and procedures for the negotiations were adopted.[36] The obligation to negotiate at aj particular time is hard to enforce due to lack of incentives and the j absence of a meaningful remedy.

The GATS schedules, by and large, follow a classification, based on the United Nations Central Product Classification (CPC)j system. This identifies 11 basic service sectors plus a twelfth! category for miscellaneous services. These sub-sectors are further divided into some 160 sub-sectors or separate service activities. Th 12 services recognized in the UNCPC system sectors are:

- business (including professional and computer) services,
- communication services,

H GATT Art. XXVIII *bis.* 1 (emphasis added).

"' GATS Art. XIX : I *{emphasis added).*

On the shaping of the agenda for the services negotiations, see Andre Sapir. *The General Agreement on Trade in Services: From 1994 to the year 2000, 33* J, World Trade Law 51(1:1999). [36]

GATS Art. 1:1.

- construction and related engineering services,
- distribution services
- educational services,
- environmental services,
- financial (insurance and banking) services,
- health-related and social services,
- tourism and travel-related services,
- recreational, cultural and sporting services,
- transport services, and
- other services not included elsewhere.

INSTITUTIONAL ISSUES

The WTO Agreement provides for the establishment of a Council for Trade in Services (GATS Council), which operates under the general guidance of the General Council.[37] The mandate of the GATS Council is broad:

> The Council for Trade in Services shall carry out functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies, as it considers appropriate for the effective discharge of its functions.[38]

The GATS Council has established a series of subsidiary bodies to deal with sector-specific (e.g., financial services, telecommunications) or horizontal issues (e.g., the Working Party on GATS Rules established by the Council to pursue the mandate laid down in GATS Article X).

GATS AND INDIA

The Agreement on Services has shown some consideration for the concern and interests of the developing countries. It lays down (Article XIX.2) that

[37] WTO Agreement Art. IV:2. [58]
GATS Art. XXIV:2.

> —[T]he process of liberalization shall take place with due respect for national policy objectives and the level of development of individual members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing countries for opening fewer sectors, liberalizing fewer types of transaction, progressively extending market access in line with their development situation and when making access to their markets available to foreign service suppliers, attaching to it conditions aimed at achieving the objectives referred to in Article IV.

Article IV is about increasing participation for developing countries. This objective is sought to be facilitated by "(a) strengthening domestic services capacity *inter alia* through access to technology on a commercial basis; (b) the improvement of their access to distribution channels and information network; and (c) the liberalization of market access in sectors and modes of supply of export interest to them." But this is only of operational significance from our point of view.

During the negotiations on GATS, India sought deeper commitments by developed countries under Mode 4 of supply of services. To this end, India suggested bringing about transparency in concerned rules, doing away with additional tariffs and other such regulatory restrictions on the nationals of foreign countries which do not apply to one's own nationals, abolishing quantitative limits ontemporary movement of natural persons etc. India also proposed non-application of the Economic Needs Test in sectors of interest to developing countries.

Further, India sought provisions of special and differential treatment for developing countries as outlined in Articles IV (increasing participation of developing countries) and IX (business practices) of GATS in modes other than Mode 4.[39] It raised the issues that Articles IV and XIX: 2 of the General Agreement on

WT/GC/W/224, 2 July, 1999.

Trade in Services provide for special and differential treatment for developing countries.

But the actual history of implementation since the conclusion of the Uruguay Round Agreements do not evidence the extension of such treatment to the developing countries. Also, the importance of Mode 4 for developing countries is obvious; and yet commitments made by the developed countries in this area are far from satisfactory. An assessment by the Council for Trade in Services under Article XIX is mandatory before embarking on negotiating guidelines for the new round of negotiations. Such an assessment must be carried out by CTS in collaboration with UNCTAD, who have already commenced such work. Until such an assessment is complete, both, in overall terms and sector-wise, it is very difficult to conclude that developing countries have gained much from the GATS so far.

Mode 4 commitments undertaken by developed countries being modest, there is a need for making substantially higher commitments in this area if the balance of benefits under GATS is to be preserved. Higher levels of commitments can be achieved on the basis of: rules that are transparent; no additional tariff/tax or other regulatory restrictions on the nationals of foreign countries that do not apply to one's own nationals; no quantitative limits on temporary movement of natural persons; fees/charges applicable for providing social security nets should not apply to temporary movement of natural persons; no non-tariff barriers and no regulatory restrictions on the movement of natural persons. At least in sectors of interest to developing countries, the Economic Needs Test should not apply; where it would apply exceptionally. it would be based on transparent and objective criteria. In modes other than Mode 4, developing countries to be given special and differential treatment as outlined in Articles IV and IX of GATS. India has also submitted that any future negotiations in GATS to be guided by the same architecture based on "positive list", request and offer approach, no prior exclusion of any mode and by the principles outlined in Article IX for developing countries. For Mode 4. a new list of occupations using the ILO International Standard Classification of Occupations could be established.

It is also incumbent on the CTS to establish modalities for treatment of autonomous liberalization undertaken by Members since the Uruguay Round. And finally, Article IV to be given real meaning in any new commitments by developed countries. Also, a monitoring mechanism to be set up for tracking implementation of Article IV of the GATS Agreement.

But despite these submissions by India, in actual practice, India is negotiating in all service sectors, open for negotiations and has taken a cautious approach. It is also pertinent to notice that in legal services, due to the protests from the profession, the Government has kept it out of negotiation. But reading carefully, the Advocates Act, 1961 does not prohibit consultancy outside the courts (sec. 45). Thus the foreign professionals may render these services under Mode 3 or Mode 4 without violating the Advocates Act.

CONCLUSIONS

The GATS is best described as a forum of ongoing liberalization. Even though the argument could be made that existing Schedules of Commitments do not represent meaningful liberalization in the services sector, one should always keep in mind that the GATS is the first attempt to liberalize trade multilaterally in this field and that existing examples at the regional level (such as the EU) have not been immediately successful. It may, however, be reminded that liberalization is a slow process, particularly when a country's sensitivities and national development issues are at stake. One should not expect too much too soon. The current attitude of WTO Members toward services is caution.

GATS envisages objectives like establishing a sound multilateral framework or principle and rules for trade in services, which can

In practice, however, India has just followed the developed countries, excluding certain specific areas and modes of services, as is evident from its negotiation on educational services expand under conditions of transparency and liberalization; it also aims at increased participation by developing countries. But the fact is that in the area of service trade, it is the industrial countries, which matter most because they control more than 80 per cent of the market. These countries have erected different kinds of non-tariff barriers to protect their senescent service industries. Developing countries on the other hand are minor players in services trade and they may succeed only when the industrial countries take the initiative to liberalize services. While there is scope for the industrial countries doing away with some of its protectionist tendencies to respect GATT's deliberations, some provisions have been legitimized by the GATT Uruguay Round in its escape clauses relating to Article XIV (security exceptions) in Part II of GATS. In GATS, there is absence of a standard classification seeking 'commercial presence,' under which multinationals can produce and sell services in the territories of other countries. But the developing countries are not easily inclined to have foreign presence, affecting indigenous industries and interference in the autonomy of their service sectors.

In contrast to goods, services are subject to number of non-tariff barriers, which mostly remain invisible. This, most of the time, makes it difficult to quantify the exchange of concession. There is a need to have total transparency, along with a legally binding international code on restrictive business practices.

TRUTH ABOUT TRUTH TECHNIQUE

P. Chandra Sekharan

1. INTRODUCTION

Police and other investigators depend on interrogation as a principal means of determining facts and resolving issues. It is a well-accepted norm in civilized nations that for both ethical and pragmatic reasons no interrogator may take upon him the unilateral responsibility for using coercive methods. Concealing from the interrogator's superior intent to resort to coercion, or its unapproved employment, does not protect him. It rather places him in serious jeopardy.

Reliance on interrogation, however, involves certain problems. A prominent among them are: ascertaining when a suspect or witness is telling the truth, evaluating memory, allowing for the physical and mental condition of a witness or suspect, and understanding the problems created by an individual's perspective. Interrogation methods and equipment have evolved in response to these problematic areas. It is true that the psychological, psychophysical, and physical sciences have played vital roles in police interrogation techniques. This eventually led to many truth-detecting techniques.

Before assessing the reliability of the truth detecting techniques, we should have basic information about coercive techniques that

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are used by the investigators in the interrogation situation. Coercive procedures are designed not only to exploit the resistant's internal conflicts and induce him to wrestle with himself but also to bring a superior outside force to bear upon the subject's resistance. The principal coercive techniques of interrogation are: arrest, detention, deprivation of sensory stimuli through solitary confinement or similar methods, threats and fear, debility, pain, heightened suggestibility and hypnosis, narcosis, and induced regression.

If we look at the history of police investigation, physical coercion [third degree practice] has been preferred to painstaking and time-consuming inquiry in the belief that direct methods produce quick results. Sir James Stephens, writing in 1883, rationalizes a gristly example of 'third degree' practices by the police of India when he observed: *It is far pleasanter to sit comfortably in the shade rubbing red pepper, in a poor devil's eyes than to go about in the sun hunting up evidence.'

2. TRUTH DRUGS

More recently, police officials in our country are turning to drugs for assistance to extract confessions from accused persons. The police are misguided to think that narco-analysis is a boon to the police to make breakthroughs. This technique, as claimed by the police, is neither modern nor an internationally accepted one having its origin in the early 1920s. Drugs are supposed to relax the individual's defenses to the extent that he unknowingly reveals truths he has been trying to conceal. This investigative technique cannot be considered as humanitarian and as an alternative to physical torture, but could be dubbed as 'psychological third degree', raising serious questions of individual rights and liberties. The civilized nations abhor the use of chemical agents 'to make people do things against their will'.

The use of so-called 'truth drugs' in interrogation is similar to the accepted psychiatric practice of narco-analysis, which is nothing but psychotherapy conducted while the patient is in a 'sleep-like-state' induced by barbiturates or other drugs, especially as a means of releasing repressed feelings, thoughts, or memories. Its use in psychiatric practice is restricted to circumstances when there is a compelling, immediate need for a patient's totally different objective. The police investigator is concerned with empirical truth that may be used against the suspect, and therefore almost solely with probative truth: the usefulness of the suspect's revelations depends ultimately on their acceptance in evidence by a court of law. The psychiatrist, on the other hand, using the same 'truth-drugs' in diagnosis and treatment of the mentally ill, is primarily concerned with psychological truth or psychological reality rather than empirical fact. A patient's aberrations are reality for him at the time they occur, and an accurate account of these fantasies and delusions, can be the key to recovery. They cannot be considered as reliable recollection of past events, according to psychiatrists.

The terminology *'truth serum'* is itself a two-fold misnomer. Neither the drugs used in this technique are *sera* nor do they necessarily bring forth probative truth. It is the media, which continue to exploit the appeal of the term as it provides an exceedingly durable theme for the press and popular literature. The phrase 'truth serum' appeared first in a news report of the experiments conducted on prisoners in 1922 by Robert House, a Dallas obstetrician, in the Los Angeles Record. He himself resisted the term for a while but eventually came to employ it regularly himself.

Scopolamine was the drug tried earlier for interrogation and because of a number of undesirable side effects it was disqualified as a 'truth drug'. Barbiturates, such as sodium amytal (anobarbital), Pentothal sodium (thiopental), and to a lesser extent Seconal (seconbarbital) are the drugs used in later years. Pentothal Sodium is the drug resorted to nowadays in our police interrogations. The life-threatening side effects of this drug are circulatory depression, respiratory depression with apnoea and anaphylaxis. Its adverse effects on CNS may produce headache, retrograde amnesia, emergence delirium, prolonged somnolence and recovery. Myocardial depression and arrhythmias may also occur. The other side effects are nausea, vomiting, regurgitation and gastric contents, rectal irritation, cramping, rectal bleeding, diarrhea, hiccups, sneezing, coughing, bronchospasm, laryngospasm, hypersensitivity reactions, hypothermia, thrombosis and sloughing (with extravasations) salivation, shivering, skeletal muscle hyperactivity.

The clinical and experimental studies conducted by many researchers have concluded that there is no such magic brew as the popular notion of truth serum. The barbiturates, by disrupting defensive patterns, may sometimes be helpful in interrogation, but even under the best conditions they will elicit an output contaminated by deception, fantasy, gabled speech, etc. A major vulnerability they produce in the subject is a tendency to believe he has revealed more than he has. Not only may the inveterate criminal psychopath lie under the influence of drugs which have been tested, but the relatively normal and well-adjusted individual may also successfully disguise factual data.

Studies also point out that several patients' revealed fantasies, fears, and delusions approaching delirium, much of which could readily be distinguished from reality. But sometimes there was no way for the examiner to distinguish truth from fantasy except by reference to other sources. One subject claimed to have a child that did not exist, another threatened to kill on sight a stepfather who had been dead a year ago, and yet another confessed to participating in a robbery when in fact he has only purchased good from the participants. Testimony concerning dates and specific places was untrustworthy and often contradictory because of the patient's loss of time-sense. His veracity in citing names and events proved questionable.

Because of his confusion about actual events and what he thought or feared had happened, the patient at times managed to conceal the truth unintentionally. As the subject revived, he would become aware that he was being questioned about his secrets and depending upon his personality, his fear of discovery, or the degree of his disillusionment with the doctor, grow negativistic, hostile, or physically aggressive. Drugs disrupt established thought patterns, including the will to resist, but they do so indiscriminately and thus also interfere with the patterns of substantive information the interrogator seeks. Even under the conditions most favorable for the interrogator, output will be contaminated by fantasy, distortion, and untruth. Because of these worldwide opinions, narco-analysis for interrogation has been dispensed with long back in advanced countries.

3. HYPNOSIS

Hypnosis has been another method of truth detection attempted earlier. Hypnosis, by definition, is a trancelike condition usually induced by another person, in which the subject is in a state of altered consciousness and responds, with certain limitation, to the suggestions of the hypnotist. Doctor use hypnosis in psychological applications to recover memories in the hope they can be used to treat whatever problems a patient has. But hypnosis can't recover the truth reliably.

Hypnosis that attempts to retrieve the truth may actually help convince you of something false, say the study conducted by Joseph Green of Ohio State University. When the study was presented at the meeting of the American Psychological Association, proved what many doctors already believed that hypnosis can't help you recover 'lost' memories. In fact, it tends to make people more confident in false memories. 'There are no reliable ways to recover memory', said Michael Yapok, a clinical psychologist. Hypnosis is not some kind of truth detector.

In 1970s, hundreds of police departments have hired hypnotists to enhance eyewitness testimony. The results showed that hypnosis increased the amount of information recalled, but the information was not always accurate. Again, in the early to mid-1990s there were thousands of cases clogging courts based on recovered memories. Eventually, it became apparent that many of these cases were actually of false memories created during hypnosis. The influence of hypnosis in producing recall in investigation is not reliable. Besides, hypnosis will cause irreversible psychological damage. Even in instances where it appears that only good has been obtained by submitting to hypnosis, there is always the possibility of some deep-lying suggestion or psychic infection, introduced while the subject was in a passive state, which will manifest after many years, and then without revealing any obvious connection with the earlier experience of hypnotism.

Another practice of interrogation is the combined use of drugs with hypnotic trance and post-hypnotic suggestion. It is said that hypnosis could presumably prevent any recollection of the drug experience. Whether a subject can be brought to trance against his will or without awareness, however, is a matter of some disagreement. Orne, in a survey of the potential uses of hypnosis in interrogation, asserts that it is doubtful, despite many apparent indications to the contrary, that trance can be induced in resistant subject. It may be possible, he adds, to hypnotize a subject unaware, but this would require a positive relationship with the hypnotist not likely to be found in the interrogation setting.

4. Polygraph Test

The most dramatic gains in interrogation technology have come through the polygraph, or so-called 'lie detector'. The polygraph monitors and records selected body changes that are affected by a person's emotional condition. The recorded changes are then studied, analyzed, and correlated in respect to specific questions or other *stimuli.* The first modern polygraph was constructed in 1921 by John A. Larson, a medical student at the University of California, working with a member of the local police department. Larson's instrument was capable of continuously recording blood pressure, pulse, and respiration; since it recorded these conditions simultaneously, it was called a polygraph. A later development provided for the recording of the psycho-galvanic skin reflex (electro-dermal response), the flow of current between two different parts of the body. Research has continued on both the instrumentation and the psychological techniques necessary for its effective use by the police. Even though the polygraph has been formally and successfully used in police intelligence and security

[1] Orne, M.T., The Potential Uses of Hypnosis in Interrogation: An evaluation, ARDC Study SR 177-D Contract AF 18 (600) 1797, Dec. 1958, Bureau of Social Science Research, Inc.

investigation since 1924, there is still no complete agreement by psychologists on its validity. Furthermore, the results of a polygraph test are not always judicially acceptable.

The Term 'polygraph' would literally mean 'many writings'. The name refers to the manner in which selected physiological activities are simultaneously recorded. Polygraph examiners may use conventional instruments, sometimes referred to as analog instruments, or computerized polygraph instruments. Again, the name 'polygraph test' is itself misleading. The word 'test' indicates an 'objective process of evaluation' based on facts; similar to a DNA or a blood test. Results obtained from a polygraph test are much less credible, since the device measures the body's reaction to two different types of questions. The two different types of questions are known as relevant and control questions. The examiner must compare responses from relevant questions to those of control questions in order to form an opinion.

In order for a polygraph to work, the examiner must establish a base line for a lie. This is known as a control question. In order for this to occur, the polygraphist must trick the examinee into consciously lying to him. The polygraphist will ask a question he believes the examinee will lie about. The polygraphist will assume no one can answer this question honestly and whatever response is generated from asking this question will be assumed to be a lie. This assumption forms the basis of the polygraph examination.

The polygraphist will then ask a question for which the reaction is supposed to be measured is known as the relevant question. If the response to the relevant question reaches the level of an assumed lie, the person is considered deceptive. If it reaches the vicinity of the assumed lie, it is inconclusive. Thus, there is scope for the polygraph examiner to manipulate the results.

5. How Polygraph Examinations are Manipulated?

The polygraph examination results can be entirely manipulated by the examiner. Every polygraph examiner will make a conscious decision to pass the examinee, fail the examinee, or conduct the polygraph professionally. The polygraphist realizes the vulnerability of the polygraph. The polygraphist knows that by sensitizing the examinee prior to the administration of the polygraph, (s)he can manipulate the results.

The polygraph works by being able to detect the 'fight or flight' response of the human body. The ability of a polygraphist to manipulate this is ridiculously easy. The polygraphist will do this by sensitizing the examinee prior to the polygraph test, when he first interviews and interrogates the suspect. This can be accomplished in a variety of yelling, and/or making disbelieving gestures in front of the examinee, prior to the administration of 'he polygraph.

The polygraphist knows that if the entire pre-interview is not audio and video-recorded, (s)he will have free reign in manipulating the test. The polygraphist knows the only physical evidence produced from the examination will be the charts. The polygraphist realizes that by manipulating the charts via the examinee, the polygraphist can decide what the result of the examination will be.

The polygraphist realizes that if the examination is called into question, a referee examiner who independently reviews that charts will come to the same conclusion, not realizing the charts were manufactured by the polygraphist. However, if the examination is recorded and the recordings and charts are immediately turned over to the examinee at the completion of the test, the polygraphist will be forced to conduct the test professionally, as (s)he will be subject to an independent audit. Since the pre-interview is not recorded, the polygraphist will innocently look at the examinee when the examination is questioned and say something similar to, "the charts don't lie for what ever reason you responded to those questions'. The polygraphist knows that inflicting stimulation onto the examinee on a relevant question will cause the examinee to become sensitized in that area. Technically, this is called 'jacking them up'.

In some cases the polygraphist will inflict stimulation onto both relevant and/or control questions. To the examinee, there is no difference between the control and relevant question; they believe each question is of equal importance. Therefore, strategically placed stimulation on a control question will cause crossover contamination of the relevant question.

The dirty little secret behind the polygraph is that the 'test' depends on trickery, no science. It is not supposed to be known that while the polygraph operator admonishes the examinee to answer all questions truthfully, warning that the slightest hint of deception will be detected, he secretly assumes that denials in response to certain questions-called 'control' questions- will be less than truthful. An example of a commonly used control question is, 'did you ever lie to get out of trouble?' The polygraphist steers the examinee into a denial by warning, for example, that anyone who would do so is the same kind of person who would commit the kind of behaviors that is under investigation and then lie about it. But secretly, it is assumed that everyone has lied to get out of trouble.

The polygraph pens don't do a special dance when a person lies. The polygraphist scores the test by comparing physiological responses to these probable-lie control questions with reactions to relevant questions such as, 'did you ever use an illegal drug?' is the commonly asked in pre-employment screening. If the reactions to the control questions are greater, the examinee passes; if they are greater in relevant questions, he fails. If responses to both 'control' and 'relevant' questions are about the same, the result is deemed inconclusive. The test also includes irrelevant question such as, 'are the lights on in this room?' The polygraphist falsely explains that such questions provide a 'baseline for truth' because the true answer is obvious. But in reality, they are not scored at all! They merely serve as buffers between pairs of 'relevant' and 'control' questions. Absolutely, there is no difference between a polygraphist who manipulates examinations, and a law enforcement officer who plants contraband on a suspect. In both the cases, evidence is being manufactured. The only difference is the law enforcement officer has committed a crime, and the polygraphist just made money.

The simplistic methodology used in polygraph testing has no grounding in the scientific method: it is no more scientific than astrology or tarot cards. Government agencies value it because people who don't realize it's a fraud sometimes make damaging admissions. But as a result of reliance on this voodoo science, the truthful, are often falsely branded as liars while the deceptive pass through.

Perversely, the 'test' is inherently biased against the truthful, because the more honestly one answers the 'control' questions, and as a consequence feels less stress when answering them, the more likely one is to fail. Conversely, liars can beat the test by covertly augmenting their physiological reactions to the 'control' questions. This can be done, for example, by doing mental arithmetic, thinking exciting thoughts, altering one's breathing pattern, constricting the anal sphincter muscle, or simply biting the side of the tongue. Truthful persons can also use these techniques to protect themselves against the risk of a false positive outcome. Although polygraphist frequently claim they can detect such countermeasures, no polygraphist has ever demonstrated any ability to do so, and peer-reviewed research suggests that they can't.

6. Anti-polygraph Organizations

There are several anti-polygraph organizations in the U.S., which feel that the polygraph is a highly inaccurate device to detect lie. With minimal effort, the polygraph results are easily manipulated by either the polygraphist or examinee, thus defeating the very purpose the polygraph is supposed to serve. 'Since the invention of the polygraph in 1921, intelligence officials can't cite on high-level spy who's been tripped up by the so-called lie detector test', CNN reported in June 1999. In a 1983, Leonard Saxe in his Federal study of polygraph accuracy stated 'it (the polygraph) doesn't work' and 'it is not accurate'. 'It', he observed, 'can lead to what are called false positives, finding people untruthful when in fact they are truthful and the opposite.' The anti-polygraph organizations address issues - the polygraph industry does not want people to know - concerned with the inherent inaccuracy of the polygraph, the abominable behavior of some examiners and the fact that there is no universal minimum standards for polygraph examiners to maintain. 'When the door closes on the polygraph examination room, there are no witnesses', they say. It is just like the door closing on the woodshed. It is time to bring polygraph out of the woodshed and into the mainstream.

There are many unpalatable remarks made by many researchers and eminent persons about polygraph testing. Stephen E. Fienberg, Chairman, Committee to Review the Scientific Evidence on the Polygraph, National Academy of Sciences, has commented that 'Polygraph testing has been the gold standard, but it's obviously fool's gold.' 'Polygraph is more art than science, and unless an admission is obtained, the final determination is frequently what we refer to as a scientific wild-ass guess (SWAG)', says John F. Sullivan, a retired CIA polygraphist. Opining about polygraph, the well-known physicist David Dearborn of Lawrence Livermore National Laboratory observed, 'if you choose to implement this astrology surrogate, and to treat us with such-deep disrespect, do not confuse our contempt for arrogance.' According to John M. Deutch, a former CIA Director, '[The CIA's] reliance on the polygraph is truly insane'.

7. Brain Fingerprinting

The technique developed in the early 1990s by Lawrence A. Farewell, a former research associate in psychology in the Department of Psychiatry of Harvard Medical School, is claimed to be an alternative to polygraph test. In using the technology, a suspect is shown carefully selected words, phrases or images on a computer screen. They are things like a photo of a murder weapon or the model of car used in a crime. It is claimed that the person who committed the crime would only recognize these things.

Sensors on a headband register the subject's EEG, or brain wave responses to the computer images. The EEG is fed through an amplifier and into a computer that uses proprietary software to display and interpret the brain waves. Unlike polygraph testing, it does not attempt to determine whether or not a subject is telling the truth. Rather, it attempts to determine whether the subject's brain has record of relevant words, phrases, or pictures. In 1999, Farewell used his techniques to solve a 1984 murder in Missouri. Police strongly suspected a local woodcutter, James Grinder, of kidnapping, raping and murdering Julie Helton, a 25 year-old woman, but had lacked the evidence to convict him. He agreed to undergo brain fingerprinting to demonstrate his innocence.[2] However, in 2000, brain fingerprinting underwent its first legal challenge in the case of Terry Harrington, an Iowa man who had spent 23 years in prison for the 1978 murder of a security guard. Farewell' tests suggested conclusively that Harrington was innocent since he did not have knowledge of the crime scene. The judge in the case admitted the evidence but did not free the suspect, saying it was not clear test results would have led to a different verdict in the original trial.

Farewell's technique incorporates the following procedure. A sequence of words or pictures is presented on a video monitor under computer control. Each stimulus appears for a fraction of a second. Three types of stimuli are presented: 'targets', 'irrelevant', and 'probes'. The 'targets' are made relevant and notable to all subjects: the subject is given a list of the target stimuli and instructed to press a particular button in response to 'targets' and another button in response to all other stimuli. Since the targets are notable for the subject, they elicit a MERMER (Memory and Encoding Related Multifaceted Electroencephalographic Response). Most of the non-target stimuli are irrelevant, having no relation to the situation under investigation. These 'irrelevants' do not elicit a MERMER. But within these 'irrelevants' a few 'relevants', which are connected with the case under investigation

Farewell flashed on a computer screen details of the crime that only the murderer would have known, including items taken from the victim, where the victim's body was located, items left at the crime scene and details of the wounds on the body of the victim. 'What his brain said was that he was guilty,' he said. 'He had critical, detailed information only the killer would have. The murder of Julie Helton was stored in his brain, and had been stored there 15 years ago when he committed the murder.' Grinder pleaded guilty a week later in exchange for a sentence of life in prison, avoiding the death penalty. He also confessed to three other murders of young woman.

are mixed purposely. Since these non-target stimuli are relevant to the situation under investigation, they are referred to as 'probes'. For a subject with knowledge of the investigated situation (information present'- stored in the brain), the 'probes' are noteworthy due to that knowledge, and therefore, 'probes' elicit a brain MERMER. For a subject lacking this knowledge (information absent'-not stored in the brain), 'probes' are indistinguishable from the 'irrelevants', and thus 'probes' do not elicit a MERMER. When the information tested is crime-relevant and known only to the perpetrator and investigators, then 'information present' implies gilt and 'information absent' implies innocence.

Dr. Farewell's idea is derived from the P300 response seen on brain wave tests. He claims that the P300 response is a component of his larger MERMER techniques. A subject generates a P300 when memory is triggered by a familiar stimulus. Stimuli irrelevant to either the crime or the subject's memory generate no P300 response, whereas a recognizable stimulus induces a strong wave response. Because the P300 response has been well accepted and documented in the scientific community, Dr. Farewell currently uses it for court evidence. Many scientists have studied that initial spike in brain activity, known as the p300, which peaks' at between 300 and 500 milliseconds in response to a stimulus. Farewell's contribution was to develop something he calls the MERMER that measures the pattern of brain response up to 1,200 milliseconds after the stimulus has been administered.

Dr. Farewell displayed the following pictographs when he visited India and made a presentation on 'Brain fingerprinting' developed by him, on March 27, 2004 at the National Seminar on 'Emerging Technologies in Forensic Science for Contemporary Crime Investigation' at Hyderabad.

j

P-300 Information present: Target-Red, Irrelevant-Green, Probe-Blue

[*P-300 Information absent: Target-Red, Irrelevant-Green, Prdbe-*
\ ***mm***

The author made the following observations to Farewell:

1. The nomenclature 'Brain Fingerprints' (or brainwave fingerprinting) is itself a misnomer. The developer of this technology, who plausibly tempted by the terminology 'DNA Fingerprinting' and was more eager to see his work be used in crime detection, has given this misleading nomenclature.

2. Fingerprints are the infallible means of personal identification based on finger ridge patterns. Fingerprint science is based on three established basic principles.

   (i) A fingerprint is an individual characteristic, which differs from finger to finger of even the same individual, and no two fingers have yet been found to possess identical ridge characteristics.
   (ii) The fingerprint remains unchanged during an individual's lifetime.
   (iii) Fingerprints have general ridge patterns that permit them to be systematically classified.

   None of these criteria can ever be established in the case of brainwaves. Fingerprints are used not only for human identification but also to identify criminals if they leave their fingerprints at the scenes of crime.

3. This technique cannot also be called as 'Brain Mapping' as 'brain mapping' denotes the task of identifying the functions of different regions of the brain. Over about the last hundred year^, scientists and physicians have gathered large amounts of information and maps of the brain regions generally involved in specific functions.

4. What Farewell claims about the 'brain fingerprinting' technology developed by him is that it is possible to identify the perpetrator of a crime accurately by measuring brain-wave responses to crime-relevant words, pictures, or

sounds presented on a computer screen. But all other persons who have knowledge about the crime could also produce similar brain-wave responses.

5. Brain fingerprinting does not match evidence from a crime scene with evidence stored in the brain of the perpetrator.

6. It is totally wrong to compare brain fingerprinting to conventional fingerprinting in the sense fingerprints at the crimes scene match with the lingers of the perpetrator. Nor it can be compared with DNA fingerprinting which matches biological samples from the crime scene with the DNA in the body of the perpetrator.

7. There is neither matching of any physical evidence nor comparison of any pattern in brain wave technique. Not even details of any evidence at the crime scene can be elicited. All that this technique shows is that the person has certain memory encoded in his brain. But there is no way to determine if the memory is correct or from where it came.

Farewell replied that even the fingerprint experts in his country strongly objected to his using the terminology 'fingerprinting' to **the** technique he has developed. He has very graciously agreed that **the** other queries I have raised are indeed the limitations to his technique and further research has to be carried out to overcome **these** limitations. He also added that investigators utilize skills they have gained throughout years of training to determine the stimuli **and** questions to be presented to the suspect. The stimuli selection process can be exhausting. 'We examine all available sources to **make** sure that the person doesn't know the details we are looking at', Farewell explained. In addition to this, the suspect is also interviewed before going through the process in order to ensure **that** there is no previous knowledge of the details being used.

But in my opinion there is no way to determine if the memory is **correct.** Memory is a constructive and reconstructive process. What is remembered about an event is shaped by what was observed of **that** event, by conditions prevailing during attempts to remember, and by events occurring between the observation and the attempte remembering. Memories can be altered, deleted, and created b events that occur during and after the time of encoding, and durin the period of storage, and during any attempts at retrieval.

Also there is no way to find from where the memory came. In a much as it cannot be ascertained wherefrom the memory cam(whether it came while committing the crime or while witnessing or while reading about it from a newspaper or while watching it i the TV. No credibility can be attached to the memory. Suppose person 'A' is accused of killing 'B' in a restaurant, which *'A* doesn't visit quite often, the test would try to show that 'A' had th memory of the restaurant. Perhaps, 'A' was taken to the restaurai while he was under investigation, the test could come up positiv< because 'A' was in the restaurant. 'A' might have memories aboi the murder from reading about it in the newspaper or seeing it o TV or learning it from the questions of the police. Why only 'A' All the witnesses to the crime would likely have the sam recognition to crime relevant words or pictures as the perpetrator.

The brain wave is based on the P300 complex, a series of wel known brainwave components that can be measured. Scientisi first discovered the P300 in 1965 and found that when the brai thinks yes to a 'yes' or 'no' choice, it responds with a large numb* of neurons firing' all at once - sort of like thunderous applause.. pair of hands clapping might not be so noticeable, but an entii audience clapping gets heard. In the brain, the tremendoi response of neurons signals an overwhelming 'yes' while little 1 no response is a 'no'. With small variations of detail, the P30 evoked potentials to elicit, auditory and visual, 'oddball' stimul For example, a normal subject listening to the auditory tone seri< *beep, beep, beep, beep, boop* will exhibit a P300 signature on tr oddball *boop* item.

The electric response evoked in the central nervous system t stimulation of sensory receptors or some point on the sensoi pathway leading from the receptor to the cortex. The evoke stimulus can be auditory (evoked potentials, auditory somatosensory (evoked potentials, somatosensory), or visu (evoked potentials, visual), although other modalities have been reported. Event-related potentials are sometimes used synonymously with evoked potentials but are often associated with the execution of a motor, cognitive, or psycho-physiological task, as well as with the response to a stimulus.

P300 is a late-appearing component of the event-related potential. P stands for positive voltage potential and 300 represents 300 millisecond post stimulus. Its amplitude increases with unpredictable, unlikely, or highly significant stimuli and thereby constitutes an index of mental activity.

This P300, 'brainwave' is electroencephalographically recorded at the scalp. The scalp electric current is recorded as a transient positive ('P') charge that is produced approximately 300 milliseconds after stimulus onset. The horizontal scales represent time in milliseconds (ms.). The vertical scales represent wave amplitude measured in micro volts (mV) of electrical potential. The positive charge results from positive ions being discharged from the pyramidal cells of cerebral cortex as local pyramidal cells hyperpolarize as they deactivate following their initial response to the oddball stimulus.[3]

According to the theory behind P300 testing, there are different brain wave responses to pleasant and unpleasant stimuli. 'You can elicit different types of P300 with those different types of stimuli', said Dr. John Polich, attached to the Cognitive Electro physiology Laboratory in the Department of Neuropharmacology at the Scripps Research Institute in La Jolla, California. In general, "negative stimuli tend to produce a stronger reaction.' The strength of the reactions distinguishes the positive and negative responses. For example, a positive stimulus such as a picture of people vacationing *creates a weaker brain wave response than a picture of someone being stabbed to death. This would again mean that all subjects, in general would react strongly to all negative stimuli as compared to positive ones.*

A single P300 event cannot be reliably detected so the results of many stimulus-brainwave recordings are averaged to filter out noise and expose the signal.

It is because of this reason many in the scientific community remain skeptical about this method. Dr. Emanuel Donchin, attached with the Department of Psychology at the university of South Florida argues that the science behind the method is not the problem. Instead, the specific questions posed to the subject are problematic. He argues that 'the success of the technique depends on the construction of the stimuli and there is no analytic, systematic way of constructing the question. It depends on the subjectivity of the person. It is an art, not a science/

It is important to note that found that CIA, FBI, Department of Defrnse and Secret Service officials, according to *A General Accounting Officer Report* (2001, do not foresee the use of brain fingerprinting as it needs expertise. The CIA opined that to administer brain fingerprinting an investigator would have to know enough details of a particular event to test an individual for knowledge of that event.[4]

Independent scientists contacted by the GAO investigators also raised various objections to brain fingerprinting and said it needed more work into issues such as how memory was affected by drugs and alcohol, mental illness and extreme anxiety during crime situations. Still, William Iacono, a Professor of Psychology and Neuroscience at the University of Minnesota, said he was confident that brain fingerprinting would eventually establish itself for many applications, including the investigation of carefully planned premeditated crimes.

Further, just like lie detector tests, the technique requires the cooperation of the subject. A suspect could simply refuse to cooperate by closing his eyes and refusing to watch the prompts flashed on the screen before him. If and when the technique is widely accepted, a judge may have to decide whether to admit test results as evidence.

[4] However, Farewell countered by citing a 1993 test he conducted for the FBI in which he identified 11 FBI agents from a group of 15 people. "If we can detect someone trained by the FBI, we should be able to detect someone trained by *Al-Queda"* he said.

Faced with the above problems, Farewell himself it struggling for more than ten years to stabilize and standardize this technique, which is yet to gain acceptability in forensic community. Except Farewell's own laboratory, no other forensic science laboratory either in the USA or other countries of the world is using this technique.

When such is the real position of brain fingerprinting, one or two forensic science laboratories in India have taken interest in this technique and permitted their psychologists to apply this technique in actual cases. The initial reports appeared in local dailies [not in peer-reviewed scientific journals] have indicated that they are simply following Farewell's technique only. But the psychologist attached to one of the forensic science laboratories, who participated in the above mentioned Hyderabad National Seminar, claimed, in their presentation, that the method developed in India is different from that of Farewell's. While the pictograph shown during the presentation represented a strip of normal electroencephalogram of a subject which was different from the pictographs shown by Farwell, the basics of the technique remained to be the same as that of Farwell. Therefore, all my comments on Farewell's Technique mentioned here before are equally applicable to the so-called indigenous technique.

Besides, I am yet to find any publication about original research, if any carried out in this direction by our brainwave experts in peer-review scientific journals. If they are simply copying Farewell's patented technique without paying royalty to him they will get into problems. First, they must come out with their own technique; if any. which is different from that of Farewell, and satisfy the falsifiability criterion', before applying the technique in actual cases. But their claim that they have brought out the hidden secrets., of the brain of the accused is absurd. Whether it is Farewell's technique or our indigenous technique it cannot and does not bring out any hidden secret. All that this technique can at the most brings out is that the person has certain memory encoded in his brain.

It is totally unethical for the psychologists to get into the role of the interrogators and subject the accused to questioning and that too for days together. It would become a dangerous precedent if they would further be permitted to give a report based on their questioning while even the 'yes" or 'no' involvement-report based on the brain responses itself is looked upon as unscientific. The P300 brainwave response is just a waveform with a single spike, which is very similar in the suspect as well as the other witnesses. Unless scientists find out a distinct characteristic in the brainwave response of the perpetrator, which is totally different from the response of other witnesses, even the information derived from brainwave response will have no meaning. 'Brain fingerprinting', as it is today, is little supported by forensic evidence or experience and is no better than its cousin 'lie-detector'.

8. CONCLUSION

The police are a disciplined force trained to uphold the law and to enable democratic institutions to function lawfully. Police powers are confined by the provisions of the Constitutions, the Police Act, the Criminal Procedure Code, the Evidence Act and many other local and special laws which impose restrictions on the scope and method of exercise of that power. Forensic scientists should inspire the police with their scientific methods not to violate the norms. They will be accused of conspiring with them if they are a party in using the above psychological coercive methods.

Courts have powers to extract accountability from the police in case of violations of human rights in exercising their functions. Courts should therefore be posted with a detailed knowledge about these techniques. The recent decision of the Bombay High Court in a case that employing certain physical tests involving minimum bodily harm such as narco-analysis, lie detector tests and brain fingerprinting, did not violate the rights of the accused persons guaranteed by article 20 (3) of the Constitution of India has come probably due to the fact that they have not been posted with full information about these techniques. Certainly this will lead to a systematic violation of human rights through the use of coercive pseudo-scientific practices under the label of proven and recognized forensic scientific techniques.

All the more, it is necessary that the media, the *Lok Ayuktas,* the Human Rights Commissions, the superiors within the police organizations, should take a serious view about the use of these techniques in the guise of interrogation and guide the Home Ministries to evolve a common code in this regard.

In the case of *Daubert* v. *Merrell-Dow Pharmaceutical,* the Supreme Court of America unanimously decided on June 28, 1993, that 'falsifiability criterion' should be the arbiter of what kind of scientific evidence will be admissible. According to this criterion Freudian psychoanalyst concept is clearly unscientific. Many psychologist themselves have little or no understanding of •falsifiability criterion' and this may be even truer of psychiatrist and social workers.

The test of 'falsifiability' would also mean that the expert witness of psychologists using hypnosis, theories of repression, recovered memories, deviant behavior, dissociation and'multiple personality disorder, as well as others, is no longer acceptable. And such expert witness can be questioned on the grounds of lack of reliability and testability.

Finally, courts in India, in my submission, are playing hob with the **truth** that makes a forensic scientist a mountebank. The situation once prevalent in developed countries is showing its ugly teeth now in this country. The excesses and exaggerations the forensic scientists make in their statements of opinions would certainly lead to miscarriage of justice. The courts should also know that the existence of mountebanks among forensic scientists. Tragic though it is, is not a sign that forensic sciences or those who practice forensic sciences are in peril of being overrun by charlatans. Quackery is not ubiquitous in forensic sciences. Nevertheless, the problem of charlatanism should not be minimized to the point that it is treated as ephemeral and of little consequence. Mountebanks are a challenge to the professional standing of the multitude of forensic scientists who are good and true. The problem is acute and deserves immediate attention.

DRUG POLICY AND DRUG LAW

THEORETICAL APPROACHES TO DEVELOPMENTS IN GERMANY AND THE EUROPEAN COMMUNITY

Lorenz Bollinger'

1. INTRODUCTION

Drug use and drug control in Germany are viewed theoretically as complementary components of a complex social and historical process recognizing extensive interdisciplinary interaction aimed at integrating sociology, sociology of law, political science, and social psychology. The German drug control system is viewed as a byproduct of these different disciplines. The evolution of pertinent drug laws and their implementation is discussed in the instant paper. Recent developments are viewed as taking place in a series of stages based on three malleable paradigms: the criminalization paradigm, the medicalization paradigm and the acceptance paradigm. Over a period, there seems to have been a slow transition from the first to the last, implying that elements of all the three approaches have been integrated into various policies and strategies that differ between states and regions of the German Federal State, as well as between different levels of drug policy and drug care.

2. OUTLINE OF THE GERMAN DRUG LAWS AND DRUG CONTROL SYSTEM

Criminal law statutes within the German *Betdubungsmittelgesetz* (Narcotics Law, which is abbreviated as: *BtMG,* stands as an administrative statute law) provide for punishment of up to five

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years of imprisonment for any drug consumption-oriented behavior such as buying, possessing, or selling controlled substances. Drug consumption *per se* is not punishable, as it is considered to be part of the German constitutional right to harm oneself. Any supply related or trafficking behavior involving drugs is punishable by up to ten or fifteen years of imprisonment. According to general criminal law principles, the degree of punishment must be commensurate with the 'dangerousness' of the act and the "gravity of guilt'.

The overriding principles of German drug policy are that supply reduction efforts should focus on strict law enforcement and harsh punishment for offenders, while demand reduction strategies shall encourage 'therapy instead of punishment' wherever possible. Specific 'deserved' punishments are provided for by sees. 29 - 30c *BtMG* - these are determined on the basis of the danger for the legal interest protected by criminal law, intensity of unlawfulness of the act and the degree of guilt of the perpetrator. A set of consequential questions that obliviously emerge are: what constitutes 'danger for the legal interest', 'unlawfulness' and the 'amount of guilt', how are they measured? An 'essence' of the German criminal law is: a human act can only be criminalized if it violates so-called 'legal interests'. Drug use is considered harmful to individual and public health. It disturbs family life. It may generally lead to organized crime. Consumption as such is not generally punished, as 'harming oneself is not considered a "wrong'. But obtaining and possessing drugs is considered a wrongful act as it endangers others as it may 'pass on' to others and thereby boost illicit markets. These principles concur or even contradict with the basic human right of protection of individual health, including the right to seek proper treatment. If a drug delinquent is considered to be guilty and at the same time addicted and/or mentally disturbed he may be compelled to undergo a "forced treatment'.[1] Over time, four models of coerced or mandatory drug treatment for persons labeled 'addicted or 'drug

In the course of criminal procedure, addiction is usually diagnosed by an expert, a medical practioner or a psycho-therapist having diagnosed the perpetrator beforehand. —

dependent' have gradually emerged in the German law. The first of these is the commitment to intramural addiction-treatment in closed psychiatric hospitals. The second model calls for a treatment order to be carried out in conjunction with probation or parole. The third mandates treatment within penal institutions. Finally, the fourth calls for the deferral of criminal indictment or punishment in favor of drug treatment. The application of any of these modes obviously depends on a variety of factors.

Despite appearances, in practice this formal legal program leads to the conclusion that for many drug-users, the actual outcome is punishment *plus* coerced therapy. It is now clear that treatment compliance may be compelled through the threat or actual suffering of punishment.[2] Coercion is now acceptable and is considered necessary to initiate a long-term process that, in the long run, may develop a relationship of trust. However, the positive potential of such a treatment depends on the non-repressive and relationship-oriented quality of the treatment itself. Charging treatment personnel with performing the dual function of treatment and control increases the possibility of treatment failure. This is especially true when the traditional psychiatric perspective prevails that therapists must violate their clients' trust and communicate the contents of their therapeutic relationship to the law enforcement agencies. This 'paternalistic' principle conflicts with the modern psychotherapeutic approach of confidentiality. In many cases of coerced treatment, inmate 'patients' are quite compliant. This behavior is usually valued as an indicator of successful treatment outcome, although, in reality, it may represent a rather preliminary adaptation to the situation having no real behavioral post-release implications.[3] Research has also shown that the more courts allow for out-patient maintenance treatment of Heroin addicted perpetrators, the lower the number of subsequent drug-related deaths after prison release due to immediate relapse

Korner, H. H., *Kommentar zum Betdubungsmitte/gesetz,* Sect. 35 No. 19 (Beck Publ, Munchen, 5th edn., 2001).

Bollinger, L., Therapy instead of Punishment for Drug Users - Germany as a Model? 8 *European Addiction Research* 282 (2002).

and dosage mistakes after 'cold' withdrawal in prison. It, however, raises an issue of ethics and the highest constitutional principle; the principle of commensurateness i.e. justifiability of the extent of the coercive means for the drug rehabilitation. The principle of commensurateness requires that law and state measure must be in consonance with the purpose and aim of the rehabilitation as well as to the danger and guilt. In the cases of severe crimes like murder and rape, coerced treatment may well be legitimate.

3. Historical Perspective

After the curative or palliative potentials of substances like opium, coca, and cannabis had been discovered by the pharmacological sciences - fostered of course by profit incentives - it was only in the second half of the 19th century that resistance began to untrammeled access under the label 'public health' concerns.[5] China wanted to reduce domestic opium use, but the British fought two wars with them to assure the continuance of the lucrative opium trade. On the British side, these actions were also supported by latent motives that had nothing to do with the danger of drugs as such: namely global political power interests. Thus, even at this early stage, drugs were being used as a vehicle to achieve ulterior motives - only in an inverse way. And the current historical interpretation is that China, fighting the Opium War, tried to save her population from opium addiction. The US fight against opium, in turn, at least initially, had much to do with the alleged problem posed by Chinese immigrants after the end of railroad construction where their labor had been extensively exploited.

The German pharmaceutical company, Bayer, invented Heroin and then began marketing it in 1898. The producer trivialized "Unwanted side-effects' in order to boost sales. Following

See, Legge, Ingeborg, *Einfluss des Methadonprogramms auf die Delinquenzentwicklung polizeibekannter* (2000), and Legge, Ingeborg, Sozialer **and** medizinischer Hintergrund des Drogentodes. Landeskriminalamt (Hamburg, 1992). * For the historical account see Koerner H. H., *op. cit.* vor § 1.

Germany's defeat in the World War I the nation was forced by the 1919 Versailles Treaty (Art. 295 Sect.l) to accept the Hague Convention of 1912 and to pass its first Opium Law in 1920. One of the reasons Germany had resisted the Hague Convention (which Germany did not participate in due to having lost the war) was the vast need for medical opium to treat war mutilations. It also seems there is a little doubt that very sober economic motives, in contrast to the claimed priority of public health considerations, played a major role in the Allies' decision to undermine the dominance Of the German pharmaceutical industries on the world market. However, due to a loophole that existed in the German Opium Law of 1920, the pharmaceutical industry was able to keep producing Heroin. Between 1925 and 1930, they produced 30 tons of Heroins, only 10 of which were needed for legitimate medicinal applications. The remainder was apparently diverted into the world black market.

Even though cocaine and Heroin consumption was tolerated among the leading ranks of the Nazi regime, drug use suppression was energetically pursued during the Third Reich. It can be shown that the postulated danger for the ' *Volkskorper*'[6] also served the purpose of more perfectly controlling the population: multiple mechanisms for monitoring drug use in the population were established by changes of the Opium law in 1933 and 1934, e.g. registries of drug addicts, job dismissal, loss of rights, forced intramural treatment etc. Ironically this is one of the relatively few laws that remained in force after the end of the Nazi regime in 1945.

The 'modernization' of the German drug law then took place under the auspices of the UN Single Convention. In 1971, responding to what was represented in both politics and the media as a 'drug wave'; the 'Narcotics Law' replaced the old 'Opium Law'. Since then, law has undergone many minor changes and two major reforms. *First,* in 1981 adding sections 35-38 to the Narcotics

[6] *Volkskorper,* literally means 'body of the people', is a specific Nazi term of the Nazi period signifying the ideology of all the people forming one coherent and harmonious organism, thus, demanding utmost conformity.

Law. providing for deferring punishment of a criminal addict if drug therapy takes place, initiated the so-called "principle of therapy instead of punishment*. *Secondly,* in 1992 the perception of a growing problem with 'organized crime' led to a toughening of the punishment for related acts.[7] Germany has never had any legislative scrutiny or evaluation of its drug laws, although this is prescribed in the constitution. Thus, when the Opium-Law was first passed in 1920, after the Nazi-Regime, or in the passing of the so-called 'modern' Narcotics Law in 1971, there were no legitimizations by expert hearings, government commission reports or any formal bodies concerning compelling reasons for initiating drug laws. The phrase 'drugs and their epidemic spread pose dangers for public health and society' exemplifies the social construction of a factual constraint, posing an unquestioning necessity that continues to suffice as the legitimization for these repressive laws. In other important areas of criminal law making, the legislature was much more scrupulous: in these cases, many extensive expert hearings were held and serious deliberations about the constitutional proportionality principle took place, such as in the areas of international weapons trade or sexual offences. Interestingly, the same scrupulous examination never occurred with regard to drugs.

4. RISKS AND THE DEVELOPMENT OF HARM REDUCTION: THEORETICAL REFLECTIONS

In Germany and other EU Member-States a complex mix of developments, especially harm reduction policies, have resulted in a trend against the dominant US model of prohibitionist drug control. However, movement is, as perceived and interpreted by

For example, Sect. 30 a BtMG with an increased punishment frame of at least 5 and up to 15 years for the trafficking in the context of organized crime, for selling drugs to minors and for trafficking with significant amounts of drugs *(nicht geringe Menge),* usually determined by the highest court defining threshold amounts of active ingredient. For instance, 7.5 g of THC or, 5 g of cocaine or 1.5 g of pure Heroin have been normatively defined as threshold to a significant amount.

European social and political science experts, being strongly counteracted not only by UN agencies, US foreign policy officials and international DEA activities, but also from within the EU Member-States. What makes some European politicians and law enforcers to profess, silently or openly, for the US approach is the increasing interest in securing the 'European Fortress' against terrorism, unwanted labour migration and political asylum seekers. In a system relying strongly on populist rhetoric, the drug scare continues to serve as an excellent pretext and vehicle for enacting tough legislation.

There are, ideally speaking, three distinct drug policy paradigms:

1. the criminalization concept of eliminating drug use through the deterring and educating functions of punishment;

2. the medicalization model of prescribing certain psychotropic substances to those who are defined to suffer from an addictive disease; and

3. What in Germany is called the acceptance paradigm, leaving the decision to consume potentially dangerous substances to the self-responsible user and limiting regulation to drug prevention and education, consumer protection and health measures,

During the last two decades, viewing the increasingly undeniable failure of the 'War on Drugs' approach, there has been a distinct process of erosion of the formerly embraced abstinence paradigm and an evolutionary movement in drug policy in Germany towards the acceptance paradigm. This trend began with growing scientific insight into some of the myths embedded in the old drug policy, and it continued with an increasing awareness in the professional fields, especially among drug workers, medical & psychotherapeutic practitioners, police and judges, and the media and the public. There was more and more insight that there cannot

[s] Pompidou Group, *Connecting Research, Policy and Practice: Lessons Learned. Challenges Ahead* (Strasbourg, 2004).

> be a drug-free society, that recreational and hedonistic drug consumption has to be accepted to some degree, that it is possible to discriminate between non-harmful drug use - depending on drug dosage and use pattern - and risky use, and that drug repression causes more harms than drugs do.

Based on these events, we can predict that this social change toward a liberal and modern conception of drug use will be a part of constitutional freedom rights in a multi-cultural global society. This will amount to 'normalization' in the sense of dealing with this problem as practically as we do with other social problems in the areas of consumer protection and public health. For example, we can abolish exclusive and rigid criminal law drug control and replace it with a sober, rational system of production, distribution and prescription control, based on evidence rather than misconceptions and myths. This would mean that analysis of positive and negative potentials of every single drug would have to entail a specific way to regulate it. Eventually there will probably be an amalgamation of the three paradigms, with changing weights between its different components. It seems likely that the | acceptance paradigm will gain ground on the other two, as in the | long run it will prove to enable more rational, pragmatic, specific and efficient solutions. The criminalization paradigm will probably dwindle to the status of a normal residue of securing administrative law regulations, typical for German administrative law. But, given the existing conservatism and resistance in society, the functionality for social control purposes beyond the drug problem, as mentioned above, this process will take a long time.

> For the time being, some nucli of the acceptance paradigm and an intermediary level of policy development can be empirically observed: Possession of drugs for personal use has been de-penalized, syringe exchange and other practices formerly considered as accessory to harmful drug use, for example, the installation of consumption rooms for Heroin and crack, have been de-criminalized. The latter, plus the recently introduced and scientifically accompanied Heroin dispensing project may at the

same time be seen as a manifestation of the medicalization paradigm.

However, these 'new' control strategies seem ambivalent. Instead of employing an evidently inefficient and counter-productive method of deterrence and incapacitation by criminal law, the political strategy resorts to 'soft' control strategies, while officially retaining the goal of a drug-free society. There is a common element in forcing drug users to get treatment or prescriptions, in tightly controlled Heroin dispensing programs or licenses for consumption rooms, in drug testing programs and in the now compulsory DNA analysis for sexual delinquents. What we mean is that all these 'soft' control measures constitute an intrusion into the most private psychological, physical and biological sphere of the person. This strategy has, much more that just deterrence or imprisonment, extended social control into the core of personal privacy which in the German constitutional law is considered intangible. When medical or psychological diagnosis legitimizes such intervention measures, the unintended outcome could be an extension of disease definitions into patterns of drug use that could very well be defined as non-pathological. This in turn would result in 'control net widening' and a further loss in civil liberties.

Recent developments in the harm reduction and acceptance direction in Germany have been supported by several convergent aspects of social change:

Firstly, both the development of scientific and professional standards etc. and of legal restraints have been brought to bear on the 'three powers'- public administration, the legislature, and the justice system- to 'secure quality', to monitor, evaluate and modify measures based on evidence. Even though the response to this fundamental criticism of bureaucracy is partly undermined by hidden agendas, it still has some effect.

[9] Polak, F., Thinking about drug Law Refomi: Some Political Dynamics of Medicalization. XXVIII(l) *Fordham Urban Law Journal* 351-361 (2000).

Secondly, there has been a strong move in the scientific world leading to emancipation from the strictures of traditional disciplinary lines and from the artificial separation of "basic" and "applied" sciences, and toward the implementation of more modern methodological thinking. In this way, the classic concept *oi~* "faculties* has been reintegrated in favor of increasing interdisciplinary and even trans-disciplinary thinking, in the sense *o[~* developing specific methodologies that are closely adapted to the research subject. This change may be called a paradigm shift. Referring to our subject here, it includes novel links between natural sciences and humanities, for example, between bio-neurological and bio-chemical approaches in drug research and psychological approaches to cognition, motivation and the pertinent conscious and subconscious processes.

Thirdly, there is an increasing general need for the state to economize on the basis of sober cost-benefit analysis and scientific insight - again trends that are counteracted by bureaucracy. Especially in the social welfare system in general and in the drug aid in particular funding is being cut down tremendously. On the other hand this opens more conceptual freedom for NGOs in the drug field to implement harm reduction strategies.

Fourthly, an increase in the political self-assurance and autonomy of German interior and foreign policies can be observed. One facet of this is an increasing tendency to interpret the underlying US dominance of global drug control as a continuous activity of political control and exertion of power, not only in those hemispheres defined as being vital to US security, but even among Furopean allies. Paradoxically, this development could contribute to a closing of ranks between the often-dissenting EU Member-States, and to an increasing commitment to political autonomy with respect to the USA.

Fifthly, another "stream" of development can be seen in the increased acceptance of scientific insights. Even the damning conclusion that most drug trafficking problems are really problems of drug policy is no longer taboo. Today, scientifically based information has increasingly entered the political focus. Ironicall; the public health discourse has given the debate a new twis confluent with concerns related to economic efficiency and qualil management. Advances in general drug research, and especially i evaluation research assessing harm reduction measures, have bee increasingly implemented, and the success of these , for exampl* reduction of deaths and more availability for therapy, have bee scientifically proven.[10]

Sixthly, economically founded globalization as a comple dialectical process seems to also be contributing to this evolutior On the one hand this process imposes a homogenization o lifestyles and normative systems along with standards establishei initially in the western world, thus fostering western hegemony an< control mechanisms. On the other hand, the globalization proces has eliminated the traditional delineation of culturally integrate* [or nonintegrated] drugs: drug use patterns which were formed; limited to certain cultures or hemispheres are now being exporte(and generalized, e.g. Quat in Germany. For the time being, a sharec understanding of drug policy all over Europe is a four-fok approach of the following:

1. Primary prevention: teaching about drugs in schools strengthening of protective factors etc.

2. Secondary prevention: criminal law deterrence exerted or the supply side.

3. Harm reduction: acceptance, aid, and social reintegration measures for users.

4. Tertiary prevention: treatment for addicted users.

The relevant difference with the US system is that the main emphasis rests on the non-ciminalizing approaches and that

[10] Weihmann, Robert, Rauschmittelkriminalitat - Eine kritische Bestandsaufnahme. *Kriminalistik.* May 2003, No.5:266-269.

obtaining and possessing drugs for personal use must not be punished.

5. Changes in Drug Laws and Drug Law Implementation

A recent survey of drug laws and drug law implementation in the sixteen EU Member States[11] as well as a study commissioned by the EU in 1998 reveal an increasing momentum toward decriminalization in Europe. In these efforts, three models are being employed: (1) formal procedural law decriminalization *("nolle prosequi',* etc.), (2) de facto and informal practices of not enforcing the law, and (3) substantive law decriminalization. Each of these is briefly described below.

5.1 Informal Decriminalization Practices

Almost all EU Member-States have utilized informal practices to diminish punishment for obtaining and possessing small amounts of illicit drugs. This type of decriminalization is restricted to certain drugs and certain situations and- with the exception of the Netherlands- is never practiced systematically or regularly. In Germany one can observe that in consequence of a procedural decriminalization of obtaining, producing, and possessing small amounts for personal use, the police have increasingly abstained from proactive enforcement and even from reactively responding to such incidents. This is especially true of cannabis and ecstasy enforcement- even though the German legality principle officially obliges them to intervene in such situations, and only the prosecutor - the attorney of state - is empowered to drop the case.

" Boekhout van Solinge, Tim, Drugs and Decision-Making in the European **Union.** (Mets & Schilt Publ, .Amsterdam, 2002.

[c] Bollinger, L., Report on Germany, in Dorn & Jamieson A. (eds.), *Room for Manoeuvre* 19-23 (Drugscope, London, 2000) and Bollinger, German National **Report,** in Dorn Dorn, N. (ed.), Comparative Case Study on the manner in which ***ird** pillar EU legislation is implemented within the Member States (Drugscope, **London,** 2001 (In Press).

5.2 Substantive Law Decriminalization

Some EU Member States (Belgium, Spain, Italy, UK) have by substantive criminal law formally abolished punishments for obtaining, producing and possessing small amounts of cannabis for personal use.[13] In spite of some political parties and many expert views Germany so far has refrained from such a move in order not to get in conflict with the US.

5.3 Procedural Law Decriminalization

Practically all EU Member-States have, by procedural criminal law, diminished the punishments for obtaining and possessing small amounts of all illicit drugs. In Germany, the Supreme Constitutional Court (Bundesverfassungsgericht) stipulated in 1994 that users possessing small quantities must not be prosecuted.[14] Subsequently, however, the justice systems of the federal states were not able to strike a compromise regarding the threshold limits of'small amounts'. Consequently, the southernmost Federal States insisted on very low limits (e.g. six grams of street cannabis. 0.5 grams of Heroin, 0.3 grams of cocaine, 0.2 grams of amphetamine and its derivatives), while the other Federal States have varying limits between 10 and 30 grams of cannabis. Paradoxically, this controversy will probably result in a future substantive law initiative by the federal government.

Invariably these procedural law changes have made the law enforcement agencies more lenient, sometimes hardly enforcing the law at all. There are, of course, exceptions. For example, the Bavarian government strongly resisted the Federal Constitutional

[13] European Monitoring Center for Drugs and Drug Addiction, (EMCDDA), Drogen im Blickpunkt - Drugs in Perspective. Bi-monthly briefing at: www.emcdda.eu.int

[14] See, Korner, H. H., Die EntpSnalisierung und Entkriminalisierung von Cannabis-Konsumenten, in Bollinger, L.(ed.), *Cannabis Science* (Peter Lang Publ, Frankfurt am Main/New York, Paris, Vienna, 1997) 289-312; Nestler, Cornelius, Grundlagen und Kritik des Betaubungsmittelstrafrechts. in Korner 1998, pp. 702-863, and Bollinger, L., Grenzenloses symbolisches Strafrecht. *Kritische Jusliz* :405-416(1994).

Court decision of 1994 obliging prosecutors to *nolle prosequi* such cases, and the attorney general sometimes instructed the Bavarian police to intensify cannabis enforcement in sharp contrast to the other Federal States of Germany. Those in the political, administrative and judiciary systems who are opposed to the acceptance tendencies are looking for compensation. They have found functional equivalents of punishment by advancing substitute control and deterrence mechanisms, especially drug-testing. So far, in Europe there is no drug testing in schools or at the work place. But in Germany, in spite of solid empirical evidence[15] repeated use of cannabis may lead to a permanent loss of one's driving license.

6. MEDICALIZATION OF THE DRUG PROBLEM: LEGISLATIVE DEVELOPMENTS

The medicalization hypothesis is reflected in several developments in Germany, and it can be similarly observed in Austria, Portugal and France.[16]

The first German Narcotics Law of 1972 replaced the old Opium Law of 1920 that was amended under the Nazis in 1933 and 1934. The 1922 Narcotics Law served to implement the UN accords of 1961 and 1971 and closely followed the criminal law prohibition paradigm. In the rationale for the new Bill, much of the US rhetoric was repeated. It was, without explicit reference to any scientific evidence, assumed that cannabis use could be addictive, could cause psychoses and could invariably be the stepping stone or gateway to harder drug use.

In 1981 the Narcotics Law was modified considerably and with much ambiguity. On one side, the declaration and escalation of the

See. Robbe. H.. Cannabis and Car Driving, in Bollinger *Cannabis Science*
•Peter Lang Publ, Frankfurt am Main/New York, Paris, Vienna, 1997) 127-138,
ami Grotenhermen, Franjo and Karus, Michael (eds.)
Cannabis. (Springer Publ, Strassenverkehr und Arbeitswelt. Recht - Medizin - Politik. Berlin/New York, 2002).
* Information concerning other EU member states is lacking

US drug war and increasing activities of foreign drug traffickers from particular named problem areas - such as Turkey - led to calls for a rigorous sharpening of the German law. Punishment maximums were raised from four to five years of imprisonment for simple drug offences and from ten to fifteen years for those defined as dangerous acts. By way of comparison, having killed somebody by negligent behavior was only punishable by imprisonment for a term up to 5 years, which most of criminal law scientists consider to be a clear case of disproportionality. On the other hand - in a parliamentary compromise - a new principle, labeled "therapy instead of punishment', was established for addicted drug offenders. Although in its implementation this really meant punishment as well as forced therapy, it symbolically marked a paradigm shift away from institutionalization and toward the acknowledgment of medical considerations. Subsequently, enforcement practices directed at addicted offenders have been moderated considerably, while everyday judicial practice has become more lenient in awarding lesser punishments and granting probation. [1?]

Despite these changes, however, the 'carrot-and-stick' ambiguity in the law persisted. The increasingly undeniable failure of the 'war on drugs' that was officially declared in Germany in 1991 through a federal program, which was somewhat less militant than that found in the US, did not lead to any fundamental rethinking of policy but rather to a strategy of 'more of the same'. This time the magic words by which politicians and the media enhanced collective fears and pressurized the legislature were 'organized crime'. The term was imported into Europe in response to the increasing US political rhetoric, language used in the UN convention of 1988 and by some EU measures demanding more

[1] See, Bollinger, L., Therapy instead of Punishment for Drug Users - Germany as a Model? 8 *European Addiction Research* 282 (2002) and Egg, R., Drogenmissbrauch und Delinquenz. Schriftenreihe der Kriminologischen Zentralstelle. (KrimZ, Wiesbaden, 1999).

' See, Albrecht, Hans.JOrg, Internationales Betaubungsmittelrecht und internationale Betaubungsmittelkontrolle, in Kreuzer, Arthur, *Handbuch des Betaubungsmittelstrafrechts* (Beck Publ, M. Mtinchen, 1998), 653-699, and United Nations, *Commentary on the United Nations Convention Against Illicit* control and criminalization (money laundering, precursor substances) and harsher punishments (higher mandatory minimums and asset forfeiture). Therefore in the 1992 Narcotics Law Amendment [the 1993 Money Laundering Law) and 1994 Precursor Substances Law], drug laws were enhanced by both criminal and administrative law measures. In addition, police and other enforcement and control resources were once again increased.

As it turned out, the toughening of laws and the attempt to implement them by increasing the pertaining policing resources had as little effect on international drug trafficking in Germany as in the other countries. That fact was stubbornly ignored regarding the increasing involvement of foreigners in drug trafficking on German territory, the appearance of rackets, Mafia and international ethnic movements, now often resulting in dangerous shoot-outs and armed conflicts. These were not just typical symptoms of drug demand and supply, but rather phenomena intricately intertwined with Germany having actually become a target of international labor migration and political fugitives from many areas of the world. Also the globalization process was well under way. Given these circumstances, it was futile to believe - or cynical to ask the voters to believe - that sharpened drug laws could have any positive influence on these larger trends. Consequently, drug supply soared in spite of the increased forfeitures of illegal imports and transports. Due to refined techniques utilized in the rackets and the ethnic isolation of gangs, police found it impossible to increase the number of real kingpins who were being caught in spite of a multiplication of police forces and legal instrurfients, such as undercover enforcement, crown witness privileges, use *of agents provocateurs,* eavesdropping, etc. Ultimately law enforcement agencies resorted to apprehending rather small-scale drug peddlers. About 80 percent of the traffickers sentenced to relatively high prison terms have been low

Traffic in Narcotic Drugs and Psychotropic Substances (United Nations, New York:, 1998).

category dealers of cannabis. [19] On the other hand, the treatment system was strengthened by a 1992 amendment to the Narcotics Law that provided for faster *nolle prosequi* procedures and easier access to drug treatment, as well as counting treatment time toward prison time, so long as there has been no relapse. By another amendment of the Narcotics Law in 1994, methadone treatment was to be regulated, even though the judiciary had already made it clear in 1979 and 1991 that it was legal when medically supervised.

Increasingly, either reaching a verdict or actually doing time is deferred when the perpetrator agrees to undergo maintenance or withdrawal treatment along with some kind of drug therapy -either long-term inpatient or outpatient care. Practically all perpetrators accept to undergo treatment. The proportion between in- and out-patient treatment was originally about 90 percent to 10 percent and is now the inverse. This system is highly evolved in Germany and Austria and has recently been adopted in Portugal, Spain and Belgium.

6.1 Other Developments

Other activities have also contributed to the movement toward the medicalization paradigm. In 1993 and again in 1994, both the Federal States of Hessen and Hamburg initially failed with their initiatives to begin Heroin-dispensing programs. In 1993 the city of Frankfurt applied for a special permission to administer Heroin within the framework of a scientific study of long term addicts who could not be reached by methadone treatment,] which in Germany was monitored exclusively by private practitioners.! Even though the application was turned down by the federal authority, its impact on the public debate helped pave the way. for the change of law in 2000 that finally allowed for Heroin dispensing-programs. Five I model programs have been instituted under scientific surveillance I since 2001. I

[19] Hellebrand, Johannes, Die Gerichte in Betaubungsmittel-Strafverfahren, in Kreuzer Arthur, Handbuch des Betaubungsmittelstrafrechts (Beck Publ, M. Munchen, 1998), 1998, pp. 1246-1300.

Also, in 1993 the city of Frankfurt, based on expert briefs reached an informal consensus among an influential prosecutor, medical experts, and city administrators that allowed for the operation of drug injection rooms. At the same time, in other parts of Germany this act was considered to be a punishable offense due to a different interpretation of the law (those who provided these drugs in this manner would be considered accessories). After much controversy, in 2000 the new German coalition ended the controversy by passing a law allowing safe injections rooms. Except for two (Bavaria, Baden-Wttrttemberg), all federal states have implemented such facilities. There are now around 50 such premises in Germany.[21]

Certain institutional and organizational changes can also be interpreted as indicators that social change is heading in the direction of medicalization of the drug problem. For example, in 1994 the German Society for Drug and Substitution Medicine (now named as the German Society for Addiction Medicine DGS) was founded. In 2000, a new journal, *Suchttherapie {Therapy of Addiction),* appeared in the market. This publication was decidedly positioned against the traditional *Suchtgefahren {Dangers of Addiction).* The latter in turn then moderated its political position by renaming itself *Sucht {Addiction).* Another example is provided by the 'Deutsche Hauptstelle gegen die Suchtgefahren' (DHS), recently renamed 'Deutsche Hauptstelle fur Suchtfragen'. This is a politically important national umbrella organization, comprised of all government institutions and NGOs in the area of licit and illicit drugs, and one that functions as an interest group. This same group used to be very influential in supporting prohibition. More recently, they have come to the conclusion that there has to be a fundamental change in drug policy. This was signified by renaming the organisation. The DHS is now lobbying for a government or parliamentary expert commission to look into this matter.

[20] Bellinger, L., Gesundheitsvorsorge fuer Heroinabhangige strafbar? *Jiiristische Arbeitsblaetter* 292-299 (1991).

[21] European Monitoring Center for Drugs and Drug Addiction, (EMCDDA), Drogen im Blickpunkt - Drugs in Perspective. Bi-monthly briefing at: www.emcdda.eu.int (2004).

An ambiguous role has been played by recent initiatives of tl German Medical Society for Medical Cannabis (ACM). They ha[1] legitimately argued for the legalization of undeniably effects medication options for certain illnesses. This call has certain contributed to making the cannabis discourse more rational and 1 policy leaders regarding cannabis more seriously. But there is ah a risk involved: in case medical cannabis is legalize! prohibitionists will then argue that medicinal drugs cannot at tr same time be recreational drugs.

6.2 The Rise of the Acceptance Paradigm

For the time being, the general public and legislators do not seer to be ready to accept a libertarian approach to drug use. Howevei some studies have indicated that there may be a growin acceptance of that possibility. At present the main content o acceptance policy is harm reduction by any possible means. O course, the preferred form of harm reduction would be legalizatioi with all kinds of administrative regulations for general consume protection as well as for the protection of minors and people wh< are mentally unfit. For now, however, lesser degrees of ham reduction will suffice. Most of these may be gradually replaced *b* more adequate solutions in the future.

The Netherlands' model for controlled availability of cannabis anc cocaine is the foremost example for the acceptance paradigm Support for this model or even for the Swiss approach is increasing in the serious media, though the popular press and other mass media sometimes still indulges in exposing prominent persons who consume cocaine.

In Germany, needle exchange initiatives were started privately and informally by courageous NGOs as early as 1985. In a few cases there was prosecution of the providers because they were of accessories to those possessing drugs, although there has never been a conviction for that charge in such a case. In 1992 the practice was legalized, however, and needle exchange programs have been running smoothly all over Germany ever since. In 1998 needle exchange programs were started in two prisons taking the form of scientific field studies. Since their positive outcome has been shown,[22] it has been decided to continue and expand these programs. No new law is necessary for that expansion to occur.

In 1994 the Federal Constitutional Court reached a decision obliging prosecutors to stop enforcement in cases of small quantities for personal use. Even though cannabis was by no means legalized, this decision had a great impact on public perceptions of cannabis use as not being dangerous and therefore as acceptable. In 1994 two of the federal states (Hessen and Schleswig-Holstein) suggested legally dispensing cannabis, either in specialized 'coffee shops' like those in the Netherlands or in pharmacies on the basis of a license system. Both motions were turned down, but the fact that they were even considered had an influence on the debate.

As mentioned above, Heroin dispensing programs and safe injection rooms were legalized in 2000. These measures are institutionally centered in the medical sphere. Yet, in the perspective of the acceptance paradigm these measures mark a transition toward legalization as their intention is harm reduction.

One very efficient measure is practiced in the Netherlands and in some places in Germany: Drug-checking. Users can deliver a tiny : sample of their substance to a laboratory and have it tested as to its content and concentration. This practice is known to have saved lives, as very often intravenous Heroin users overdose because of not knowing the concentration of the black market substance. The practice has also proven very helpful for ecstasy users at raves and bouse parties. In Germany and Italy the practice is not officially accepted yet.[23] The majority of prosecutors still holds the opinion

~ StSver, Heino, Risk Reduction for Drug Users in Prison - Encouraging Health Promotion for Drug Users within the Criminal Justice System., Utrecht/NL: Trimbos Institute <www.trimbos.nl> (2001).

~ Schroers, Artur, Monitoring - Drogentrendforschung auf der Basis von Drogenanalysen (Drug checking) am Beispiel des Ecstasykonsums zum Zwecke *4a* GesundheitsfBrderung in Jugendkulturen. (Bremen University Dissertation, 2000), Bellinger, L. & Burkhardt, S., MDMA: Das Recht auf Qualitatsbestimmung und therapeutischen Gebrauch, in Neumeyer, J. &

that this service is punishable as it violates Sect. 29 Para. 1 No.3 (possession) drug use). However, in two German citi (Amtsgericht Berlin Tiergarten 1998) the courts have refused apply this law. arguing that the people operating the drug checkin service are intending to extinguish the substance after checking. And increasingly prosecutors are silently tolerating these practices while in some cities such services operate secretively. Since Mr. Korner. the leading commentator on the German narcotics law, as well as a growing number of legal scientists, like the instant author, are supporting the liberal interpretation of the law. We hope that this practice will probably be legalized in Germany too. In Austria there is one such program now under official scientific scrutiny.

Another facet of harm reduction is everyday practice in the Netherlands and at the same time bears the risk of punishment in some regions of Germany: the operation of 'sleep-ins' for wayward intravenous drug users. These services for free and protected overnight stay are usually operated by informal initiatives or in somewhat of a 'grey zone' by NGOs. Punishment in Germany could be based on the perpetration of tolerating unlicensed injections within the premises. This feature is either not punishable in other member-states of the EU or will probably officially be de-criminalized in the near future.

Last but not least, it should be mentioned that there are local, regional and national service organizations for drug users and for supporters of legalization. The main national NGO in Germany is called 'Akzept e.V.' (Association for Accepting Drug Use). Another NGO is called 'Junkies, Ex-users and Substitution Patients - JES - alluding to 'yes!'

Schmidt-Semisch, H., *Ecstasy - Design fuer die Seelel* (Freiburg, 1997) 217-232, and Bollinger, L., Gesundheitsvorsorge flier Heroinabhangige strafbar? *Juristische Arbeitsblaetter* 292-299 (1991).

7. Conclusion

In this paper, we have tried to sketch a theoretical concept, consistent with a wider sociological and socio-psychological context, and apply it to the field of drug use and control. The question of why people use drugs, why some abuse them and become addicted, why some are criminalized and de-socialized while this does not happen to others have not been discussed. It is difficult to theorize when the whole context wherein theorizing takes place is moving so fast and the determinants of such movement have to do with power and politics rather than with insight, science, and reason.

CONSULTATION WITH THE JUDICIARY IN APPOINTING SUPERIOR JUDGES: A REFLECTIONS ON THE BANGLADESH AND INDIAN PERSPECTIVES

*Sarkar AH Akkas**

1. INTRODUCTION

In any modem democratic society, there are three branches of government - the executive, legislature and the judiciary- and each branch has some special responsibilities. The responsibilities of the executive branch are to determine government policies, supervise execution of those policies, enforce or administer the laws and conduct other business of the government. The legislature is responsible for making the laws of the land and the judiciary applies the laws in resolving disputes between citizens or between citizens and the government. In order to perform this function properly, the judiciary needs to be independent from the executive, the legislature or any other sources of influence or interference. This is because only an independent judiciary can protect the rights of citizens by making judicial decisions without fear or favour even when the decisions are unpopular or difficult.[1] Therefore, judicial independence is very much crucial to ensure the fair administration of justice and to gain public confidence in the justice system.

The concept of judicial independence carries a wide range of aspects including the appointment of judges. In fact, the mechanisms for appointment of judges are of paramount

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[1] Stephen Parker and B Petrie-Repar, Judicial Independence in Australia: Briefing Materials for the Community', <http://www.law.monash.edu.au/JCA/com.html> accessed on 22 August 1999.

importance because they have great impact on the quality of judges and impartiality in making judicial decisions which are preconditions to gain public confidence in the judiciary. There is a common consensus among jurists and commentators that the mechanisms for appointment play an important role in selecting the persons having the professional skills and qualities that are required forjudges in an independent judiciary.[2]

In terms of the mechanisms for appointment, the concept of judicial independence seeks to ensure that the power of appointment of judges is not vested exclusively in the executive government. If the executive government is invested with the exclusive power of appointing judges, political or other considerations may prevail over the merit criteria for appointments and thus the quality of the judiciary might be weakened. Judges appointed on basis of executive discretion or favour may be obliged to serve the interests of their appointing authority so as to undermine judicial independence.[3] Therefore, jurists and commentators do not support the appointment of judges exclusively by the executive government: rather they campaign for reducing the exclusive executive power. With a view to reducing the exclusive executive power, the involvement of parliament, judiciary or any other statutory body, like an independent judicial commission, may play a vital role in appointing judges. This paper seeks to deal with the involvement of the higher judiciary in appointing superior judges.

Judges are in a position to assess the quality of persons who are to be appointed to judicial office. Members of the higher judiciary ■ay play their role in appointing judges by way of consultation or recommendation. The consultation system has significant implications for the quality of the judiciary and public confidence

- Sarkar Ali Akkas, Appointment of Supreme Court Judges in Bangladesh: A Smdy of Law and Practice', (2002) 11 *Journal of Judicial Administration* 146 at 146.

[3] Sarkar Ali Akkas, *Independence and Accountability of Judiciary: A Critical Review* (Center for Rights and Governance, Dhaka. 2004). p 122. See also. Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Cjnada* (Canadian Judicial Council, Toronto, 1995), p 233.

in it. which is necessary for the maintenance of judicial independence. As to the significance of consultation with the judiciary the *Universal Declared ion on the Independence of Justice [Montreal Declaration]* 1983 provides that participation injudicial appointments by the executive government is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary or by a body in which members of the judiciary and the legal profession participate.[4]

In fact, the judiciary is involved in one way or another in making judicial appointments in many countries of the world including Bangladesh and India. The main purpose of this paper is to evaluate the conditions of Bangladesh in terms of consultation with the judiciary in appointing superior judges with reference to Indian perspective. In doing so, it first discusses the consultation system as currently existed in India and then addresses the conditions of Bangladesh.

2. CONSULTATION SYSTEM IN INDIA

In respect of consultation with the judiciary in making judicial appointment a significant system was introduced in India by a decision of the Supreme Court. Under the Indian Constitution, the President of India appoints all judges of the Supreme and of the High Courts including the Chief Justices 'after consultation' with different functionaries as follows:

In appointing the Chief Justice of India, the President consults such of the judges of the Supreme Court and the High Courts as he or she 'may deem necessary for the purpose'.[5] In appointing other ; judges of the Supreme Court, the President consults such of the judges of the Supreme Court and the High Courts as he or she ;

[4] Montreal Declaration 1983, Art 2.14(b). The Montreal Declaration was adopted at the first World

[5] Constitution oflndia, Art 124(2).

"may deem necessary', but 'consultation' with the Chief Justice of India is mandatory. [6]

In appointing the Chief Justice of a High Court, the President is under an obligation to consult the Chief Justice of India and the Governor of the State.[7] In appointing the puisne judges of a High Court, the President consults the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. [8]

Hie constitutional provision of consultation with the Chief Justice was an important issue of interpretation in a series of decisions of the Indian Supreme Court. The question of consultation was first raised in the case of *S. H. Sheth* v *Union of India.* [9] Justice S. H. Sheth was transferred from the Gujarat High Court to Andhra Pradesh High Court and he challenged the transfer order in the Gujarat High Court on two grounds. Firstly, the transfer was without Justice S. H. Sheth's.consent and secondly, it was without consultation with the Chief Justice of India. Although the first ground was rejected by the majority opinions of two judges of the Gujarat High Court, the petition was allowed on the second i ground. Then an appeal in the Supreme Court of India was Jisposed of in accordance with an assurance by the government of Me Union of India to withdraw the transfer.[10]

For the second time the issue of consultation in appointing judges came before the Supreme Court of India in *S. P. Gupta* v. *President of India,*" popularly known as the *First Judges* Case. In respect of appointment of judges in consultation with the Chief Justice, the Supreme Court held that there must be 'effective I consultation' between all the constitutional functionaries. However, it was observed that though the President was obliged to consult the Chief Justice, the opinion of the Chief Justice was not

* **Constitution of India, Art 124(2).**

" **Constitution of India, Art 217(1).**

'Constitution of India, Art 217(1).

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'•'•' *Union of India* **v.** *S* ***H Sheth*** , **AIR 1977 SC 2328.**

:! **AIR 1982 SC 149.**

binding upon the President. Thus, the Court gave primacy to the executive so that it could appoint or not appoint any judge to the High Court or to the Supreme Court without paying any attention to the opinion of the Chief Justice.[12]

However, the decision in the *First Judges Case* was overruled by > the Supreme Court in *Supreme Court Advocates-on-Record] Association* v. *Union oflndia,^* known as the *Second Judges case.* In this case the Supreme Court held that the proposal for the appointment of judges to the Supreme Court and the High Courts | must be initiated by the Chief Justices of the respective courts, and these proposals have to be submitted by the Chief Justice of India I to the President, who must consider these proposals within aJ specified time. The Court emphasised that in the case of differences between the opinion of the Chief Justice and the President, the! opinion of the Chief Justice must prevail and no judge should bed appointed without the concurrence of the Chief Justice. The Chief I Justice, however, should consult the next two senior judges of the Supreme Court. The Court held:

> The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach *[sic]* an agreed decision, sub-serving the constitutional purpose, so that the occasion of primacy does not arise. — In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India'', and formed in the manner indicated has primacy. ... In exceptional case alone, for stated

'-Ml[1] Singh, Securing the Independence of **the** Judiciary- **The Indian]** [•xperience, (2000) 10 *Indiana International & Comparative Law Review* **245** i 268.

[13] AIR 1994 SC 268.

> strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.[14]

This judgment was a significant gain for the judiciary in comparison with the executive in relation to the appointment and transfer of judges, but it was not universally hailed.[15] Moreover, it could not cover up all the controversies and a great controversy became public in mid-1998, when the executive refused to appoint judges to Supreme Court and to transfer Chief Justices of High Courts recommended by the Chief Justice of India. It is to be noted that at the beginning of 1998, Chief Justice M. M. Punchhi recommended three appointments to the Supreme Court and the transfer of four Chief Justices of the High Courts. These appointments and transfers became subjects of criticisms by some judges and senior lawyers, who alleged lack of bona fides and required consultation in the action of the Chief Justice of India. It led to an unpleasant exchange of notes and letters between the Chief Justice of India and the executive government and at least two writ petitions were filed in the Supreme Court for appropriate directions to the executive to make the appointment of judges.[16] Under this situation, in July 1998, the President of India asked for the advisory opinion of the Supreme Court on various areas of the' judgment of the *Second Judges case* including the issue of consultation.[17]

'"* *Supreme Court Advocates-on-Record Association* v. *Union of India,* AIR 1994 SC 268 [508].

15 *Supra,* n 12 at 273.

16 *Ibid,* at 274.

17 Under art 143 (D) of the Constitution of India President K.R. Narayanan made the Reference to the Supreme Court on 23 July 1998. The Supreme Court

In October 1998, the Supreme Court in its advisory opinion confirmed the primacy of the Chief Justice's opinion over that of the President in appointing judges. The Court, however, observed that the 'sole, individual opinion of the Chief Justice of India does not constitute 'consultation' within the meaning of Arts. 217 and 222(1) of the Constitution. In appointing judges to the Supreme Court, the Chief Justice must make a recommendation in consultation with the four most senior puisne judges of the Supreme Court. In the case of appointments to the High Courts, the Chief Justice must consult the two most senior puisne judges of the Supreme Court. The views of the puisne judges 'should be in writing and should be conveyed to the [President] by the Chief Justice of India along with his [or her] views'. The Supreme Court further observed that the Chief Justice is under an obligation to follow the 'norms and requirements of the consultation process', and recommendations made by him or her 'without complying .= with the norms and requirements of the consultation process' are not binding upon the President.'[8]

3. CONSULTATION SYSTEM IN BANGLADESH

The People's Republic of Bangladesh emerged as an independent State in 1971. From ancient times Bangladesh was a part of undivided India and it was known as 'Bengal'.[19] It was a part of the British Indian Empire until 1947, when India was partitioned into two independent States, India and Pakistan, and then from 1947 to 1971 Bangladesh was a Province of Pakistan.

During the British period the executive government enjoys an exclusive privilege in appointing judges and the judiciary had no role in it. Even under the *Government of India Act,* 1919 and the

disposed of the Presidential Reference by its Advisory Opinion on 28 October 1998 in *Re Presidential Reference,* AIR 1999 SC 1.

18 *Re Presidential Reference,* AIR 1999 SC 1, 16.

19 Broadly speaking the term 'Bengal' designates the Bengali-speaking area, but its history is very complex because there is very little recorded history of the land, language and people of this area. However, the most available historical records reveal that in different ancient periods it was called *Vanga* or *Bang,* Bangla and then Bengal.

subsequent *Government of India Act,* 1935, appointments to the then higher judiciary were the prerogative of the Crown with no specific provision for consulting the Chief Justice in the appointment process. After the emergence of Pakistan, the system of consultation was first introduced under the Constitution of 1956, which established the 'Supreme Court of Pakistan' comprising a Chief Justice known as the 'Chief Justice of Pakistan' and not more than six puisne judges. [20] The Chief Justice would be appointed by the President and the other judges by the President "after consultation' with the Chief Justice. [21]

For each of the Provinces of Pakistan, the Constitution of 1956 provided for a High Court consisted of a Chief Justice and other judges appointed by the President in consultation with the Chief Justice of Pakistan and the Governor of the Province. In the case of the appointment of High Court Judges other than the Chief Justice, the Chief Justice of the High Court was also consulted. [22]

After independence the first highest court in Bangladesh was the High Court established under sec. 2 of the *High Court of Bangladesh Order* 1972. The High Court consisted of a Chief Justice and 'so many other judges as may be appointed from time to time' and they would be appointed by the President and held office "on such terms and conditions as the President may determine'.[23] Subsequently, by the *High Court of Bangladesh 'Amendment) Order* 1972 an Appellate Division of the High Court of Bangladesh was established and it consisted of the Chief Justice and two other judges of the High Court appointed by the President after consultation with the Chief Justice.[24] The High Court of Bangladesh existed until the Supreme Court was established under the Constitution of Bangladesh.[25]

-^ Constitution of Pakistan 1956, Art 148. :i

Constitution of Pakistan 1956, Art 149.

— Constitution of Pakistan 1956, Art 166.

[15] High Court of Bangladesh Order 1972, s 3.

-* High Court of Bangladesh (Amendment) Order 1972, s 3.

— The Constitution of the People's Republic of Bangladesh 1972 [hereinafter Constitution of Bangladesh] was adopted by the Constituent Assembly on the 4th November 1972, given effect from the 16th December 1972, the first anniversary

The Supreme Court of Bangladesh is the highest court, comprising an Appellate and High Court Division. It consists of the Chief Justice who is the 'Chief Justice of Bangladesh' and such number of other judges as the President may appoint to each division.[26] The Chief Justice and judges appointed to the Appellate Division sit in that Division exclusively; other judges sit only in the High Court Division. [27]

Under Art. 95 (1) of the Constitution, the Chief Justice and other judges of the Supreme Court are appointed by the President. In addition, Art. 98 of the Constitution empowers the President to appoint additional judges of the Supreme Court. However, in practice, all judges of the Supreme Court are initially appointed to the High Court Division as additional judges for a period of two years under Art. 98 and then they may be appointed as High Court Division Judges under Art. 95(1). Subsequent to serving in the High Court Division, they are only appointed as Appellate Division Judges on the occurrence of a vacancy.[28]

The original Art 95(1) provided, '[t]he Chief Justice shall be appointed by the President, and the other judges shall be appointed by the President after consultation with the Chief Justice'. Art 98 originally provided, 'if the President is satisfied, after consultation with the Chief Justice, that the number of the judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more — additional judges'.

The *Constitution (Amendment) Act* 1975 empowered the President to appoint the Chief Justice and other judges of the Supreme Court without consulting the Chief Justice. Under ss. 14 and 16 of .the *Constitution (Fourth Amendment) Act* 1975, the requirement of consultation with the Chief Justice was omitted by amending Arts. 95 and 98 of the Constitution.

of the victory day of Bangladesh. There have been 13 amendments to the Constitution to date (2002). The latest amendment was made by the Constitution (Thirteenth Amendment) Act 1996.

[26] Constitution of Bangladesh, Art 94(2).

[27] Constitution of Bangladesh, Art 94(3).

[28] Akkas, above n 2 at 147.

In 1976, during the first Martial Law in Bangladesh, some major changes were introduced in the structure of the Supreme Court.[29] Instead of the Supreme Court comprising the Appellate Division and the High Court Division, a separate Supreme Court and a High Court were established by sec. 4 of the *Second Proclamation (Seventh Amendment) Order* 1976. Under the changes, the Chief Justice and other puisne judges of the Supreme Court were appointed by the President, but in appointing the puisne judges, the President was under an obligation to consult the Chief Justice. The Chief Justice of the High Court would be appointed by the President after consultation with the Chief Justice of the Supreme Court, and other judges of the High Court would be appointed by the President after consultation with both the Chief Justice of the Supreme Court and the Chief Justice of the High Court. However, in appointing the additional judges of the Supreme Court and the High Court, the President was not under an obligation to consult the Chief Justice of the Supreme Court or that of the Hight^ourt.[30]

In 1977, the separate structure of the Supreme Court and High Court was abolished and a Supreme Court comprising the Appellate Division and the High Court Division was re-established by sec. 2 of the *Second Proclamation (Tenth Amendment) Order* 1977. The powers to appoint the Chief Justice and other judges of the Supreme Court were again vested exclusively in the President, and he was empowered to appoint the puisne judges of the Supreme Court without consulting the Chief Justice.

This system is still prevailing in Bangladesh and under the current parliamentary system of government the President must act in accordance with the advice of the Prime Minister when exercising I his or her functions, except in appointing the Prime Minister and I the Chief Justice.[31] The President may appoint the Chief Justice I without consulting the Prime Minister, but in appointing other

-^ The first Martial Law was declared in independent Bangladesh on 15 August 1*975 and it was withdrawn after passing the Constitution (Fifth Amendment) Act 1979 on 6 April 1979.

-'*-' Akkas, above n 3 at 147. See also Akkas above, n 2 at 150

[51] Constitution of Bangladesh, Art 48(3).

judges of the Supreme Court, he or she is bound to act on the advice of the Prime Minister.

Thus, under the present system, the executive government enjoys an exclusive privilege in appointing Supreme Court Judges. However, before making any appointments, the government informally consults the Attorney General, judges and lawyers. Although there is no constitutional requirement to consult the Chief Justice, all appointments are made in consultation with him or her. The Chief Justice, before forming his or her opinion about the suitability of the persons for the office of Supreme Court Judge, informally consults the other judges of the Supreme Court and some times senior lawyers of the Supreme Court Bar Association.[32]

The original Constitution adopted the provision of consultation as a major safeguard against political appointment and it was a constitutional acknowledgement of the role of the Chief Justice in appointing judges.[33] Following the withdrawal of the provision requiring consultation with the Chief Justice, there is a great scope for appointments to be made based on political or other considerations regardless of merit. In other words, there is always a risk of violation of the constitutional practice of consultation with the Chief Justice and in reality; the first incident of such a violation was happened in 1994. For better understanding of the situation, the incident of 1994 is discussed below:

In February 1994, the government selected nine additional judges for the High Court Division without consultation with the Chief Justice. On the very day of the appointments, the then Chief Justice Shahabuddin Ahmed made reference to the incident at the inaugural session of the National Lawyers' Conference organised by the Bangladesh Bar Council. The Chief Justice expressed his concern that judges of the Supreme Court should be appointed in accordance with the Constitution and the Chief Justice had no role

[32] Law Commission of Bangladesh, Annual Report (1997), Vol II, para 22.
[33] Mustafa Kamal, Bangladesh Constitution: Trends and Issues (University of Dhaka, Dhaka, 1994), p 29.

in the process. He added that the Chief Justice is 'Mr. Nobody' in making such appointments.[34]

The Conference then expressed its disapproval of such appointments by a unanimous resolution and urged the Chief Justice to refuse to swear in the judges. The resolution was conveyed to the Chief Justice by the leaders of the Bar Council and the Supreme Court Bar Association. The Chief Justice, after consultation with all other judges of the Supreme Court, informed the leaders of the Bar Council and Bar Association that he would defer swearing in the newly appointed judges for two days and that during this period the President and the Prime Minister could be approached to resolve the situation.[35] Thereafter, a delegation of senior lawyers met the President and the Prime Minister and urged them not to violate the established practice of consultation in appointing the judges.[36]

The government tried to justify its stance by saying that there was no constitutional requirement of consultation with the Chief Justice. However, due to the pressure of public opinion and the increasing pressures from lawyers, the government ultimately rescinded its notification of the appointments.[37] After consultation with the Chief Justice, the names of two of the judges earlier appointed were dropped and fresh appointments were made adding another two judges.[38]

This incident demonstrates two aspects of the conventional practice of consultation. *First*, although the Chief Justice has no formal power in relation to the appointment of judges, he or she is constitutionally empowered to swear in the judges. Any judge appointed to the Supreme Court must 'make and subscribe an oath

[34] The Daily Star, Dhaka (Bangladesh), 5 February 1994.

[35] Ishtiaq Ahmed *et al,* Appointing Judges in the Appellate Division: A Memorandum from the Five Member Committee of Senior Advocates, in the *Daily Star,* Dhaka (Bangladesh), 4 March 2001 [7].

[3^] Ali Ahmed, *Theory & Practice of Bangladesh Constitution* (HA Publisher, Dhaka, 1998), p 128.

[37] *Ibid;* see also Kamal, above n 33 at 30.

[38] The *Dainik Sangbad,* Dhaka, 14 January 2001

or affirmation' before entering upon the office.[39] He or she is "deemed to have entered upon the office immediately after he [or she] makes the oath'.[40] The oath or affirmation of a judge must be administered by the Chief Justice or another person designated by the Chief Justice. [41] After the incident of 1994 this power of the Chief Justice came to be regarded as a safeguard against the unilateral power of the executive government in appointing judges. Other safeguards were the active role of the lawyers and public criticism.[42] Consequently, the importance of the executive government consulting the Chief Justice prior to appointing judges to the Supreme Court became recognised as essential. Thus, in practice, the constitutional convention of consultation has partially filled the gap in the written constitutional provisions. [43] *Secondly,* the incident highlights the Chief Justice's role in informing lawyers and the public of a breach of this constitutional convention. The Chief Justice decided to defer swearing in the judges for two days. If the government chose not to change its controversial appointments, the Chief Justice was ultimately powerless to stop it. He was under a constitutional obligation to administer the oath because being appointed Chief Justice, he made and subscribed an oath or affirmation that T will preserve, protect and defend the Constitution and the laws of Bangladesh'.[44] Under his oath the Chief Justice was bound to observe the constitutional provision of administering the oath or affirmation of judges and was therefore only able to defer it for a short time. The government was bound to change its decision only because of the pressure from lawyers and the weight of public criticism. However, lawyers' role in creating pressure relies on them being informed when judicial appointments are made without consultation with the Chief Justice. They were only aware of the

[3y] Constitution of Bangladesh, Art 148(1) and Sch III, para 6.

[40] Constitution of Bangladesh, Art 148(3).

[41] Constitution of Bangladesh, Art 148(2) and Sch III, para 6.

[42] In Bangladesh, the general public through the media and lawyers individually and collectively play significant roles in scrutinising the judiciary as well.

[43] Akkas above, n 3 at 151.

[44] Constitution of Bangladesh, Sch III, para 6.

incident as a result of the Chief Justice's disclosure at a lawyers' conference. [45]

The process of judicial appointment is very secretive and, as a consequence, only the Chief Justice knows whether or not the practice of consultation has been followed. The Chief Justice's position does not, however, permit public disclosure of details relating to judicial appointments or of cases where the government has departed from the conventional practice of consultation. Whether an incident is reported to the public will often depend on the personal attitude of the Chief Justice. It is likely that some Chief Justices will prefer to avoid confrontation with the government, so there is no guarantee that all governments in future will be compelled, as in this incident, to follow the practice of consultation in making appointments to the Supreme Court.[46]

In this context it is to be noted that subsequent to the above incident there were some other incidents happened in 2001, 2002 and 2003 in which it were alleged that the appointment of judges were not made in accordance with the consultation with the Chief Justice. At every time of those incidents the lawyers from the Supreme Court Bar were very much critical and they urged the executive government to follow the constitutional practice effectively, but failed to convince the government.

4. CONCLUSION

There is no denying that consultation with members of the higher judiciary is very significant in appointing the best-qualified persons to judicial office. However, the consultation system has a serious limitation, because the efficacy of consultations depends mostly on the attitude of the executive government. It could be that after consultation with the judiciary and legal profession the executive government will ignore the opinion given by them.[47] If

[45] **Akkas above, n 3 at 151.**

[46] ***Ibid.*, at 152.**

47 uan-i/ nihhc Thp. Annnintment of Judges'. (1987") 61 *Australian Law Journal*

the executive is reluctant to give due consideration to the advice of the judiciary and legal profession, this system is useless and thus its ultimate weight is dependent on the executive.

In fact, for the sake of judicial independence the judiciary should have an effective role in appointing judges by way of effective consultation and in this regard the Indian system of consultation with the judiciary may be considered an effective model.

Under the Indian Constitution, the executive government is bound to consult the Chief Justice of India and in accordance with the Supreme Court's decision in the *Second Judges Case* the opinion of the Chief Justice prevails over those of the executive. As a matter of fact, the verdict of the Supreme Court of India excludes the executive government from appointments to the highest court and the Supreme Court itself assumed the power of appointment of judges and therefore, this judgment of the Indian Supreme Court may be subject of criticism. H. M. Seervai, a staunch supporter of judicial independence and one of the strongest critics of the *First Judges Case* who asked for its immediate overruling, criticised the *Second Judges Case* and called it an amendment and reversal of the Constitution.[48]

Despite this criticism, it can safely be said that the decisions of the Indian Supreme Court in the *Second Judges Case* as well as in the *Third Judges Case* are very much useful to control the power of the executive government in appointing judges and it may be an effective mechanism for the protection of judicial independence. Conversely, in Bangladesh the Supreme Court has not gained any such authority in appointing judges either by the Constitution or by judicial decision. The role of the Supreme Court in appointing by way of consultation was recognised in the original Constitution of Bangladesh, but it has been omitted by subsequent amendment of the Constitution. The foregoing discussion reveals that the conventional practice of consultation in Bangladesh is not sufficient to regulate exclusive executive control over

[48] H. M. Seervai, *Constitutional Law ofJndia,* 4th ed, p 2927, cited from Singh, *supra* n. 12 at 273.

appointments or to exclude undue political or other considerations in appointing judges. Due to the absence of a constitutional obligation of consultation with the Chief Justice, there is always a risk that with an object of facilitating nepotism and political favouritism the practice of consultation will be ignored and the power of judicial appointment will be misused.

Under such circumstances, in appointing the judges of the Supreme Court of Bangladesh, a constitutional obligation of consultation is essential to ensure the effective role of the Chief Justice and therefore, Art. 95 (1) of the Constitution should be amended to this effect, by inserting a provision requiring consultation with the Chief Justice.

REFORMS IN THE LAW RELATING TO CHILD SEXUAL ABUSE IN INDIA - A CIRCUITOUS JOURNEY FROM *SUDESH JHAKU* TO *SAKSHI?*

1. INTRODUCTION

A student of criminal law may recall the 1996 judicial dictum of the High Court of Delhi in *Sudesh Jhaku* v. *K.C.J.*[1] (hereinafter *Sudesh Jhaku),* a case exhibiting disgusting sexual proximity of a well-educated and highly placed bureaucrat with his minor daughter and response of the Delhi High Court thereto. One may also recall the post-1997 untiring efforts and zeal of Sakshi, a voluntary organization rendering medico-psycho-legal assistance to victims of sexual abuse and harassment, to, through judicial process, bring appropriate reforms in the law relating to child sexual abuse. Sakshi's efforts commenced in 1997 to seek a progressive interpretation from the constitutional law courts, after a series of orders from the Supreme Court of India[3] and a set of proposals for reforms solicited from the Law Commission of India,[4] of the law relating to child sexual abuse came to halt in 2004, when the apex court, like the Delhi High Court, opined that it is for the Legislature, and not for the judiciary, to bring reforms

' 1998 Cri.L.J. 2428 (Delhi). Cri. R. No. 101 of 1996. Decided on May 23, 1996.

[2] *Sakshi* v. *Union of India,* Writ Petition (Cri.) No. 33 of 1997. Decided on August 9, 1999.

•' For order of the Supreme Court see *Sakshi* v. *Union of India,* (1999) 6 SCC 591. For other details of the petition; subsequent events, and 'precise issues' raised by Sakshi, see Law Commission of India, *One Hundred and Seventy Second Report on Review of Rape Laws* (Government of India, 2000), para. 1. 2.1-1.1.4and 1.2-1.2.2.

[1] See, Law Commission of India, *One Hundred and Seventy Second Report on Review of Rape Laws* (Government of India, 2000).

in the law.^ The instant note endeavors to outline the road map and to sketch the suggested paradigm of law.

2. JOURNEY FROM *SUDESH JHAKU* TO *SAKSHI:* 1996 TO 2004

In the *Sudesh Jhaku* case the Delhi High Court was urged to resort to a progressive judicial interpretation to 'penetration' and 'sexual intercourse', appearing in sec. 375[6] of the Indian Penal Code, 1860 (IPC), and thereby to inflict severe punishment on the erring father, K.C.J., who in a perverted and disgusting manner sexually abused his minor daughter.[7] The High Court, in the backdrop of the

""" *Sakshi* v. *Union of India & Ors.* [with *Smt. Sudesh Jhaku* v. *Narender Verma & Ors.]*, AIR 2004 SC 3566. Decided on May 26, 2004.

[6] Sec. 375. IPC, reads: *'Rape* - A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: -

First: - Against her will.

Secondly: -without her consent.

Thirdly: - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly: -With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly: - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly: - With or without her consent, when she is under sixteen years of age.

Explanation: - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: -Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.'

Facts of the case as narrated in the reported decision, in brief, were: A father of three daughters, an Under- Secretary in the Ministry of Home Affairs, used to take his youngest daughter (of about six years) to his office and from there to a hotel in the evenings. There he, along with his other colleagues, in company of the girl, used to consume alcohol and watch 'blue films'. During watching the films, the father would make his daughter to consume alcohol, remove her clothes, and thrust his fingers in her vagina and anus. At home also he used to, after stupefying his other two daughters and the wife and consuming alcohol with some 'white tablets', bring the youngest daughter to the drawing room. Then he would make himself naked and the daughter too and make the daughter to suck his penis. The CBI under sections charged the father 376 (punishment for rape), peculiar facts of the case, was invited to deliberate upon: is Tape', as defined in sec. 375, IPC, confined only to penile penetration of vagina?; what about penetration of a bodily orifice (vagina, anus, or mouth) by a penis or other part of the body, or by an object?; would it fall within the meaning of words 'sexual intercourse' and •penetration' as used in sec. 375, IPC?

Arun Jaitley, former Union Law Minister, representing Smt. Sudesh Jhaku, argued that the wordk 'sexual intercourse' [appearing in sec. 375, IPC] and 'carnal intercourse' [used in sec. 377, IPC[8]], read in conjunction with the common word 'penetration', in the absence of statutory definition, should be interpreted to mean that where a male with the consent of the ; woman penetrates any part of his body into any part of her body j other than her vagina, then he commits an offence punishable j under sec. 377 of the Penal Code but where he so penetrates into j any part*o^r^f her body including vagina without her consent then he ■ commits an offence punishable under sec. 376 of the Code. In the alternative, he contended, that even if sec. 377 is taken to be \ confined only to the acts of sodomy, buggery and bestiality, the j 1
position with regard to 'rape' is bound to remain materially the i

377 (unnatural offences), 354 (outraging modesty of a woman). & 366-A (seducing a minor girl for illicit intercourse) r.w. 109 (abetting an offence). However, the Additional Sessions Judge charged the father under sections 354, 377 and 506 (punishment for criminal intimidation) of the IPC and his colleagues under sections 354 and 377, IPC. The mother of the child, on whose complaint the case was registered, however, was not satisfied with the charges slapped on her husband. She urged that he, in addition to the above-mentioned charges, be charged under section 376 and 366-A, IPC. For comments on the *Sudesh Jhaku* case, see K. I. Vibhute, Sexual Violence against Children and the Indian Penal Code: Proposals for Reform, 22 *Del. L. Rev. 2*1 (2000). Also see K. I. Vibhute, 'Rape' and the Indian Penal Code at the Crossroads of the New Millennium: Between Patriarchiast and Gender Neutralist Approach, 43 *J.I.L.I.* 25(2001).

Sec. 377, IPC, reads: *'Unnatural offences* -Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. £.Y/?/a>7tfr/ort-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.'

same and therefore, where a male penetrates any part of his body or any foreign object, like say a stick or a bottle, into a woman's vagina without her consent, it amounts to Tape' within the meaning of sec. 375 of the Code.[9]

Relying heavily upon phraseology of sections 375 (rape) and 377 (unnatural offences) of the Penal Code along with *'Explanations'* thereof and perceiving that the definition of 'rape' incorporated in the IPC is solely premised on the Common Law of England, Jaspal Singh, J., speaking^fbr the Delhi High Court, held that the words "sexual intercourse "and 'penetration' can not be interpreted to bring within their fold-the vaginal penetration by fingers or any other object. His Lordship, justifying his stand, observed:

> The Cdurt has to see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it, which does not come within the reasonable interpretation of the statute. It is also a cardinal principle that in construing a penal statute, in case of doubt, the construction favourable to the subject should be preferred. If I go by the suggestion of [Mr. Jaitely] I will be acting against these very well established principles.[10]

However, realizing the shock, trauma and long-term psychological damage to a minor victim of vaginal penetration otherwise than with penis or oral intercourse, the High Court opined that it is for the Legislature and not for the judiciary to give wider interpretation to the words 'sexual intercourse' and 'penetration'.

See, *Sudesh Jhaku* v. *K.C.J., supra* n. 1, para. 5. '
Ibid., para. 22.

In 1997 Sakshi, plausibly perturbed by the dictum of the Delhi High Court in the *Sudesh Jhaku* case, through a PIL writ petition," urged the Supreme Court to issue an appropriate writ or direction declaring, *inter alia,* that 'sexual intercourse' as contained in sec. 375, IPC, shall include 'all forms of penetration' [such as penile/vaginal; penile/oral; penile/anal; finger/vaginal; finger/anal penetrations and object/vaginal penetration]. The 'precise issues' submitted by Sakshi to the apex court for its consideration were:

1. Would it, having regard to the widespread prevalence of child sexual abuse, not be appropriate to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within the meaning of the expression 'penetration' in the *Explanation* to sec. 375 of the IPC?

2. Is it not wrong to classify the penetrative abuse of a child below the age of 12 as unnatural offence under sec. 377, IPC, or as outraging the modesty of a woman under sec. 354, IPC, depending upon the 'type' of penetration ignoring the 'impact' on such child?

3. Is it not wrong to continue to treat non-consensual penetration upon such a child as offence under sec. 377, IPC. on par with certain forms of consensual penetration (e.g. consensual homosexual sex) where consenting party can be held liable as an abettor or otherwise?

[1'] *Sakshi* v. *Union of India, supra,* n. 2.

Sec. 354, IPC, says, *'Assault or criminal force to woman with intent to outrage her modesty*- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her j modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.'

The apex court, by its order dated January 13, 1998, directed the Fifteenth Law Commission of India to communicate its response to these 'precise issues'. The Law Commission, however, on July 28, 1998 filed an affidavit setting out in *extenso* the relevant portions of its 156th Report. Convinced by the fact that the 156th Report has not addressed itself to the 'precise issues' raised by Sakshi and its (the Law Commission's) recommendations that penile/oral penetration and penile/anal penetration be covered by sec. 377, IPC, and that the present sec. 354 of the Penal Code is adequate enough to bring in its ambit the finger penetration and object penetration into vagina or anus, are not in tune with the issues raised by Sakshi, the Supreme Court again on August 9, 1999[13] directed the Fifteenth Law Commission 'to examine the issues submitted by the petitioner [Sakshi] and examine the feasibility of making recommendations for amendment of the IPC or deal with the same in any other manner so as to plug the loopholes."

The Fifteenth Law Commission, in its 172nd Report, after a careful review of the rape laws in vogue and intensive deliberations with Sakshi, recommended that 'all kinds of penetration' in the vagina, anus or urethra of another [whether by a part of human body or by an object] as well as oral sex, be brought within the purview of the terms 'penetration' and 'sexual intercourse', the key terms in the offence of 'rape'. It also recommended that the offence of 'rape' be substituted by the offence of'sexual assault'.[15]

[13] *Sakshi* v. *Union of India, supra,* n. 3.
[14] *Ibid.,* pp. 592-93.
[15] Relevant part of the proposed sec. 375, IPC, defining 'sexual **assault', having** bearing on sexual violence against child, reads as under:
"375. *Sexual Assault:* Sexual assault means -
(a) penetrating the vagina (which term shall include the *labia majora),* the anus or urethra of any person with -
- i) any part of the body of another person or
- ii) an object manipulated by another person [except where such penetration is carried out for proper hygienic or medical purposes];

(b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the *labia majora),* the anus or the urethra of the offender by any part of the other person's body;

It is equally interesting to note that the Law Commission, charged with its deep concern.for sexual violence against a child within its own family, like in the *Sudesh Jhaku* case, not only suggested that "sexual assault' on a victim by her "near relative' [such as father, grandfather or brother] or by any other person being in a position of trust or authority towards his victim be brought within the ambit of the Indian Penal Code but _it (such a sexual assault) also be met with rigorous imprisonment for a term not less than ten years (that may be extended to life imprisonment).[16]

Further, it is interesting to note that the Law Commission has also recommended that a new section - sec. 376E[17] captioned *Unlawful*

(a) introducing any part of the penis of a person into the mouth of another person;

(b) engaging in cunnilingus or fellatio; or

(c) continuing sexual assault as defined in clauses (a) to (d) above in circumstances falling under any of the *six* .following descriptions: —

Sixthly- With or without the other person's consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purposes of this section.

See, Law Commission of India, *One Hundred and Seventy Second Report on Review of Rape Laws, supra,* n. 4, para. 3.1.2.

[16] See, the recommended sec.376 (1). *Ibid.,* para. 3.2.3. •

[17] The proposed sec. 376 E reads as: "376E. *Unlawful sexual contact* - (1) Whoever, with sexual intent, touches, directly or indirectly, with a part of the body or with an object, any part of the body of another person, not being the spouse of such person, without the consent of such other person, shall be punished with simple imprisonment for a term which may extend to two years or with fine or with both.

(2) Whoever, with sexual intent, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites, or touches, with sexual intent, directly or indirectly, with a part of the body or with an object any part of the body of ayoung person, shall be punished with imprisonment of either description which may extend to three years and shall also be liable to fine.

(3) Whoever being in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency, touches, directly or indirectly, with sexual intent, with a part of the body or with an object, any part of the body of such young person, shall be punished with

Sexual Contact- criminalizing a non-consensual 'touch', with any part of body or an object, 'with sexual intent' to 'any part of the body" of a 'person' as well as of a 'young person' (i.e. below sixteen years), be inserted in the Penal Code. It also recommended that "such' 'touch' to a 'young person' by a person 'in a position of trust or authority' [towards such a 'young person'] be treated as an aggravated form of sexual violence and an imprisonment, with or without fine, for a term up to seven years be provided therefore. In the light of these changes, the Law Commission, however, recommended deletion of the existing sec. 377 from the Penal Code.

Sakshi, recalling the hitherto trend exhibited by criminal law agencies and courts[1] in treating a non-penile/vaginal penetration as either 'unnatural act' contrary to sec. 377, IPC [unnatural offence| or/and an act 'outraging the modesty of a women' contrary to sec. 354, IPC, and not as 'rape' under sec. 375, IPC [r.w. sec. 376, IPC] and the untold trauma of, and impact on, a victim of sexual abuse caused by the non-penile/vaginal penetration, *inter alia*, urged, through a SLP,[19] the Supreme Court, through progressive interpretation of provisions dealing with "sexual violence' in general and 'rape' in particular, to:

1. declare that the expression 'sexual intercourse' contained in sec. 375 of the IPC includes all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration, and

2. direct, through an appropriate writ, order or direction, the Union of India, the Union Ministry of Law & Justice, and

imprisonment of either description which may extend to seven years and shall also be liable to fine.
Explanation: 'Young person' in this sub-section and sub-section (2) means a person below the age of sixteen years." See *ibid.*, paras. 3. 5.1 and 3. 6.

[1] For example see, *Sudesh Jhaku* v. *K.C.J.*, *supra* n. 1.

Sakshi v. *Union of India & Ors.* [with *Smt. Sudesh Jhaku* v. *Narender Verma & Ors.]*, *supra*, n. 5.

the Commissioner of Police, New Delhi, to register all the cases of 'sexual violence' falling within the above contended broad interpretation of 'sexual-intercourse' as offences under sec. 375, 376 and 376A to 37.6D of the IPC.

Sakshi, on direction of the apex court, formulated, *inter alia,* the following issues for consideration of the apex court:

1. Does the term 'sexual intercourse' appearing in sec. 375 of the IPC, in the backdrop of the increasing instances of child sexual abuse and the legislative intent of sec. 376 (2) (f), IPC, dealing with 'child rape', take into its sweep all forms of non-penile/vaginal penetration [such as penile/oral penetration, penile/anal penetration, •finger/vagina & finger/anal penetration, and object/vaginal penetration], and does the expression 'penetration', appearing in *Explanation* to sec. 375 of the Code, consequentially, warrant clarification?

2. Does treating sexual abuse by 'type' of a non-penile/vaginal 'penetration' of a child below the age of 12 years, overlooking 'impact' thereof on such a child, as either an 'unnatural offence' [under sec. 377, IPC] for penile/oral penetration and penile/anal penetration or as 'outraging the modesty of a woman' [under sec. 354, IPC] for finger penetration or penetration with an inanimate object, justify?

3. Does treating a non-consensual penetration of a child under the age of 12 as offence under sec. 377, IPC, on par with certain forms of consensual penetration (such as consensual homosexual sex), wherein a 'consenting partner' is held liable as an abettor or otherwise, justify j continuity?, and

4. Does the prevalent narrow interpretation of 'rape', bringing only the cases of non-consensual penile/vaginal penetration within its ambit, adversely

affect the sexual integrity & autonomy of women and children and thereby violate their fundamental right guaranteed under art. 21 of the Constitution of India? [20]

With a view to combating the increasing incidences of child sexual abuses by non-penile/virginal penetration and appealing the apex court to offer a progressive interpretation to 'sexual intercourse' and 'penetration', Sakshi argued that:

1. A narrow interpretation of 'sexual intercourse' and 'penetration' is not only unjustified in, and incompatible with, me contemporary understanding of 'rape' [as a sexual assault intending to humiliate a woman by disregarding her sexual integrity & autonomy, in violation of art. 21 of the Constitution] but also defeats the very legislative intent of the Criminal Law (Amendment) Act, 1983 that, *inter alia*, inserted sub-section 2(f) in sec. 376 of the Penal Code to punish a person guilty of committing 'rape' on a girl below 12 years of age.

2. Rape, as perceived by the emerging feminist legal theory, is an experience of humiliation and degradation rather than an outdated notion of penile/vaginal penetration. Criminal law agencies, by restricting an understanding of rape in terms of non-consensual penile/vaginal penetration, reaffirm the view that rapists treat rape as forced sex and not sexual violence.

3. The expressions 'sexual intercourse' and 'penetration', the terms that are not 'defined' in the Penal Code, are subject to, and capable of, judicial interpretation.

4. Such a narrow interpretation is not only contrary to the contemporary understanding of sexual violence all over the world but also allows criminals to go unscathed on mere technicalities of law. It, in ultimate analysis, also denies a

[10] For other issues, see *ibid.,* para. 9.

majority of 'victims' of sexual violence-women & children-access to adequate legal redress.

5. The respondents, by treating a non-penile/vaginal penetration as either an 'unnatural offence' [under sec. 377, IPC] or an offence 'outraging modesty of a woman' [under sec. 354, IPC], have not only failed to take into consideration the legislative intent of sec. 377, IPC, which clearly intends to punish 'homosexual' behavior and certain forms of private sexual relations perceived as immoral, but have, in violation of articles 14 and 21 of the Constitution, also wrongly and arbitrarily strained the language of sec. 377, IPC.

6. Such an arbitrary and narrow interpretation of sees. 375 & 376 render the effectiveness of redress provided under sec. 376(2)(f), IPC, meaningless in violation of art. 15(3) of the Constitution.

7. The Union of India, which has ratified respectively in December 1993 and August 1993 *Convention on the Rights of the Child* (1989) and *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1979) and thereby created a 'legitimate expectation' that it would 'adhere' to those international commitments, has, by imposing, through its criminal law agencies, restrictive interpretation to 'rape', violated its international commitments.

However, the Union of India (and other respondents), opposing such a progressive plea, advanced, *inter alia,* the. following counter arguments:

1. Doubting Sakshi's argument that the respondents plea that they (respondents) are letting the persons guilty of child sexual abuse to go with lesser offences by prosecuting them under sec. 377 of the Code, the respondents argued that 'penetrations' other than penile/vaginal penetration, which

are most unnatural forms of perverted sexual behaviour, are treated, under sec. 377. as serious sexual offences of unnatural nature and are, therefore, subjected to punishment as severe as that provided for 'rape' [under sec. 376]. Child sexual abuse of any nature, other than penile penetration, is, therefore, unnatural and is to be dealt with under sec. 377 and not under sec. 375/376. IPC. And provisions of sees. 375, 376 and 377 of the Penal Code are not violative of fundamental rights guaranteed under arts. 14, 15(3) and 21 of the Constitution.

2. Recalling the hitherto judicial pronouncements holding that a penile/vaginal penetration is essential to hold a person guilty of rape, it was argued that a writ petition under art. 32 of the Constitution, is not maintainable to reverse earlier judicial dicta on the "supposed ground' that a restrictive interpretation has been given to certain provisions of a statute.

3. A reading of 'international commitment' in international instruments, and its assimilation in the municipal law, arises only in the absence of municipal law. Such an international instrument may operate as a source for formulating a 'guiding principle' in 'reading' a fundamental right. Similarly, post-law ratification of an international instrument does not render a municipal law in vogue *ultra vires* to the instrument even though [it municipal law] is inconsistent with the international instrument and the so-called 'international commitment' arising therefrom. Tuning domestic law with a treaty obligation is in the realm of State policy and is, therefore, not enforceable in a court of law in India.

4. No writ of mandamus is maintainable against the Parliament to mandate it to amend law or to bring it in accord with 'international obligation'.

The Supreme Court, on May 26, 2004, speaking through S. Rajendra Babu, C.J. and G. P. Mathur, J., dismissing the SLP, refused to, by way of judicial interpretation, 'read' different forms of non-consensual [in case of a women] as well as consensual [in case of a minor child] non-penile/vaginal forms of 'penetration', [such as penile/oral penetration, penile/anal penetration, finger/vaginal, finger/anal penetration, and object/vaginal penetration] as acts of 'sexual intercourse' under sec. 375, IPC. It, thereby, also refused to, through judicial interpretation, expand the expression 'penetration' appearing in '*Explanation"*[1] of sec. 375, IPC.

Quoting, with approval, opinion of the Law Commission of India that it may not be appropriate to bring all forms of non-penile/vaginal penetration within the ambit of sec. 375 IPC, ' and recalling that during the last more than one hundred forty years of its survival the IPC has remained substantially unaltered and even sees. 375, 377 and 354 of the Code are not altered substantially, the apex court justified its stand thus:

> Sections 354, 375 and 377 IPC have come up for consideration before the superior courts of the country on innumerable occasions in a period of almost one and a half century. Only sexual intercourse, namely, heterosexual intercourse involving penetration of the vagina by the penis coupled with the *explanation* that penetration is sufficient to constitute the sexual intercourse necessary for the offence of rape has been held to come within the purview of section 375 IPC. The wide definition which the petitioner wants to be given to 'rape' as defined in section 375 IPC so that the same may become an offence punishable under section 376 IPC has neither been considered nor accepted by any Court in India so far. Prosecution of

[1] Law **Commission of India,** *One Hundred and Fifty Sixth Report on the Indian Penal Code* **(Government of India,** 1997), para. 9.59.

> an accused for an offence under section 376 IPC on radically enlarged meaning of section 375 IPC as suggested by the petitioner may violate the guarantee enshrined in article 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

The apex court also tried to defend, on some realistic as well as jurisprudential considerations, its reluctance to, resort to progressive interpretation of'sexual intercourse' and 'penetration'. It observed:

> An exercise to alter the definition of rape, as contained in section 375 IPC, by a process of judicial interpretation, and that too when there is no ambiguity in the provisions of the enactment is bound to result in good deal of chaos and confusion, and will not be in the interest of society at large. — Accepting the contention of the writ petitioner and giving a wider meaning to section 375 IPC will lead to a serious confusion in the minds of prosecuting agency and the Courts which instead of achieving the object of expeditiously bringing a criminal to book may unnecessarily prolong the legal proceedings and would have an adverse impact on the society as a whole. We are, therefore, of the opinion that it will not be in the larger interest of the State or the people to alter the definition of 'rape' as contained in Section 375 IPC by a process of

Supra, n.5, para 20.

> judicial interpretation as is sought to be done by means of the present writ petition.[23]

However, it is interesting to note that the apex court, relying upon some constitutional, jurisprudential, and interpretation rules, refused to concede plea of Sakshi for progressive interpretation of 'sexual intercourse' and 'penetration", key expressions in the law rape and thereby to. *inter alia,* widen ambit of the law relating to child sexual abuse, admitted that 'the suggestions made by the petitioners" do not only "advance the cause of justice" but also serve 'the larger interest of society'. Recalling the increasing cases of child abuse and of rape, the Supreme Court stressed the need for an 'appropriate legislation in this regard'. 'We hope and trust', it observed, 'that the Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves'."

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3. CONCLUSION

Efforts of Sakshi to elicit a progressive interpretation to 'sexual intercourse' and 'penetration', key words in 'rape' law, with a view to enlarge the scope and ambit of penal law dealing with child sexual abuse, in the present opinion, should not be undermined as the Delhi High Court and the Supreme Court, relying upon rules of interpretation and a few constitutional and pragmatic inhibitions, refused to greet its effort with positive interpretation. There cannot be two opinions that its pursuance of the matter in the apex court and appropriate interventions in legal proceedings have, in ultimate analysis, led to progressive proposals for reform from the Law Commission of India and appeal from the apex court to the Parliament to make these proposals a legal reality. All these proposals, in fact, constitute a road map for the legislative action. Sakshi undoubtedly deserves appreciation for the outcome. What now remains to be seen is response and sensitivity of the Legislature to the appeal of the Delhi High Court and of the

r' *Ibid.*, para 22 & 26.

-[4] *IU: 1* -----------">c

Supreme Court of India to bring appropriate reforms in the rape law and to the plight of hapless vulnerable victims of sexual violence.

Criminal policy reflected in the suggested sec. 375. as outlined by the Fifteenth Law Commission, not only exhibits deep concern of the Law Commission towards the sexual violence against children from their relatives but it also hints at the need to have severe punitive sanction to combat sexual assaults on children by their own 'near and dear' ones. Similarly, the recommended sec. 376E. creating the offence of 'unlawful sexual contact'', deserves a high appreciation. It, *inter alia*, provides for rigorous imprisonment for a term up to seven years for direct or indirect non-consensual 'touching with sexual intent'', with a part of the body or with an object, any part of the body of a 'young person'', by a person, with whom such a 'young person'' is in relationship of dependency. It also provides for an imprisonment for a term up to three years, if a person 'invites, counsels or incites' such a 'young person' to 'touch with sexual intent'', directly or indirectly, his body with the part of the body of the young person or with an object. The proposed offence will not only supplement the existing sec. 354 of the Penal Code but will also effectively deal with perverted sexual assaults on child that do not amount either 'indecent assaults'' or ''sexual assaults'.

Keeping in view the increasing incidences of sexual violence against children in India & the pertinent inadequacies of the existing legislative scheme devised under the Penal Code to deal with perpetrators of such assaults on minors, and recalling the spirit of art. 39(f) of the Constitution of India, requiring the State to 'direct its policy towards securing that childhood and youth are protected against exploitation and against moral and material abandonment'' as well as India's commitments under her National Policy for Children (1974) to take appropriate measures, *inter alia*, to protect children against cruelty and exploitation and under the UN Convention on Rights of the Child (1989) to protect children from sexual exploitation, it is, as pleaded elsewhere by th author, high time for the Parliament of India to pay seriou attention to above proposals for reform suggested by the LaA Commission and to accord its seal of Legislative approval to ther not only to bring the Indian penal law relating to sexual violenc against children in tune with the current thinking but also to dee effectively with the perpetrators of sexual violence agains children.

K. I. Vibhute

"' See author's references cited in *supra n.* 7.

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BAYESIAN ANALYSIS OF DNA FINGERPRINTING: A MATHEMATICAL APPROACH TO LAW OF EVIDENCE

1. INTRODUCTION

Recently the Indian Evidence (Amendment) Bill, 2003 has been proposed. The bill provides for DNA tests in paternity disputes and discriminates between a 'match' and 'mismatch'. Scientific evidence frequently plays a key part in both civil and criminal trials and the scientific investigation of evidence left at the crime scene can seem more persuasive to a court than the testimony of eyewitnesses. One of the newest forms of forensic evidence is DNA Fingerprinting, which uses material from which chromosomes are made to identify individuals positively. The use of DNA evidence is anticipated to become a universal place in the 21st century. It is considered to be a major breakthrough in forensic science in this century. DNA fingerprinting is based on the principle that the genetic makeup of every individual is different from the others but is unique and idiosyncratic to an individual. DNA evidence, like fingerprint evidence, offers prosecutors new tools for the identification and apprehension of some of the most violent perpetrators of crime. DNA testing, however, is no panacea. Material Science is beyond the shadow of doubt, but problems exist relating to the processes of gathering, storing, preparing and testing evidence. The Gujarat High Court recently observed that human being can make mistakes and there is possibility of laboratory errors in a DNA test.[1] Laboratory error, therefore, might result in wrong finding.[2] In the present note, s few problems related to DNA evidence, which are likely to be of great and increasing significance in the near future, have been analyzed. Finally, an approach that decision makers might take in general with respect to DNA evidence has also been suggested. While

[1] *Chandan PanalalJaiswal\. State of Gujarat,* 2004 *Cri.L.J.* 2992 (Guj.)
[2] *Ibid.*

suggesting this approach the Bayesian[3] perspective has been use which Finkelstein and Fairley long ago posited as a paradigm fi identification of evidence.[4] It is the duty of the courts to promo the search for truth. If that search can be assisted by mathemati< that can give reliable results, the whole system as well as sociei bene 11 ts.

2. OovsrmTIOYU.ITYOFDNA TESTS

Applications of DNA testing are now well established i developed countries/ Jn India, in several cases.[1] the judgment ha been given either based on the results of DNA testing alone c along with other corroborative evidence. Although DNA test ha been accepted in many courts in India, it, in the absence of it existence in the Indian Evidence Act. 1872, is left to the discretioi of the judges to a DNA tests under sec. 45 of the Indian Evideno Act.

Many a times questions have been raised before the courts U challenge the constitutionality *of* DNA fingerprinting. The questions are: whether a suspect, or for that matter can anybody. b<

■[5] See *infra* n. 70 & 77.

' Michael O. Finkelstein & William B. fairly. A Bayesian approach U Identification Evidence, (1970) 83 *liar L Rev.* 489.

The DNA Identification Act, 2000 (which allowed a DNA data bank to be created and amended the Criminal Code to provide a mechanism for a judge to order persons convicted of designated offences to provide blood, buccal or hair samples from which DNA profiles can be derived) has been passed in Canada. Britain has also the Criminal Justice and Public Order Act, 1994 (which provides for forcible testing of blood samples). USA has Advancing Justice through DNA Technology Act, 2003.

" The first paternity dispute in India, which was solved by DNA fingerprinting test, was the case No. M.C. 17 of 1988 in the court of the Chief Judicial Magistrate of Telicherry (Thalassery). The Chief Judicial Magistrate held that: "the Evidence of Expert is admissible under Section 45 of The Indian Evidence Act. 1872. So also, the grounds on which the opinion is arrived at are also relevant under sec. 51 of the Indian Evidence Act. — Just like the opinion of a chemical analyst, or like the opinion of a fingerprint expert, opinion of— [an] expert in the matter of cellular and molecular biology, is also acceptable." This verdict was unsuccessfully challenged in the High Court. *See* Pandit, and Lalji Singh, DNA Testing, Evidence Act and Expert witness, *the Indian Police Journal.* October-December 2000. p. 100.

forced to give a blood sample for testing?, and whether such a testing would be considered as a violation of art. 20(3) of the Constitution, which protects every citizen from providing self-incriminating evidence? And whether an order forcing an individual for DNA testing would be violative of his right to privacy? [7] And if the person refuses to submit himself/herself to such test, whether adverse inference or presumption can be drawn by the court? However, there do exit conflicting judicial perceptions.

In *Polavurapu Venkataswarht* v. *Polavurapu Suhbayya*, an application was filed about legitimacy of the plaintiff in the suit. The defendant was alleged to be the father and he was disputing the same. The Madras High Court held that if parties are unwilling to offer their blood for paternity test, the Court cannot force them to do so. In *Sabayya Gounder* v. *Bhoopala Subramanian!* wherein a similar question cropped up under sec. 488 of the old Code of Criminal Procedure of 1908 corresponding to sec. 125 of the new Code of Criminal Procedure of 1973 (CrPC), the same Court referred to art. 20(3) of the Constitution to conclude that no person accused of an offence be compelled to be a witness against himself. If a party is unwilling to such a test, a Court cannot direct it to submit accordingly.

The Bombay High Court in *Sadashiv Malikarjun Kheradkar* v. *Smt. Nandini Sadashiv Kheradkar and Another?*® however, held that the Court has the power to direct blood examination but it cannot compel a person to give blood sample.

[7] In *Kharak Singh* v. *State ofU.P. & Ors.,* AIR 1963 SC 1295, it was held by the Supreme Court that right of privacy is a part of the right to life enshrined under art. 21 of the Constitution. In the case of telephone tapping, *People's Union for Civil Liberties* v. *Union of India*, **AIR** 1997 SC 568, once again the said right had been recognized. '**AIR** 1951 Mad. 910. * AIR 1959 Mad. 396. :º1995CW. *L.J.* 4090

The Karnataka High Court, in *Smt. Ningamma and Anr.* v. *Chikkaiah and Anr.,*[u] wherein which the paternity of the child was in question, was more explicit when it observed:

> To compert a person to undergo or to submit himself
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> or herself to medical examination of his blood test -
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> — without his consent or against his wish tantamounts to interference with his fundamental right of life or liberty particularly even when there is no provision either in the Code of Civil Procedure or the Evidence Act or any other law which may be said to authorize the Court to compel a person to undergo such a medical test —. [I]nherent powers
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> are not meant to be exercised to interfere with the.
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> fundamental right of life and liberty of the person
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> nor to nullify or stultify any statutory provision.
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Recently, the Delhi High Court in *Teeku Dutta* v. *State andAnr.*, a request for a DNA test to establish paternity was opposed on the ground that compelling a person to undergo DNA test would be violative of his right to privacy guaranteed under art. 21 of the constitution. Accepting this contention the court held that no party to a legal proceeding can be subjected to any scientific test against his or her will as it has the effect of infringing upon his or her right to privacy. The court also referred to the constitutional safeguard provided under art. 20 (3) of the Constitution.

It is interesting to note that the High Court failed to take {
cognizance of its earlier decision in *Kanchan Bedi andAnr.* v. *Shri* j
Gurpreet Singh Bedi,[n] wherein the parentage of the infant was in f
question, and the application filed by the mother for conducting !
DNA test was vehemently opposed by the father contending that it ;
would violate his rights. Vikramjit Sen J. opined that 'law, as it presently stands, does not contemplate any impediment or violation of rights in directing persons to submit themselves for DNA test, especially where the parentage of a child is in

[1] AIR 2000 Kar. 50.
[12] AIR 2004 Del. 205.

[13] AIR 2003 Del. 446.

controversy for the grant of maintenance'. In *Ms. X* v. *Mr.Z & Anr.,*[u] a single Judge of the Delhi High Court directed the All India Institute of Medical Sciences to conduct a DNA test. The DNA test was to be conducted of a fetus. It was observed that right of privacy, though a fundamental right enshrined under art. 21, cannot be taken to be an absolute right.[l:>] However, it cautioned that DNA test should not be done in the ordinary course. A strong *prima facie* case needs to be made out for such a test.

In *X* v. *Hospital* Z,[16] the Supreme Court concluded that the right to privacy cannot be treated an absolute right. It may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. Recently, the Supreme Court in *Sharda* v. *Dharmpal}*[1] wherein respondent in a divorce proceeding opposed a DNA test order on the ground that it violates his right to privacy, also observed that if respondent avoids such a medical examination on the ground that it violates his/her right to privacy or right to personal liberty as enshrined under art. 21, then it may in most of such cases become impossible to arrive at a conclusion. It also opined that if, despite an order passed by the Court, a person refuses to submit himself to such medical examination, an adverse inference, under sec. 114 of the IEA, be drawn.

3. How **DNA** FINGERPRINTING IS DONE?

In DNA profiling process firstly, the DNA is isolated from the source of DNA.[18] After chemically extracting the intact DNA from the sample restriction enzymes are used to cut DNA at specific places. The DNA pieces are then sorted out according to size by sieving technique called electrophoresis in an agarose gel. The DNA fragments are blotted from the gel onto a nylon membrane.

[14] AIR 2002 Del 217.
[15] *d.* at p. 223.
[16] (1998) 8 SCC 296.
[P] 2003 AIR SCW1950 (B); 2003 (3) JT 399; 2003 (3) Scale 475(2); 2003 (2) Supp. 962.
DNA can be extracted from Blood, Semen or even from the hair roots, which might be left at the scene of the crime by the criminal.

This process is known as Southern Blotting. On addition of radioactive or colored probe to the nylon sheet a pattern called the DNA fingerprint is produced. The final DNA fingerprint is built by using several probes (5-15 or more) simultaneously.

RFLP is used when we have a lot of sample, e.g. blood stains the size of a quarter.[19] Where the samples are inadequate and the quality poor, this technique has been found to be less satisfactory. Therefore, a new technology was developed to replicate the inadequate sample, by synthesizing new DNA from the existing one to obtain sufficient quantities for analysis. This technique is called Polymerase Chain Reaction (PCR) and the testing PCR is known as PCR-STR (Short Tandem Repeat). It can produce quick, valuable results with degraded specimens.

Paternity Inclusion

This is a graphical representation of an RFLP paternity profile. Each of the DNA methods displays two alleles. These are a direct result of having two parents. One allele is inherited from each parent. It is this reason that DNA may be used to determine paternity. One can conclude that the alleged father is included in the group of possible fathers, based on the one shared band

[19] http://www.members.aol.com/EarlNMeyer/DNA.html - 8k (visited on 8th August, 2004).

between the alleged father and the child. The likelihood of the alleged father being the actual father will increase if other primers are used and continue to show at least one common band between the alleged father and the child.[20]

In India this technique is in its infancy. Centre for DNA fingerprinting and Diagnostics (CDFD), Andhra Pradesh Forensic Science Laboratory (APFSL), Centre for Cellular and Molecular Biology (CCMB), Rajiv Gandhi Centre for Biotechnology (RGCB) are the major institutes where DNA fingerprinting is done.

4 Application of Bayes' Theorem at Different Stages in Interpretation of DNA Profiles

4.1 Declaration of a match - the role of an 'expert' stated

In most modern profiling systems the length of DNA fragments can be measured precisely. In comparing two samples at a given locus, if the pair of measurements from one sample is the same as that of the other, the profiles are said to match at that locus; otherwise, they are said not to match at that locus.[21] If the two profiles match then the significance of the match is assessed by calculating 'match probability'. However, for various reasons, matching is not a straightforward mechanical process. Forensic science laboratories use procedures which generally stress on the importance of matching and expert judgment.[22] A declaration of a match does not mean that the samples have a common source. Rather, it means only that the measurements are sufficiently close to each other to satisfy some prescribed standard. This standard is

"' In older systems, length measurements are only approximate, and the profiles are said to match at a given locus if the pairs of measurements from each are sufficiently close, i.e. if they fall within some pre-specified tolerance of each other. There is thus a slight chance that, even if two samples from the same source are measured properly, the test results will nevertheless be sufficiently different that the samples will be declared not to match. See, Peter Donnelly & Richard D. Friedman, DNA Database Searches and the Legal Consumption Of Scientific Evidence, (1999) *Mich. L. Rev.* 931 (at. 935).

"Berry, Evett and Pinchin, Statistical Inference in Crime Investigations Using Deoxyribonucleic Acid Profile, (1992) 41 *Applied Statistics* 499 at. P. 504.

generally set by adapting the classical method of statistical inference and is essentially arbitrary. If the standard is tight, a match will not be declared in a substantial percentage of cases in which the samples in fact come from a common source, and if the standard is too loose the declaration of a match will lose much of its probative value.

There are a few common problems at the matching stage. They are :

1. A common problem at the matching stage is 'band shifting', where DNA samples in different lanes on electrophoretic gel migrate at different speeds.[24] Band shifting can occur even if the various lanes contain DNA from the same person.[25] Band shifting can sometimes be caused by differences in the amount of DNA loaded, particularly when ethidium bromide is used in the gel. Before the restriction endonuclease digestion, the technician would normally measure the concentration of DNA in each sample, and

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then digest equal amounts to be run in each lane. Inaccuracy in the measurement can result in one lane being overloaded with DNA. This lane will run differently than adjacent lanes loaded with a 'normal' amount of DNA. Typically, this will generate two similar profiles, but all the bands in one profile will be slightly

[23] Richard D. Friedman, Assessing Evidence, (1996) 94 *Mich. L. Rev.* 1810 (at. 1825).
[24] In *State* v. *Quatrevingt,* 670 So. 2d 197, 205 n.8 (La. 1996), it was contended by the defendant that the DNA report should not be relied upon because of the 'band shift' during DNA profiling.
[25]http://www. wesreyan.edu/synthesis/GROUP4/FINALVERSIONS/LASTDNA. HTM (visited on 1st August, 2004).
[26] Richard A. Nakashima, DNA Evidence in Criminal Trials: A Defense Attorney's Primer, (1995) 74 *Neb. L. Rev.* 444, 464 *c.f.* Christopher L. Blakesley. Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel, (1997) 57 *La. L. Rev.* 379 at 433.
[27] DNA concentration can be measured by determining the amount of UV light of 280 nanometer wavelength that is absorbed by a sample. The more UV light is absorbed by the sample, the greater the concentration of DNA in the sample. This •■measurement is inherently inaccurate because UV light absorption can be caused -by other contaminants like proteins, ribonucleic acids and free nucleotides. A more accurate technique is to add a fluorescent dye that binds to DNA and to measure the amount of sample fluorescence. Results obtained with the fluorescence technique can still be skewed by sample contamination. *Id* at 466 n.99.

higher on the autoradiograph than the bands on the other. In such a condition it may be tempting for the scientist to ignore the difference and declare a match."

2. An additional serious problem at the matching stage is the situation where one profile matches the other at several loci, but there are inconsistencies in the number of bands between the two profiles. An unexplained band must be presumptively regarded as representing a genetic difference between the known and questioned sample,[29] but the scientist may decide to interpret some bands as 'artefactual bands', in other words bands arising from problems in the preparation of the DNA profile instead. Through the use of likelihood ratios it has been shown that 'weak' match declarations, featuring complications such as extra or anomalous bands.[30] ought to affect the statistical weight accorded to the match. In the case of *R.* v. *Deen* the prosecution scientist had assumed that there were ten matching bands between suspect and crime scene profiles, and this formed the basis of his calculation of the match probability. It was contended by the defence that in fact there were only eight matching bands and on appeal, one defence witness argued that a match could only be assumed for six bands.

So, this dispute shows that there is a considerable amount of human judgment involved. The above mentioned discrepancies should not be rejected out of hand.

:8 Mike Redmayne, Doubts & Burdens: DNA Evidence, Probability & the courts, (1995) *Criminal Law Review,* p. 464 (at 466).

29 Barry C. Scheck, DNA And Daubert, Criminal Forensics and DNA Evidence, (1994) 15 *Cardozo L. Rev.* 1959, at p. 1979.

J° Improper stripping, incomplete digestion, contaminated probes, mixed samples, misloading of two samples in the same lane, and leakage between ranes might result into the formation of extra bands.

" William C. Thompson & Simon Ford, Is the Probative Value of Forensic DNA Evidence Undermined by Subjectivity in Determination of Matches?, in Proceedings of the Second International Conference on Forensic Statistics (Arizona State Univ. Center for the Study of Law, Science and Technology, W. Harnagel & D.H. Kaye eds., 1993).

'2 *The Times* January 10, 1994 c/Mike Redmayne, Doubts & Burdens: DNA Evidence. Probability & the courts, *supra* n. 30.

It is long accepted practice for the scientist to give an opinion of the form 'in my opinion, *x* and *y* have the same source', but this should not be permitted when x and *y* are DNA profiles.[33] On a Bayesian analysis,[34] the proper approach for an expert[35] giving evidence in a criminal case is to provide the judge with a likelihood ratio which represents:

P (M|G) \ P (M|nG) i.e., the probability of the match given guilt / the probability of the match given innocence So, Likelihood Ratio is the ratio of the probability that we would find the DNA match if the defendant were the source of the DNA, to the probability that we would find that match is declared if the defendant were not the source. In any given situation, the greater the likelihood ratio, the more strongly the piece of evidence is probative of the hypothesis that the accused is guilty as compared to the hypothesis that the accused is innocent. This technique has great potential for helping the interpretation process. The forensic scientist must work through when presenting evidence in court. Though a person's DNA is the same virtually throughout his body, current technology employs remarkably indirect methods to determine DNA profiles, so multiple samples taken from the same person and even multiple tests of the same sample will yield a

Ian W. Evett, Lindsey A. Foreman, Graham Jackson, James A. Lambert, DNA profiling: A discussion of issues relating to the reporting of very small match probabilities, (2000) *Crim. L. R.* 341.

[4] A Bayesian analysis is one which uses Bayes' Theorem (a formula used for calculating conditional probabilities).

[35] An 'eApert' witness is one who has devoted time and study to a special branch of learning, and is thus specially skilled on those points on which he is asked to state his opinion. Section 45 of the Indian Evidence Act, 1872 speaks about opinion of experts.

[3] The terms guilt and innocence are used for the sake of simplicity. Strictly speaking the hypothesis in the likelihood ratio should be expressed in terms of presence or absence at the scene of the crime and not in the terms of innocence and guilt, because the fact that the accused left a source of DNA at the crime scene does not mean he is guilty.

Richard Lempert, Some Caveats Concerning DNA as Criminal Identification Evidence: With Thanks to Reverend Bayes, (1991) 13 *Cardozo L. Rev.* 303 at p. 320.

variety of slightly different profiles.[38] The probability of an exact match between two measurements, even though the samples come from a common source, may be very small; consequently, the fact that the measurements of two samples fail to match exactly does not signify that the samples lack a common origin. These statistical disparities create a very complex statistical problem, but they do not create a fundamental conceptual difficulty under the likelihood-ratio approach.[39]

The approach of the expert might be to assume that the top half of the Likelihood Ratio (the numerator) is one, meaning that if the defendant was guilty; it is certain that the two DNA profiles will match. This is maximally generous assumption. ° While it is convenient to think that if the defendant is the source of the evidence sample the probability of a match is one, this is not precisely the case because, as the above account demonstrates that deviations from the match are possible because of analytic or test problems, so keeping in view such a possibility it would be correct to use a numerator of less than one. This would diminish the power of the likelihood ratio even without taking into account denominator effects. This crucial point about the numerator may not be realized by some forensic scientists, for 'it is far from obvious, and it demands considerable personal reflection'.

While calculating the denominator the possibility of laboratory errors must be considered. Recently, in *Chandan Panalal Jaiswal* v. *State of Gujarat,* [42] for the first time in India, it was admitted by the court that there is a possibility of laboratory errors. It was said that irrespective of the request made by the accused the courts are

The pioneering exposition with respect to glass was presented by Dennis Lindley. See D.V. Lindley, A Problem in Forensic Science, (1977) 64 *Biometrika* 207.

[39] *Ibid.*

[40] The assumption is 'generous' in terms of diagtlosticity. It assumes that false negative errors do not occur. In fact, such errors are made. See Jonathan J. Koehler, DNA Matches and Statistics: Important Questions, Surprising Answers, (1993) 76 *Judicature* 222.

[41] Evett, 'Interpretation' A personal Odyssey, in Aitlcen & Stoney (eds.), *The Use of Statistics in Forensic Science* (1991, Ellis Horwood, Chichester) at p. 19.

[n] *Supra n.* 1.

supposed to ensure the laboratory accuracy and should also focus while granting such permission and asking the present accused to undergo DNA finger printing test/analysis on the aspect of 'laboratory error'.[43] So, a likelihood ratio should be used instead of declaring a match. It would effectively balance the similarities between the two profiles against any dissimilarity. A more devastating criticism of the use of any matching criteria is that it is possible for gross error during the process of preparing DNA profiles to produce perfectly matching profiles in case of non-identity. For example, if samples are confused or mislabeled by the police or laboratory staff, scientists may end up comparing two samples from the same source in a case where the suspect is not the perpetrator.[44] In the *Chandan Panalal Jaiswal* case, it was observed by the Gujarat High Court that human being can make mistakes. Technicians can mislabel a flask, change codes, change names and so on.[45] In this case the apprehension expressed before the court was qua the DNA evidence collection or the attempts by highly prejudicial investigating agency. It was urged by the petitioners that they should be permitted to observe the process of drawing of sample from the body of the person of the accused and the process of examination, which was, take place in Forensic Science Laboratory (FSL for short), at least from outside of a window glass.[46] This plea of the petitioners was rejected and it was said that the demand for appointment of an observer is not acceptable as it may demoralize the Forensic Scientist of Forensic Science Laboratory (FSL) who is an independent authority and not working either under police or under the guidance of supervision of police authorities. It was also said that appointment of an observer may also lead to contamination including leakage of confidential report and even some information and aspects, which would be, otherwise are required to be kept secret. So, in such a case the role of the laboratories has to be reviewed by the courts. It is to be hoped that statistical interpretation of DNA profiles will

[43] Wat p. 2995.
[44] Young, DNA Evidence- Beyond Reasonable Doubt, [1991] *Cri.L. Rev.* 264 at p. 266.
[45] *Supra* n. 1 at 2994.

help to avoid the possible dangers observed in the *Chandan Panalal Jaiswal.*

While deciding the significance of a match, the expert should assess the probability that a person chosen at random from a given population may have same degree of match with the given sample. For calculating this, the knowledge of the frequency with which the alleles represented on the autoradiograph occurs within a population. A recent study has shown the presence of certain unique alleles in certain ethnic groups.[47] This uniqueness of alleles may also help in identification. Databases may be of immense helpful for calculating the allele frequency and as the allele frequency may vary between races.[48] The forensic science agencies

To understand the genetic structure and intra-population diversity in the selected communities group-wise average allele frequency was calculated. Allele 5 (389 bp) at Penta D was found to be present exclusively in Maratha, Chitpavan brahmin and Dhangar communities of Maharashtra. Out of 54 populations, unique allele 27.2 (217 bp) at D21S11 locus was observed in Dheria Gond of Madhya Pradesh (Australoid ethnic group). Buddhist (north region), Lepcha and Bhutia (east region) communities of Mongoloid ethnic origin and Tibeto-Burman linguistic family showed a distinct allele 23.2 (201 bp) at D21S11 and Penta E (451 bp and 479 bp) loci. Similarly, among the linguistic groups Dravidians had maximum number of unique alleles present at U5S818 (115 bp), D18S51 (290 bp), FGA (386 bp), D21 S1I (217 bp) loci, followed by Indo-Europeans where alleles 14 (294 bp) and 14.2 (320 bp) at TPOX and D18S51 loci, respectively, were exclusive to the populations. The unique alleles 23.2 (201 bp) and 25 (479 bp) were recorded in Tibeto-Burmans at the highly polymorphic loci D21S11 and Penta E, respectively. Numbers of unique alleles were high in north and south Indian populations, followed by east, west and central regions of the country. In the northern region, 201 bp allele (D21S11), 203 bp allele (D8S1179), allele 171 bp (vWA) and alleles 320 bp and 370 bp (D18S51) were found, exclusively whereas in the south, 386 bp allele at FGA, 115 bp allele at D5S818 and allele 7 (286 bp) at D18S51 loci were exceptionally common. In the east zone, higher repeat number alleles were found to be rare, *viz.* allele 479 bp (Penta E), allele 159 bp (D5S818) and allele 251 bp (D7S820). *See* V.K. Kashyap, R. Ashma, S. Gaikwad, B.N. Sarkar & R. Trivedi, Deciphering Diversity in Populations of various linguistic and ethnic affiliations of different geographical regions of India: analysis based on 15 micro satellite markers, (2004) 83 *J. Genetics* 49-63.

[48] Relatively low number of alleles and allelic diversity (base-pairs size) had been observed in populations of central India as compared with southern and northern regions of the country. The communities of Indo-Caucasoid ethnic origin and Indo-European linguistic family (Kshatriya of Uttar Pradesh) showed

should keep separate databases for each of the major races. Different castes may have different range of allele diversities. For example the allele diversity is highest (168 alleles) in Thakur caste group of Uttar Pradesh and lowest (105) alleles, in Reddy of Andhra Pradesh.[50] So, the DNA evidence may be reviewed in the light of any prior information about the caste of the accused or with his ethnic origin.

4.2 Interpretation of DNA evidence in the court- the role of a judge

In *Mural Hal* v. *State ofM.P.*[5i] it was held by the Supreme Court that there is no rule of law that the evidence of an expert should not be acted upon unless substantially corroborated. It was also said that the approach has to be one of caution. Experts cannot act as judges.[52] The expert's opinion should not be blindly acted upon. Before acting on such evidence it should be seen if it is corroborated either by clear direct evidence or circumstantial evidence. Expert evidence like any other evidence can be used to corroborate other evidence.[54] There is no reason because of which DNA-match testimony should be treated any differently from that

highest allelic diversity, as well as rare alleles, not reported in any other Indian populations. Analysis based on average heterozygosity was also found to be lowest amongst the populations of central India (0.729) and highest among the populations from north (0.777) and west (0.784) regions of the country, having Indo-Caucasoid ethnic origin and australoid linguistic affiliation. *Id* at 49.

[49] For example, the diverse populations in India can be broadly classified phenotypically into four ethnic classes: Australoid, Negrito, Mongoloid, and Caucasoid. The last ethnic group is spread over the entire country, with specific concentration in the northern regions. Australoid group is mostly confined to western and southern states. The Negrito element is restricted to the Andaman Islands, and Siddis, the only Negroid population in India, a migrant group from Africa, reside in Karnataka, Gujrat and Andhra Pradesh. *Id at* 50.

[50] *Id* at 52.

[51] AIR 1980 SC 531 citing Lord President Cooper in *Decei* v. *Edinburgh Magistrate,* (1953) SC (Scotland) 34 on the importance of Expert evidence, and *Ramchandra* v. *State of UP.,* AIR 1957 SC 381 and *Fakhrudin* v. *State o/M.P.,* AIR 1967 SC 1326: (1967) CrLJ 1197.

[52] *Collector, Jabalpur* v. *A. Y. Jahagir Khan,* AIR 1971 MP 32.

[53] *Shashi Kumar* v. *Subodh Kumar,* AIR 1964 SC 529; *Balkrishna Das* v. *Radha Devi,* AIR 1989 All 133.

[54] *Awadesh* v. *State ofM.P.,* AIR 1988 SC 1158.

of fingerprints, bite marks, hair and fiber samples, ballistics, shoe prints, and the like. [5]

Once a match has been declared and the judge is presented with the likelihood ratio the Judge must assess the strength of the DNA evidence. The question that is most pertinent for the court is: "What is the probability that the defendant left the crime sample?" But the scientist is not permitted to address this question because its answer depends not just on the profiling evidence, but also on other non-scientific evidence, such as eye-witness and alibi evidence.[56] The questions within the expertise of the scientist are:[5]

(a) What is the probability of the crime sample profile if it came from the accused?
(b) What is the probability of the crime sample profile if it came from some unknown person?

Judges, should take the possibility of lab error into account in their subjective assessment of the evidence. It is important to emphasize, however, that what matters is not the probability of any laboratory error, but rather only the probability of those errors that would lead to the false declaration of a match in the given case, a probability that will vary widely with the circumstances of the DNA testing.[58] Judges are now posed with an appropriate question as tb how much does a particular item of evidence increase the likelihood of the defendant's involvement in the crime charged? Bayes' Theorem[59] provides a heuristic device, which allows the

[55] http://www.crimemagazine.com/dna.htm - 61k (visited on 8th August, 2004)
[56] In the judgment *otDohemy* & *Adams*, [1997] 1 *Cr.App.R.* 669 it was said that: 'the scientist should not be asked about his opinion on the likelihood that it was the defendant who left the crime stain, nor when giving evidence should he use terminology which may lead the jury to believe that he is expressing such an opinion.'
" *Supra* n. 33 (at. 346).
[58] David J. Balding & Peter Donnelly, Inferring Identity from DNA Profile Evidence, Proc. Natl. Acad. Sci. (USA) 11,741 (1995) *cf* Peter Donnelly & Richard D. Friedman, "Dna Database Searches And The Legal Consumption Of Scientific Evidence", (1999) 97 *Mich. L. Rev.* 931 (f.n. 57).
[59] It is a formula for calculating conditional probabilities. Reverend Thomas Bayes (1702-1761), an Englishman, was a Presbyterian minister and a competent mathematician. He pondered how he might prove the existence of god by examining whatever evidence the world about him provided. Attempting

judge to properly weigh the DNA identification evidence. Baye: theorem prescribes that evidentiary process is the updating of prior probability in light of new evidence.[61] A way of looking ; Bayes' Theorem is to say that we start with some idea of tr probability that defendant committed the crime, P (G), and that oi views are modified or weighted by the two probabilities associate with the matching characteristic, P(M/G) and P(M/nG). Our fini estimate of the chance defendant committed the crime is oi "initial' or 'prior' view as modified by the statistical evidence. Bayesians posit that the probability of an event can be derive algebraically by means of a sequential multiplication of tr probabilistic values of the event's constitutive elements.[6j] Baye: theorem derived from the axioms of probability, relates tr assessment of the probability of an event given certain informatic to the assessment of the probability of the same event without sue information.[64] Bayes' theorem offers a powerful statistical methc of evaluating new information and revising our prior estimat* (based upon limited information only) of the probability that thinj are in one state or another.[65] Bayes' Theorem is used to determir the probability of some event, *A,* given that another event, *B*, hi been (or will be) observed, *i.e.*, determining the value of *P (A\B* The event A is usually thought of as sample information so th

to show 'that the Principal end of the Divine Providence—is the happiness of h creatures,' Reverend Bayes used mathematics to study God. Unfortunately, tl theological implications of his findings so alarmed the good Reverend Bay that he refused to permit publication of his work during his lifetim Nevertheless, his work outlived him, and modern decision theory is often calli Bayesian Decision Theory in his honor. *See* Richard I. Levin & David S. Rubi Statistics for Management, *Revising Prior Estimates of Probabilities: Baye Theorem,* (Prentice Hall of India, 2001).

[M] *Supra n.* 37 at 315.

[61] Ronald J. Allen & Brian Leiter, Naturalized Epistemology and the Law Evidence, (2001)87 *Va L Rev* 1491, 1527-37.

"" Brenda Inman Rowe, A Possible Solution For The Problem of Juries Slightii Nonscientific Evidence: A Bayesian-Like Judicial Instruction, (1997) 24 *Am. Crim. L.* 541 (at p. 553).

[A'] Dan Simon, A Third View of The Black Box: Cognitive Coherence In Leg Decision Making, (2004) 71 *U. Chi. L. Rev.* 511 (at p. 559).

[64] Dale A. Nance, Naturalized Epistemology and the Critique of Eviden Theory, (2001) 87 *Va. L. Rev.* 1551 (at 1595).

[65] *Ibid* at p. 1593.

Bayes[7] rule is concerned with determining the probability of an event given certain sample information.[66]

Using the odds form of Bayes' Theorem, the role of DNA evidence can be depicted in the following manner[67]:

P (G|M)\P (nG|M) = P(G)\P(nG) X P (M|G) \ P (M|nG)
Or, in words,
POSTERIOR ODDS = PRIOR ODDS X LIKELIHOOD RATIO

For example, a sample output of 2 defectives in 50 trials (event A) might be used to estimate the probability that a machine is not working correctly (event 8) or we might use the results of our first examination in statistics (event *A)* as sample evidence in estimating the probability of getting a first class (event B)[66]. Where *Al* & *A2* are two set of events which are mutually exclusive & exhaustive and *B* is an event which traverses through each of *A* events, then the probability of event of event *A1* given event *B*, is

P{A1\B) = P{A1 8c B) I P{B) and, *P{A2\B) = P (A2* & *B) I P* (B) where, *P{B) = P {Al &B) + P{A2& B),*

P(A1 & B) = /> *{Al) X P (B/Al),*

and, *P{A2&B) = P {A2) X P {B/A2),*

in general, let *Al, A2, A3,* .... , *Ai*,................... *An,* be a set of *n* mutually exclusive and collectively exhaustive events. If *B* is another event such that *P* (B) is not zero, then

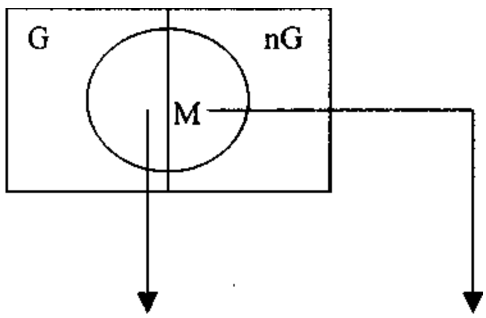
P {A1\B) = P {B\A 1)P{A1)\-L ;.,$_{tok}$ P(B|Ai) P(Ai)

Probabilities before revision by Bayes' rule are called *a priori* or simply *prior* probabilities, because they are determined before the sample information is taken into account. A probability which has undergone revision in light of sample information *{via* Bayes' rule) is called *a posterior* probability calculated after this information is taken into account. Posterior probabilities are also called revised probabilities because they are obtained by revising the prior probabilities in light of the additional information gained. Thus, *a priori* probability which is unconditional probability becomes a posterior probability, which is a conditional probability, by using Bayes' rule. *See,* S.P. Gupta, "Elementary Statistical Methods", *Probability Theory* (2003,Sultan Chand,Delhi) at p. 636-637. [Jl]
Notation: P=probability; G=guilt; nG=innocent; M=DNA match. Symbol '|' means "given", thus P(G|M) can be read as "the probability that the accused is guilty given the match.

i.e. the odds that the accused is Guilty, given the DNA matches, equals the probability that the match would have been declared if the accused were the source, divided by the probability that match would have had been declared if the defendant were not its source, multiplied by whatever odds one would have given prior to the receipt of the DNA evidence that the defendant was the source. **Proof:-** Suppose,

G & nG ('guilty' & 'not guilty') = the set of events which are mutually exclusive (the two events cannot occur together) & exhaustive (the combination of the two events in the entire process), &

M (match) = a simple event which intersects each of the above mentioned events (as it has already been demonstrated that a match may be declared because of the possibility of laboratory errors, even if the accused were not the source) as shown in the diagram belowf



'Guilty & Match' (G & M) 'Innocent & Match'(nG & M)

Observe the diagram! The part of M (match) which is within G (guilty) represents the area "G & M" and the part of M (match) within nG (not guilty or innocent) represents the area "nG & M".

Then the probability of event G given M, is

$$P(G|M) = P(G \& M)/P(M)$$

And, similarly the probability of event nG, given M, is P

$$(nG|M) = P(nG \& M)/P(M)$$

Therefore,

$$P(G|M) / P(nG|M) = P(G \& M) / P(nG \& M) \text{ .... } (1)$$

Now,

$$P(G\&M) = P(G) X P(M|G) \text{ .... } (2)$$

&,

$$P(nG \& M) = P(nG) X P(M|nG) \text{ .... } (3)$$

Putting the values of P (G & M) & P (nG & M) from equations (2) & (3) to equation (1), we have,

$$P(G|M) / P(\mathbf{nG|M}) = P(G) / P(nG) \quad X \quad P(M|G) / P(\mathbf{M|nG})$$

It will be immediately seen that in the case of a DNA exclusion P(M) equals zero, which means the ratio of probabilities, conventionally called the likelihood ratio, is zero, and the odds that the defendant was the source of the evidence DNA is zero regardless of how likely it appeared beforehand that the defendant was the source. Hence, acquittals based on DNA evidence alone are justified.[so] It is worth mentioning here that according to the Indian Evidence (Amendment) Bill, 2003, DNA tests can result in exclusion, where the samples do not match. But where the samples match, the controversy remains.[69] This,, however, assumes that one can be confident about exclusion. Since an apparent exclusion might be attributable to various kinds of measurement error or DNA contamination, but in fact P (M) will never be precisely zero and to conclude that the defendant is not the source of the DNA evidence and so deserve to be acquitted risks the danger of a erroneous exclusion, a risk that increases with the prior odds on G. Thus, the more stout is the case against a defendant, the less the importance that should be given to a DNA exclusion. Because the question of whether the defendant is the source of the evidence

" *Supra n.* 37 at 316.

** Law Commission of India, *One Hundred and Eighty-fifth Report on Review of the Indian Evidence Act, 1872,* available at awcommissionofindia.nic.in/reports/185thReport-PartI.pdf

DNA is not the same as the question of whether the defendant is guilty of a crime. A defendant may leave no trace of DNA evidence in circumstances where because other evidence suggests the defendant's guilt, one would give high prior odds that the defendant is the source of the DNA found (e.g., a rape in which there is substantial evidence that the defendant is the rapist, but unknown to anyone the victim had intercourse with another person before the attack and the defendant rapist wore a condom). This is another reason why one should not regard DNA exclusion as meaning that an acquittal is necessarily required.[70]

Prior odds should be evaluated on the basis of any other evidence . against the accused at the time when the DNA evidence is introduced. It might be argued that the concept of prior odds is incompatible with the presumption of innocence[7] i.e. at the-j beginning of the trial it is presumed that the accused is innocent. This would require prior odds of zero and zero multiplied by any number remains zero, and by this no accused would ever be[J] convicted. But this argument rests on a misunderstanding of the[J] presumption of innocence, which is best understood as subsumed I under the burden and standard of proof. Further, other evidence[1] against the accused may be introduced after the DNA evidence.' Where there is no other evidence than DNA evidence, the prior' odds can be based on the suspect population i.e. the number of persons who could possibly have committed the offence. ;

The theory of probability is generally defined in terms of relative frequencies of events. When we say that the probability of tossing' tails with a coin is one-half, we mean that over a run of tosses tails will tend to come up half the time. So it might be argued that *iV* seems wholly artificial to apply a similar concept to the probability- to the concept, say, that defendant has done a particular act 'A'. One might say that when a judge believes that 'there is a fifty percent chance that defendant is guilty' then this belief implies[1]

[m] *Supra n.* 37 (at f.n. 34).
[71] Jaffee, Prior Probability—A Black Hole in the Mathematician's view of **the** Sufficiency and Weight and Evidence, (1988) 9 *Cardozo Law Review* 967.
" Robertson & Vignaux, Extending the conversation about Bayes, (1991) 13 *Cardozo Law Review* 629. '

only a degree of belief in the proposition asserted and cannot be interpreted as expressing a frequency. These kinds of estimates are said to express a 'subjective', 'intuitive' or 'personal' probability. They have been defined in terms of the odds that a rational person acting after reflection and consistently would regard as fair in betting on the proposition.[73] Although subjective probabilities can be used on this basis, it has been suggested that in legal context they are likely to be interpreted as expressing a frequency, just as 'the chances of tails is one half expresses a frequency.[74]

4.3 'Reasonable doubt'andDNA evidence?

When we say that the accused is guilty beyond reasonable doubt, we do not mean that beyond the shadow of the doubt, we mean that the evidence has brought us to a state of belief such that if everyone were convicted when we had such a belief and decisions would rarely be wrong. The 'beyond reasonable doubt' standard thus groups together cases which are similar not because their facts are similar but because the degree of belief in guilt has passed certain mark. Thus, although it will usually be artificial to imagine a repetition of similar cases, one can nonetheless interpret subjective probability of guilt as the relative frequency of guilt over the cases judged to be similar by the degree of belief they engender. The statement that 'there is a fifty percent chance that defendant is guilty' thus means that if a judge convicted whenever the evidence generated a similar degree of belief in guilt, the verdicts in this group of cases would tend to be right about half a time. So, according to this interpretation, both subjective probability and probability as classically defined reflect frequencies of events.[75]

The crucial question that arises in a criminal trial, which involves DNA evidence, is whether the doubts mentioned above, that arise

[3] *Supra* n. 4 (at p. 504).
[74] *ibid.*
[75] The classical approach however, reflects occurrences (as, numbers of 'heads') in a number of events (tossed coins) with some physical similarity. Subjective probabilities reflect occurrences (as, guilt) among events (cases) deemed similar because they generate similar degree of belief. *Id (at* 505).

in the use of DNA evidence, amounts to 'reasonable doubts' and thus justify an acquittal. All that can be done is to describe the way of thinking process which the judge should adopt in eliminating doubt. MacCormick has argued that a probable case becomes beyond reasonable doubt when it achieves 'coherence'. [6] Defence may challenge the prosecution's case by putting a competing 'story' in front of the judge, which leaves the judge with a choice between the two. But the prosecution's case may be challenged in another way also: doubts may be raised by the defence probing several weaknesses in the case, suggesting that it is not as coherent as it looks. It is essentially the second tactic that has been adopted by him in reviewing DNA evidence, arguing that an apparently coherent case resting on DNA evidence may in fact contain several doubts or gaps. MacCormick suggests that reasonable doubt will result when these doubts destroy the coherence of the prosecution's case.[77] So, reasonable doubt does not mean some light, airy, insubstantial doubt and it cannot be distorted into a doctrine of acquittal. Judges must take a practical view of legitimate inference flowing from the evidence.[79] Lord Denning said: 'The degree of cogency need not reach certainty, but it must carry a high degree of probability' .[80]

5. SUGGESTIONS & CONCLUSIONS

In this article we have analyzed some of the assumptions underlying the presentation of DNA evidence in courts. By highlighting problems involved with DNA evidence, this article presents challenges to the scientific and justice communities. DNA evidence doubtless has the capability to amplify the accuracy of verdicts in criminal trials. But this does not mean that we should be complacent about its use. DNA evidence raises questions about the division of labour between the experts and judges, about the role of assumptions and oversimplification in the assessment of evidence.

MacCormick, The Coherence of a case and the Reasonableness of **Doubt,** (1980) *2 Liverpool Law Review* 45. *See Supra* n. 28 at p. 479.
[77] *Supra* n. 28 at 480.
[78] *Gopal Reddy* v. *State of A. P.,* AIR 1979 SC 387.
[79] *Dharam Das Wadhwani* v. *State of UP.,* 1974 Cr.L.J. 1249.
[80] *Millar* v. *Minister of Pensions,* (1947) 2 All ER 372.

These issues have so far been largely ignored, yet they are of more than academic interest, for legal debate on them should affect the way in which DNA evidence is presented in the trials.

Bayes' theorem demonstrates that DNA tests linking a defendant to the crime can help sustain the identification provided there is sufficient other evidence to connect the accused with the crime. A Bayesian approach, particularly one that began with a subjectively estimated prior probability, would probably improve the performance of Judges. For the successful incorporation of this technique in India various scientific and legal reforms are required. There is a need for the enactment of a legislation providing for DNA examination and establishment of a National Commission, which will keep abreast of all new technological developments for scientists and lawyers alike. The commission will formulate the procedure, standards and quality control, and will provide official approval to the testing laboratories. The legislation should provide that:

- DNA evidence should not be collected, without judicial authorization, from a suspect unless the information, in the opinion of the court, is relevant to a specific crime in question. However, an appropriate exception will have to be curved out when DNA test need to be carried out from suspects of violent crimes such as terrorism and national security.

- Such information, to honor privacy of an individual, will not be made accessible to others unless the person forgoes his right to privacy.

- The legislation should also prescribe certain eligibility criteria of the scientists for conducting the DNA tests.-An adequate attention be paid to the rules framed by the Medical Council of India as well as by the Bar Council of India. .
- The legislation should also provide for proper training for collecting samples for the carrying out DNA test.

The legislation should also establish a proper institutionalized mechanism for storing and maintaining DNA data intact. This would facilitate effective investigation and trial.

- The Laboratories should be mandated to declare apparently band-shifted samples inconclusive.

- Since the reliability of a DNA laboratory cannot be objectively measured by predicted outcomes, the single best form of proof that a laboratory's method has beer 'tested', and produces accurate results, is regular, rigorous external proficiency testing via blind trials.[0"] Nc laboratory should let its results to be used in the courts unless it has undergone such proficiency testing via blinc trials. No laboratory should let its results with a new *DNA* typing method be used in court, unless it has undergone such proficiency testing via blind trials.

It must also provide for the establishment of a DNA dati bank to assist police investigations. It must provide i mechanism for a judge to order persons convicted o designated offences to provide blood, buccal or hai samples from which DNA profiles will be derived.

- Guidelines must be laid down in the proposed legislatioi for analyzing DNA fingerprinting for the courts to accep this as evidence.

Proficiency testing refers to a procedure whereby a set of known samples given to a laboratory and it is asked to produce accurate results. A proficienc test may be either 'external' or 'internal', 'open' or 'blind'.

[82] For judicial authentication of such a test, see *Chandan Panalal Jaiswal State ofGujrat, supra* n. 1.

[83] A Hyderabad-based Centre for DNA Fingerprinting and Diagnostics h; recently urged the Central Government to create a DNA fingerprinting databa: of convicts like the US. *See* http://in.news.yahoo.com (visited on l[sl] Decemb 2003).

As it has already been mentioned that the Indian Evidence (Amendment) Bill, 2003 prescribes that a 'mismatch' is a conclusive proof for the person not being the father, but where there is a match, the controversy remains. We think that 'match' must also be given the same treatment because the probability is same in both the cases, being it 'match' or mismatch[1]. The errors that are possible and the dangers that are involved in the case of a match are also present in the case of a mismatch. It has already been demonstrated that none of them should be taken as a conclusive proof.

Judges, Lawyers and forensic scientists need to be oriented about the inferential value of DNA test. Obviously, with well-informed judges, lawyers and investigation agencies, the chances of convicting innocent people will be minimized, if not ruled out, and the probability of convicting guilty people will also be maximized. It was observed by the 185[1] Law Commission Report that the law of evidence is likely to undergo radical changes with standardization of new technologies. The judge will be handicapped if (s)he is unable to appreciate the probative value of new standards and concepts of evidence. The Indian police and Prosecutors have unfortunately acquired the ill publicity of fabricating and padding evidence. Effective legal and administrative measures, in the present scenario and in the interest of'justice', become imminent

It is a matter of common knowledge that the present legal system has innumerable flaws. Undoubtedly, law has to cope up with the needs of the fast changing society and quest of the people for 'justice'. Law, therefore, is expected to march and develop in consonance with the evolving scientific advancements to gather 'evidence' from the jugglery and trivial objections of lawyers.

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THE SINGLE DIRECTIVE REGIME: RESURGENCE OR A DESERTION?

1. INTRODUCTION

The level and degree of corruption in the country has been ever increasing with only little or no hesitation from the government to curb it. For bringing it down, if elimination is not possible, what needs to have is transparency and accountability in state governance. It is a well-said proverb, 'with power, comes responsibility'. This power should be accompanied with responsibility. Power, in no way, be accorded extra protection.

The Indian Constitution through art. 14 prescribes for equality before law to all persons. But recently enacted the Central Vigilance Commission Act, 2003 (Act 45 of 2003), the Preamble of which says that it is an Act to provide for the constitution of the existent Central Vigilance Commission to inquire into offences alleged to have been committed under the Prevention of Corruption Act, 1988 (PCA) by certain categories of public servants of the Central Government, corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by the Central Government and for matters connected therewith or incidental thereto, it is allegedly, does violate the spirit of art. 14 by incorporating in it the so-called 'single directive'.

The Single Directive Clause (hereinafter SD),[1] as it literally signifies, is a directive in the form of instructions made to the department of Central Bureau of Investigation, is inserted in the

The Single Directive is a consolidated set of instructions issued to the CBI by the various Ministries or Departments in this behalf. It was first issued in 1969 and thereafter amended on many occasions. The Single Directive contains certain instructions to the CBI regarding modalities of initiating an inquiry or registering a case against certain categories of civil servants.

Central Vigilance Commission Act, 2003 (hereinafter the CVC Act). It is interested to recall here that it was introduced in the CVC Ordinance and it was deleted from the said ordinance when its validity was questioned in the Supreme Court. However, it again figured in the CVC Bill and the consequential in the CVC Act. It is also equally important to note that SD was struck down twice by the apex Court.

2. THE 'SINGLE DIRECTIVE' CLAUSE

The CVC Act invests the Central Vigilance Commission (CVC) with powers of superintendence over the Delhi Special Police Establishment, governing the CBFs functioning in matters relating to offences under the Prevention of Corruption Act. Though it provides that this 'superintendence would not entitle the CVC to exercise this power to require the CBI to investigate or dispose of any case in a particular manner', the new arrangements are all designed to circumscribe the Central Bureau of Investigation's (CBI) autonomy.[2] Not only would this power of superintendence be at variance with the existing CrPC regime, which vests investigation of criminal cases exclusively as a police function, it is also at odds with the verdict of the Supreme Court in the *Vineet Narain* v. *Union of India}* case seeking to release the CBI from the stranglehold of the politician-bureaucrat nexus. And this nexus seems to return exultantly.

George Orwell in *the Animal Farm* once said that, all animals are equal but some animals are more equal than others, and in this context, it seems as if the single directive clause intends to do. The CBI Director, N. Vittal, while quoting George Orwell, added that it is obvious that corruption at the higher levels can be controlled only if there is a systematic effort to take prompt follow up action when after due inquiries are completed and the guilt is proved. There should also be no tendency to protect the corrupt.

[2] Editorial, *Reviving the Directive, The Hindu Business Line* (New Delhi) August 11,2003(7).
[3] AIR 1997 SC 898.

The central theme of the new regime is the return of the 'single directive' clause. Simply put, this provision of sec. 6 A of the CVC Act makes it obligatory for the CBI to secure prior approval of the Central Government before conducting any investigations under the PCA,[4] if the allegation(s) relate to an officer of the rank of Joint Secretary or above.

One of the major objections to the SD is that it acts as a restriction only on the CBI but is inapplicable against the general power of the State Police to register and investigate any such offence under the CrPC in particular. This sort of a classification is also not plausible. And moreover, it is not even an inhibition against a complaint being lodged under the CrPC before the competent court for any such offence. During debates in the Parliament, some members demanded that a Member of Parliament (MP) should not be treated as a public servant and that corruption cases against him should be registered only after such a prior permission. The Law Minister promptly assured them that an all-party meeting would be called to discuss the issue. Thus, while on the one hand the Prime Minister is sought to be brought under the ambit of the *Lokpal,* on the other MPs are proposing to be taken out from the rubric of the PCA. Definitely it is not intended to fighting corruption at high places by putting highly placed bureaucrats and MPs above the law.

The Supreme Court struck down the SD in the *Vineet Narain 's* case holding it *ultra vires* to art. 14 of the Constitution. The Court had given a novel interpretation that refurbished the evenhandedness to the ground reality of the structure of governance, which has all along sought to keep the rulers (politicians and bureaucrats) from any accountability mechanism.

[4] Raghavan, R.K., *Tying down the CBI*, The Hindu, New Delhi, Saturday, Oct. 18, 2003, at p. 10. After September 11, 2003, when assent of the President on the CVC Act was given, the thitherto prosecutions under sec. 197 of the CrPC, of all public servants, permission of the appropriate authority is required.

2.1 Principle of equality

The Supreme Court in *E.P.Royappa* v. *State of Tamil Nadu* laid down the strength of art. 14 in the protection of all against the thrust of arbitrariness. The CVC Act is truly falling short of these standards, which tries to directly or indirectly differentiate between a group of officers at the lower official level, and the other group at the level of the Joint Secretary and higher. It has also markedly brought disparity between the officials working under the head of the CBI, and those working under the Department of Police, that remains unaffected. This concept of equality has been taken no notice of. It has been conversed by P.N.Bhagwati J. *in Maneka Gandhi's Case,* about the scope of this principle of equality. The apex court has reiterated many times[7] that the State shall not discriminate against any citizen.

A stress is needed on the point that such specific protection to people, who cannot be reasonably classified into a special and different category, need not be given a veil. Because, if this be done, what happens to the rights of officers below the level of Joint Secretary becomes a vague. These few hordes of people do not form the basis for any reasonable differentia to be made in their favor. It is true that equal protection of laws does not mean that identically the same law should apply to all persons, or that every law must have a universal application within the country irrespective of differences of circumstances.[9] Equal protection of the laws does not postulate equal treatment of all persons without distinction, but can there be any basis for differentiating these people for the application of the same law of the provisions of the CVC Act? There cannot be, because if such a stance is taken for this side of the equator, then the same treatment would be viable

[5] (1974) 4 SCC 3.
[6] *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248.
[7] *See Saghir Ahmed* v. *State ofUttar Pradesh,* **AIR** 1954 SC 728; *Kondal Rao* v. *A.P.S.R.T. Corporation,* **AIR** 1961 SC 82; and *Manna Lai* v. *Collector of Jhalawar,* AIR 1961 SC 828.
[8] For meaning and content of the equality clause under the Constitution, see *Ajay Hasia* v. *Khalid Majib Sehravardi,* **AIR** 1981 SC 487.
[9] M.P. Jain, *Indian Constitutional Law* (Wadhwa & Company, Nagpur, 5* Edn., 2003), vol. 1, pp. 1001-1002.

for the other side of the equator. And finally the basis of such equator will only vanish, but it is factual, that the Earth cannot exist without such an equator. Moreover, to work proficiently, this will act as a check against such people, and knowing that they are accountable to the public, they will not try to budge towards corruption. Consequently, this arbitrariness will not at all be needed to be done, and if done, has to be undone.[10]

Equality is considered as one of the magnificent corner stones of the Indian democracy," and if there is any meddle with such a provision, then the statute doing this has to be declared unconstitutional. This, being one of the basic features of the ;

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Constitution, cannot be compromised on, keeping in mind that j 'discrimination and arbitrariness' do not go along with this principle of equality. Kania, C.J., speaking for the Court in a 9-Judge bench of the Supreme Court in *R.D.Shetty's Case,*[13] said that art. 14 strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The apex Court in *Bommai 's Case*[14] held that while the Constitution guarantees to all its people freedom of religion under art. 25, the provisions in articles 14, 15 and 16 enjoin upon the State to treat its entire people equally, irrespective of their religion, caste, faith or belief. Any step inconsistent with the constitutional policy is, in plain words, unconstitutional.

2.2 Rule of law

Continuing from the point established above, therefore, the branch of Legislature should imperatively note that it does not go beyond the mandate of law, i.e. Constitution, as it is subject to judicial review simultaneously. And, if this is not adhered to, and

Subba Rao J. referring to Doctrine of Classification, in *Lachhman Das* v. *State of Punjab,* AIR 1963 SC 222; see also *State of Jammu & Kashmir* v. *Triloki Nath Khosa,* (1974) 1 SCC 19, & *A.S. Iyer* v. *V.Balasubramanyam,* AIR 1979 SC 10. [1'] *Indra Sawhney* v. *Union of India,* AIR 1993 SC 477.

[12] *Kesavananda Bharati Sripadagalvaru* v. *State of Kerala,* (1973) 4 SCC 225.

[13] *R. D. Shetty* v. *International Airport Authority of India,* (1979) 3 SCC 489.

[14] *S. R. Bommai* v. *Union of India,* (1994) 3 SCC 1.

subsequently an enactment is given life, to which the Supreme Court has harangued as unconstitutional, and beyond the scope of rule of law,[15] then it is more than obvious that the Supreme Court will again strike down such a provision. And then the Legislature will again have to validate such a provision by giving it the support of the Houses of Parliament. But till how long can these battles between the state organs run? Such a situation will be one as never contemplated by the framers of the Constitution.

The framers of the Constitution have tried to create a system of verification and equilibrium, by reasons of which powers are so distributed within the Judiciary, Legislature and Executive, such that none of the three organs are predominant as to disable the others from exercising and discharging powers and functions entrusted to them. In countries where rigid separation of powers has been effected by written Constitutions, the position is very different.[16] It is true that unlike the US Constitution[17] or the Commonwealth of Australia,[18] separation of powers has not been an explicit element of study under the Indian Constitution, but still it vividly puts each of the institutions in a position so as not to engulf the other's territory, and if there evolves such a circumstance, then it is the duty of these organs of the state to harmonize amongst themselves so as to consequently put on the flag of better governance in the country to the maximum extent possible. The Constitution has envisaged separation of power not as an explicit principle, but to a reach where it can be so interpreted that these appendages of the mechanism of Constitution are independent to work in their own spheres.[1]

[15] See V.R.Krishna Iyer J. in *Dr. Jagdish Saran* v. *Union of India,* (1980) 2 SCC 768.
[16] *Associated Cement Companies Ltd.* v. *P.N. Sharma,* AIR 1965 SC 1595.
[17] See Chandrachud, C.J., speaking for himself, Bhagwati, Sarkaria and Fazal Ali, JJ., in *In Re: The Special Courts Bill, 1978,* (1979) 1 SCC 380.
[18] Section 71 of the Commonwealth of Australia Constitution Act (63 & 64 Vict. Chapter 12).
[19] The apex Court in the *Supreme Court Employees' Welfare Association's* [(1990) 4 SCC 187] held that in case of an inconsistency between either the Legislature, Judiciary or the Executive, there needs to be a demarcation done between them such as none is adamant over a single issue that it should not have

2.3 Interpretation of statutes

While explaining the varying rationales behind the interpretation of statutes in his book, *'the Discipline of Law',*[20] Lord Denning seems to show his fear towards some of the intricacies hid behind this entire phenomenon of law making. He opines that whenever a statute comes up for consideration, it must be remembered that it is not within the human powers to foresee the manifold sets of facts, which may arise, and even if it were, it is not possible to provide for them in terms free from all ambiguity. He, though talks about many references in this context, as to the steps involved before and after the enactment of a statute, relinquishes to one view of the 'pros and cons' of that enactment. He further says that the English language is not an instrument of mathematical precision, and adds that the literature would be much the poorer if it were. He refers to the *Seaford's Case,* for which he was the judge of, where such interpretation of the statute plays a major role. This is where, he says, the draftsmen of Acts of the Parliament have often been criticized. A judge, believing to be fettered by the supposed rule that he must look to the language and nothing lese, laments that the draftsmen have not provided for this or that, or have been guilty of some or the other ambiguity.

Hart, in his book, *Concept of Law,*[23] referring to Judicial Discretion, however, has tried to distinguish between the legal

touched upon. The Court has also tried to draw this line of demarcation during the interpretation of the Constitution.

[20] Denning L.J., *The Discipline of Law*, pp. 11-13, (Indian Reprint, Butterworths & Aditya Pvt. Ltd., 1993). Also see, Cardozo, Benjamin N., *The Nature of the Judicial Process*, pp. 98-141, (New Delhi: 3rd Indian Reprint, Universal Law Publishing Co. Pvt. Ltd., 2000); Roscoe Pound, *Common Law and Legislation,* 21 Har. L.R. 383, and Roscoe Pound, *Scope and Purpose of Sociological Jurisprudence,* 25 Har. L.R. 140, and Jhering, *Zweck in Recht, 5* Modern Legal Philosophy Series.

[21] *Seaford Court Estates Ltd.* v. *Asher,* [1949] 2 All ER 155 & [1950] 1 All ER 1018.

[22] Lord Denning, *supra* n. 20, at p. 12.

[23] Hart, H.L.A., *Concept of Law,* (Oxford, 2002), pp. 272-273, & 306-307. Also see, (as suggested by Hart) Dworkin, *No Right Answer?,* in Hacker, P.M.S., & Hacker, P.M.S. & Raz, J. (eds), *Law, Morality and Society. Essays in Honour of H.L.A. Hart,* (Oxford, Oxford University Press), pp. 58-84.

theory as understood by him and as laid down by Dworkin, saying that in any legal system, there will always be certain legally unregulated cases in which on some point, no decision either way is dictated by the law is accordingly partly indeterminate or incomplete.

The preceding paras, thus, shows that there is enough burden on the judiciary because of the work conferred to them by the virtue of two machineries working, first, the Constitution at the first instance, and second, the Parliament due to their probable unfinished job of making laws in a perfect manner. By the undertaking of all these works of Lord Denning, Hart, Dworkin, and also Joseph Raz, it shows that this burden on the judiciary needs to be reduced, which can be made possible only by the way of implementation of a harmonizing principle that sets the directions of each organ of the state to the right one. If law requires one organ to do something, and which is rightfully done, then the other should not subsequently undo it. It needs to be understood that only after spirited deliberations of a very high degree, and indulgence into the deep intricacies of the matter, the Court decides on a particular matter. And just because the Parliament has been conferred by the Constitution with a law making power, it should not enact laws ignoring the judicial decisions, that eventually jumps up to be in conflict with many other matters. This phenomenon, as it is said, burdens the already heavy shoulders of the judiciary, but if looked at in the right direction in the right manner, it can be noticed that, in all such instances when the Supreme Court has already decided over a matter, which is binding on the High Courts and lower Courts in the country vide art. 141, then it makes the work easier for the Parliament to go by the frame of mind of the judiciary.

2.4 Separation of powers

This variance between the two organs of the state, i.e. the Legislature and the Judiciary, will not let accomplish the dreams of those leaders of the nation who had thought of making this country a better place to live in, via the mechanism of proper governance in the nation. The doctrine of separation of powers, which consists of: the idea of three separate branches of government- the legislature, the executive and the judiciary-, the belief that there are unique functions appropriate to each branch of the government should be kept distinct, no one person being able to be a member of more than one branch of government at the same time,[25] and the need for having an independent judiciary as a bulwark of constitutional democracy persuaded the founding fathers of Constitution assigning a place of distinction of judiciary.[26]

It is almost inevitable to proceed further without the mention of the notable 2003 decision of the Supreme Court in the *People's Union for Civil Liberties' Case,*[21] as also in the *Municipal Corporation of Ahmedabad's Case,*[2]* where it held that a declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function and the judiciary **should**

See *Kesavananda Bharati Sripadagalvaru v. State of Kerala, supra* n. 12. Also see, A.M.Ahmadi C.J., in a seven-Judge bench decision of *L.Chandra \ Kumar* v. *Union of India,* (1997) 3 SCC 261.

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[25] See, *Supreme Court Advocates-on-Record Association* v. *Union of India,* AIR 1994 SC 268, para 72.

[26] *Gauhati High Court* v. *Kuladhar Phukan,* AIR 2002 SC 236.

[27] *People's Union for Civil Liberties* v. *Union of India,* AIR 2003 SC 685; The fact situation that had evolved here was almost that has arisen in the present instance of the CVC Act, 2003 in the light of the *Vineet Narain* decision and the recent PIL filed by the Centre for Public Interest Litigation, New Delhi oa similar lines as here, regarding the Amendment Act brought in by the Parliament which amended sec. 33 A & 33B of the Representation of People's Act, 1951 ■ the process of non-conformity of the guidelines set by the Supreme Court in a earlier decision. The Supreme Court struck down, a provision in the Representation of People's (Amendment) Act as unconstitutional, as it tended k> take away the fundamental right of voters to know the antecedents of electoral candidates. The court held that 'a voter has a fundamental right under article \9 (i) (a) of the Constitution to know the antecedents of candidates'. The court ah* stated that this right was independent of the statutory right under the election law. The exercise of power by Parliament to amend a law 'is subject ■• constitutional provisions' and, therefore, it cannot enact a law that violas* fundamental rights.

[28] *The Municipal Corporation of the City of Ahmedabad* v. *The New Shrodk Spinning and Weaving Co. Ltd,* (1970) 2 SCC 280.

perform all its functions without any political thicket. It has accordingly been held that a Legislature while it is entitled to change with retrospective effect the law, which formed the basis of the judicial decision, it is not permissible to the Legislature to declare the judgment of the court to be void or not binding. The Court, on such fact situations as involved in this 2003 case, ° said that the legislature cannot overrule or supersede a judgment of the Court without lawfully removing the defect or infirmity pointed out by the Court because it is obvious that the legislature cannot trench on the judicial power vested in the Courts.

Although there is no rigid separation of powers in the Constitution of India,[31] by and large the spheres of judicial function and legislative function have been demarcated and it is not permissible for the Legislature to encroach upon the judicial sphere,[32] but while quoting S.P.Sathe, in his work on *Judicial Activism in India-Transgressing Borders and Enforcing Limits?*[2] a seven-Judge Constitutional Bench of the Supreme Court in the *P.Ramachandra Rao's Case* held that the doctrine of separation of powers envisages that the Legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable.

And for all these reasons, SD headed to another PIL being filed in the apex court by the Centre for Public Interest Litigation.

Singh, N.K., *Unnatural Acts, Hindustan Times,* New Delhi, December 02, 2003 (7).
[30] The contention that the fundamental basis of the decision in Association for Democratic Reforms case has not at all been altered by the Parliament was held not sustainable.
[31] See V. N. Khare, J., in *Union of India* v. *K. M. Shankarappa,* AIR 2000 SC 726.
" *People's Union for Civil Liberties, Lok Satta and Others and Association for Democratic Reforms* v. *Union of India,* AIR 2003 SC 234. [33] S. P. Sathe, *Judicial Activism in India-Transgressing Borders and Enforcing Limits,* Directions: A New Form of Judicial Legislation, 2002, *cited from: P. Ramachandra Rao* v. *State ofKarnataka,* AIR 2002 SC 328. *P. Ramachandra Rao* v. *State ofKarnataka, ibid.*

Following it, the Supreme Court, through a three-judge bench,[3:i] on 11th November, 2003, directed the Centre to file its response in four weeks of time[36] on an application seeking a stay of the 'single directive' in the CVC Act, under the mandate of which, CBI was required to take prior approval of the Central Government for embarking on any inquiry or investigation against senior bureaucrats.[37]

2.5 Concept of judicial review

This point of view should not be seen as a matter of conflict between 'judicial review' and 'judicial activism'. Going back to 1803, when the US Supreme Court decided the historic case of *Marbury* v. *Madison*, John Marshall, C.J., speaking for the Court said that the Constitution was the fundamental and paramount law of the nation and it is for the court to say what the law is. The learned judge pointed out that the particular phraseology of the Constitution of the United States confirms and strengthens the

V.N. Khare, C.J., S.B.Sinha, & S.H.Kapadia, JJ., *cited from:* Venkatesan, J., *Supreme Court to hear plea against CVC Act curtailing CBI's Powers, The Hindu,* New Delhi, January 20, 2003 (13).

[36] Editorial, *SC Query to Centre on CVC Act, The Hindu,* New Delhi, November 04,2003(13).

[37] Editorial, *SC Directive to Centre on CVC Act, The Hindu,* New Delhi, November 04, 2003 (13) & Editorial, *Notice to Centre on plea against CVC Act, The Hindu,* New Delhi, November 04, 2003 (12).

[38] *Marbury* v. *Madison, 2* L. Ed. 60 (1803), *cited from:* Rao, M.N., *Judicial Activism,* (1997) 8 SCC (Jour) 1; Here, the author emphasises that the laws enacted by the legislature must be implemented by the executive and their interpretation is within the province of the judiciary. That is the reason why judiciary has always been treated as the least dangerous branch and sometimes it is also described as the weakest of the three branches with no control either on the purse or on the sword. By reason of judicial activism, much good or harm could be brought about by the Judges by resorting to innovative interpretation. Decisions rendered by courts generally receive public acceptance in every democracy adhering to the concept of rule of law. The criticism occasionally voiced that the judiciary does not have a popular mandate and, therefore, *k* cannot play a prescriptive role which is the domain of the elected law-making body sounds at first blush sensible. Even so, the prescriptive role of the judiciary sometimes receives public approbation because the role played by it sustains what the Constitution mandates and averts the evils the basic document seeks to prohibit.

principle supposed to be essential to all written Constitutions, and that a law repugnant to the Constitution is void and that the courts as well as other departments are bound by that instrument. If there was conflict between a law made by the Congress and the provisions in the Constitution, it was the duty of the court to enforce the Constitution and ignore the law. The judgment said that the Supreme Court has the power of judicial review and it enjoys the power to strike down statute law, as it struck off Section 13 of the Judiciary Act, 1789 in that case on grounds of unconstitutionality.

Though, it is understood that such judicial activism should also be well within the parameters of law, lest the situation that it will give rise to, will be highly unwanted space of pandemonium. The Courts have to keep this in mind while going through such provisions of the enactment which the legislature has passed. It has been observed in the *Fertilizer Corporation Kamgar Union's Case,*[39] that judicial interference with the administration cannot be meticulous in the Montesquien system of separation of powers. The Court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded.

2.6 Unconstitutionality of statute

This situation may presume an unwanted situation where the Judiciary has enabled a verity to the extent of holding it as a law under the necessary framework of the Constitution. This can be viewed as in the instance where the Supreme Court had explicitly invalidated the SD Clause in the *Vineet Narain* case, subsequent to which, the Legislature enacted a law to the effect which validated the same clause giving a picturesque of undoing the job which the apex court had done. This no doubt, would again be open for judicial review by the Court on grounds of unconstitutionality, 'for this being a basic feature of the Constitution which cannot be done away even by the exercise of the constituent power of the Legislature,[4] and also, since the Supreme Court is the final arbiter

Fertilizer Corporation Kamgar Union (Regd), Sindri v. *Union of India,* (1981) 1 SCC 568. [w] *State of Bihar* y. *Subhash Singh,* (1997) 4 SCC 430.

on the interpretation of Constitution; as held in the *P.Kannadascm's Case.*[A] Unconstitutionality of a statute or executive action may arise from violation of principle of distribution of powers or separation of powers; violation or suppression of fundamental rights or freedoms, or violation of some constitutional limitations/restrictions. Furthermore, this element of involvement of judicial review does not create any sort of supremacy on the part of the Judiciary, especially the Supreme Court, though the degree of importance of the same is very lofty in nature in a federal Constitution. Jose J. in the *Bidi Supply Co. 's Case*[4]* held that the heart and core of a democracy lies in the judicial process. Justice Sikri in *Keshvananda Bharti's Case*[44] has emphasized on the lines of Patanjali Sastri, C.J. in the *V.G.Row's Case* terming it as a *locus classicus,* and reiterating that judicial review is undertaken by the courts not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid down upon them by the Constitution. And this certainly includes judicial review of an enactment passed by the Legislature in the phenomenon of exercise of their law making power. The Supreme Court is not merely the interpreter of the laws as existing but much beyond that. It has been held in the *Nandkishore 's Case,* that the Court as a wing of the state is by itself a source of law. The law is what the Court says it is.

The present instance involving the actions of the Legislature *en route* enacting the CVC Act, also banks on the above-mentioned lines, where notwithstanding the views of the Supreme Court or the invalidation of the SD Clause, the Parliament gave life to it ir 2003 legislation.

[41] *P.Kannadasan* v. *State of Tamil Nadu,* (1996) 5 SCC 670, at para 15.
[42] *S.S. Bola* v. *B.D. Sardana,* AIR 1997 SC 813.
[43] *Bidi Supply Co.* v. *Union of India.* AIR 1956 SC 479.
[44] *Supra* n. 24.
[45] *State of Madras* v. *V.G.Row,* AIR 1952 SC 196.
[46] *Nandkishore* v. *State of Punjab,* (1995) 6 SCC 614. at para 17.

2.7 *Sustaining the 'single directive clause'*

Though also, there are arguments for sustenance of the 'Single Directive' clause. They can briefly be summed up as follows:

1. CBI being a special agency created by the Central Government;

2. CBI being required to function according to the mandate of the Central Government which has constituted this special agency for specified purpose; and,

3. The officers at the decision-making level need this protection against malicious or vexatious investigations in respect of honest decisions taken by them.

This leads to the small series of issues relating to the grant of unfettered powers to the CBI to investigate such senior officers. May this even be abused, which seems unviable to a prudent man, but even then, for the causes of much spoken, 'curving the independent bureaucrat', it would only strengthen the working ability of such officers in the right direction free of corruption, and helping them being honest in their decision making process.

As Harish Khare,[47] a regular columnist in *The Hindu*, points out the havoc caused by the agency during the Joginder Singh epoch in matters relating the fodder scam,[4] it also appears that such instances might even take place. But for the entirely unconstitutional and unacceptable activism of Biswas, former CBI Joint-Director, these are only exceptions to the general prudence. May be, those who get called upon to man the CBI's senior positions do not become *ipso facto* immune to the frailties and

Khare, Harish, *The New Neta-Babu Nexus,* Hindu Business Line, April 02, 2003 (pp. 1&3),

[48] The Congress and the United Front crowds were shown up to be neck-deep in scams and other acts of corruption whereas the BJP could position itself as a crowd of dedicated sants and swayamsevaks, all committed to austerity and probity in public life. Now that the BJP has got its chance, it wants to put a cap on any outbreak of activism in the CBI headquarters.

flaws that otherwise gnaw the entire IPS cadre, but still this argument cannot in entirety, invalidate the total process of governance in this country. Exceptions are always exceptions, and such exceptions do not make the rule. An individual to be equipped intellectually and administratively so as to understand the nuances of decision-making in an increasingly complex globalised context is learnt, if not inculcated within.

It is also further pointed out that all these are valid questions, but the task of a mature polity is to summon the requisite collective wisdom and institutional innovativeness to put in place arrangements whose purpose cannot be defeated by an errant incumbent officer or Minister. Instead, what the CVC Act proposes to do is to throw the baby out with the bathwater. The CVC Act is a clever legal technician's ploy to sidetrack the cry for rolling back corruption at the official level; it is not a statesman's remedial prescription for curing a systemic malady. This is thought as more of confusion-than an avowal, but in veracity, this equation holds good in almost all certain cases. It is sought to be known that by and large, these reactions in the form of a protection given by the CVC Act at the decision making level is indispensable for the reasons, as of a catalyst, that lest this protection, the officers would not be able to give in efficiency and efficacy to these institutions because of-the dearth of the fortification that is followed through the harassment by any malicious and vexatious inquiries/investigations against them. But for these matters, should not it be seen that the SD acts as a restriction only on the CBI but is inapplicable against the general power of the State Police to register and investigate any such offence under the law of CrPC, as already stated above.

Moreover, in a democratic country like India, such argument has little or no stance, because of the sole reasons of differentiation between the' officers at the level above Joint Secretaries, and officers below such rank. The Department of Police is also not even touched. Though it is true that CBI being a special agency was created by the Central Government, but that does not ever mean, it was required to function according to the mandate of the Central Government.

3. CONCLUSION

As discussed above, it may be concluded that the provisions of law favoring a specific group of people who cannot be classified under the category coming within the purview of the 'Principle of Intelligible Differentia' cannot be enacted. Because, if this be done, it will pilot to the empowerment of corruption in almost all spheres, hence, leading to a chaotic situation failing to ensure proper situation of law and order.

The CBI starts its investigation only under certain detailed conditions, and these conditions are a consequent of a series of happenings of facts that gives the CBI, enough locus to initiate the investigation and lead for it. The CBI does not forget its modus operandi of work and the code of professional ethics on such occasions. They also understand the 'pros and cons' of such investigations against the bureaucrats. But as alleged against the bureau, harassment of the administrative officers by the way of vexatious investigations would not, and cannot feasibly happen until some extraneous and inevitable situations. Moreover, even it happens, it would be a case of sheer exception, and as said earlier, exceptions do not make the general rule.

In the present situations, the state of affairs can be said to be very poor, and one of the important steps under the present circumstances for ensuring that corruption is checked at higher levels of administration that will continue may be perhaps through the mode of PILs where the Supreme Court can clarify that the decision of the court holding the Single Directive to be invalid and unconstitutional should apply to the Centre and also equally to all the State Governments.

Consequently, though the Legislature may be an appropriate authority to enact a law over a matter, but both the sides of *XY-.* coin should be seen before tossing it up in the air. It is because the Parliamentarians do not just toss up the coin waiting to witness the result. They know the result. If they want it to be 'heads', it will be so, and if they want it to be 'tails', so will it be.

This small or lengthy process of tossing up the coin (which is probably similar to the process of deliberations and debates in the Houses of Parliament) is the real test of such known result to be worthwhile or not. And this is the precise reason why the legislators should not only pay heed to the arbiter of the judiciary, but even should also play a vital and major role in the implementation of the same (though the job of the executive is also kept in mind). In this case, where there was no law, and the judiciary took the pain to make the law (the decision of Courts is referred to as the judge made law) after doing what the Legislature should have earlier done, then the society may blame the Legislators for not having contemplated such a type of situation to have arisen, and for not making a law for the same. These kinds of situations will be troublesome for both, the judgment creditor and the judgment debtor, the only difference will that of time. This will be because of the frequent change of law that was implemented during the times of 'judge-made law' and 'legislature-made law'. This difference in opinion formed by the Legislature and the Judiciary will lead to the failure of the Constitutional machinery, which needs to be properly balanced. The disagreement between these two organs will bring about a conflicting situation of law and order in the country.

Popular examples have been continuously demonstrated, where finally the wisdom of Judges has prevailed over that of the Parliamentarians. In this situation where the Judiciary has already given its opinion over the subject matter, after the required analysis, the legislation need not opine in the opposite direction. This inconsistency will let the unending situation travel forever. Such emblematic instances were witnessed when the Centre for Public Interest Litigation, New Delhi, filed a petition challenging the enactment of the CVC Act, 2003, and more specifically, the Single Directive Clause. What is important to note here is that this all happened only a few days after the enactment got the President's assent. The present situation is that the Supreme Court has ordered a stay on this provision and asked for an explanation from the government under which the reasons are based.

These sequences will continue happening till a proper understanding and balance is formed between the three organs of the state. Hence, there is a dire urge for the existence of harmony between these organs of the state (institutional mechanisms) that is necessitated.

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K. N. Chandrasekharan Pillai, *General Principles of Criminal Law* (Eastern Book Company, Lucknow, 2003). Pp. xvi+560. Price: Rs. 335.

Criminal law is taught, at the under-graduate and post-graduate levels, in almost all the universities in the world. Conventional universities as well as the emerging Law Schools/Universities in India are no exception to the tradition. However, criminal law teachers, depending upon the 'level' and 'pattern' of instruction adopted by their respective University, resort to either the Socratic or case method or a combination of the two to teach 'General Principles of Criminal Law'. A criminal law teacher, obviously, depending upon the adopted teaching method and the University's instruction policy, selects his references.

Generally, criminal law teachers in India, while unraveling 'general principles' of criminal law to their students, do place their reliance on classic treatises and commentaries on criminal law published at home[1] and abroad.[2] Recently, due to emergence of a couple of Law Schools/Universities in India and dialectic method of teaching-learning adopted therein, criminal law teachers are

' Well-received treatises on the Indian criminal law are: Hari Singh Gour, *Penal Law of India* (Law Publishers, India, 11th edn. 2002) and R. C. Nigam, *Law of Crimes in India: Principles of Criminal Law,* vol. 1 (Asia, 1965). [2] J W Cecil Turner, *Kenny's Outlines of Criminal Law* (Cambridge, 19th edn., 1966); J W Cecil Turner, (ed.), *Russell on Crime,* vol. I & II (Universal Law Publishing Co., 12,h edn.); J C Smith, *Smith & Hogan: Criminal Law* (Butterwoths, 10,h edn., 2002); Richard Card, *Criminal Law* (Butterwoths, 15* edn., 2001), and Andrew Ashworth, *Principles of Criminal Law* (Oxford, 3rf edn., 1999). A few leading *cases and materials* used in India are: Michael J. Allen, *Elliot & Wood: Cases and Materials: Criminal Law* (Sweet & Maxwell, London, 2001); J C Smith, *Criminal Law: Cases and Materials on Criminal Law* (Sweet & Maxwell, 8th edn., 2001), and CMV Clarkson & HM Keating, *Criminal Law: Texts and Materials* (Sweet & Maxwell, 5th edn., 2003).

now increasingly teaching criminal law, including principles thereof, through case method in addition to classroom lectures and interactive sessions. However, majority of the teachers do still feel handicapped because of the unavailability of 'good' casebooks in the subject.[3]

Author of the book under review,[4] one of the acclaimed criminal law teachers and prolific writer from India, sharing his experience of lecture method that 'cases indeed discarded in the course of lectures and that important points having bearing on General Principles of Criminal Law are sometimes lost or at least not taken note of by participants in the class room' and recalling that law teachers 'follow treatises or commentaries and there are no casebooks', desires 'to come up with the casebook incorporating both English and Indian cases and raising some fundamental questions at the end of each case to enable the students and the teacher to engage themselves in fruitful discussions in he class room'.'

The book under review, unlike overseas criminal law casebooks, incorporates only excerpts from leading judicial pronouncements of Indian and British courts followed by a set of questions posed by the author for further deliberations among the students as well as between the teacher and the taught. The author, who in the beginning of the respective chapters offers a brief thematic note of the subject-matter of the chapter and defers, unlike in the traditional leading casebooks published at home and abroad, extracts from published academic writings on the topic, is aware of the inadequacies of his instant compilation. He is also fully aware of the importance of giving a comparatively full introduction of the topic as well as extracts from other published material on the topic before giving extract(s) from, and/or summary of, the select cases

A casebook, prepared on the lines of case-books prevalent in the UK, used generally in India is: K. D. Gaur, *Criminal Law: Cases and Materials* (Butterwoths, 3rd edn., 1999). Most of the criminal law teachers in India still rely heavily upon the overseas casebooks indicated in the preceding note. [4] K N. Chandrasekharan Pillai, *General Principles of Criminal Law* (Eastern Book Company, Lucknow, 2003).

Ibid., p. v.

and a set of questions thereafter. Sharing this feeling with, and giving assurance to, his readers to overcome the inadequacy, the author observes:

> This method is inadequate. I would prefer to give a complete picture of the topic before some questions are raised after presenting one or two decisions. But at this stage I think it would be sufficient. In the next edition, perhaps more details including discussions on writings of academics could be given to provoke and persuade the young minds to think rigorously on theoretical issues in criminal law. — I am sure the book needs a lot of improvement but I would prefer it to be done only after it is responded to by the teachers and taught in course of time.[6]

However, he offers four goal-oriented justifications for such a 'different form of presentation' of case law. They are: *first*, to help the students to prepare case notes in the classrooms, and *secondly,* to avoid the tremendous correspondence involved for seeking the required permission of authors of articles, *thirdly,* to help the students, by not influencing their viewpoints, to make their own efforts to appreciate the points raised by various authors of the references listed at the end of each chapter of the book under review, and, *fourthly,* to help the students to learn searching for materials.

The author, in 'introduction', after succinctly delving into operational and theoretical premises of criminal law in general, observes that the Indian Penal Code, 1860 (IPC), penal law of India, which in several respects is not capable of preventing certain forms of crimes [like bribery & corruption of public servants; adulteration of food, and environmental pollution that are governed by separate statutes], is in flux and it is, therefore, difficult to formulate a foolproof theory of criminal law in India. Nevertheless, one can, he feels, by a mere analysis of provisions of the IPC and a careful reading, in the context of new developments

[6] *Ibid.,* pp. v-vi.

in the Indian society, of case law, identify general features of criminal law in India. The author of the book under review indeed desires to undertake the said task.

Against this background, author of the instant compilation offers an intelligent analysis of case law on: general principles of criminal law; general principles of criminal responsibility; inchoate crimes - abetment, criminal conspiracy & attempt; parties to crime; general defences-excusable & justifiable; crimes against persons & property; sexual crimes; offences relating to marriage, and crimes against public order and morals. After discussing important judicial pronouncements on these topics, he recommends, at the end of each of the topics, 'exercises'- further readings - for students and poses a set of pertinent questions based on the discussed case law therein. Different contours of subject matter of the respective chapters, in the light & with the help of appropriately selected case law, are also unraveled by the author. Similarly, penetrating questions posed at the end of these chapters not only make students to 'feel' other dimensions of the subject matter but also lead them to satisfy their urge. It, in the opinion of the present reviewer, is in fact one of the strengths of the casebook under review. The author deserves high appreciation for his endeavor. The author has, undoubtedly, achieved his goal as the book under review, as desired by him, has great potentials in keeping criminal law teachers and students engaged 'in fruitful discussions' in the class room. The present reviewer is also confident that the book will be well received by criminal law teachers and students. Nevertheless, the instant compilation, with a view to converting it into a comprehensive 'cases and materials' on, and a good 'reference book' of, criminal law in India, requires, in the subsequent edition, an addition of 'extracts' from the thitherto-published articles and relevant reports of the Law Commission of India[7] and of the Justice Malimath Committee

The hitherto major reports submitted by the Law Commission of India on one or the other aspect of criminal law are: Law Commission of India, *Forty-second Report on the Indian Penal Code* (Government of India. 1971); Law Commission of India, *Eighty-fourth Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence* (Government of India, 1980), Law Commission of India, *One Hundred and Seventy Second Report on*

Report.[8] The author may also seriously think to add at the e; each chapter 'proposals for reform' to enable his readers - criz law students - to acquaint themselves with the proposed refon criminal law. Such an addition, the present reviewer sine believes, will not only further facilitate students of criminal *le* a have a deeper insight into emerging 'trends' and 'direction the field of criminal law but will also enable them to ponder 1 the probable 'directions' of the development of criminal law.

K. I. Vibf

Review of Rape Laws (Government of India, March 2000), and L Commission of India, *One Hundred and Fifty Sixth Report on the Indian Pet* CWe (Government of India, 1997).

Government of India, *Report: Committee on Reforms of Criminal Justi System,* vols. I & II (Ministry of Home Affairs, Government of India, Nc Delhi, 2003).

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Soli J. Sorabjee, *Law and Justice: An Anthology* (Universal Law Publications Co Ltd., New Delhi. Pp. 410. Price Rs.575.)

There is an imperative to explore, if it would be appropriate to state that 'law and justice being two independent concepts are linked together by lawyers and judges in the entire process of administration of justice'. The book under review presents a healthy debate between the legal fraternity on one side and the staunch supporters of philosophical and cultural opponents on the other hand. Justice is the fundamental urge of every living creature. Most of the laws, unfortunately, do not dispense justice. It is in this background, one need to appreciate the expression 'justice according to law' and to relate it with the expressions like 'unjust laws' or 'just laws'.

A series of articles that deal with a variety of political, economic and social justice, are clustered together in the Anthology under review. These articles center round the themes like 'mechanisms for the protection of human rights within the United Nations,' 'experiences of Afro-Asian Nations with 'human rights' mechanisms and the rule of law', 'Role and significance of the Independence and Institutional Accountability of Media, Government and most significantly the Judges of various national judicial systems'. These articles reflect not only the concerns but also the thought provoking reflections of eminent jurists and jurisprudential thinkers. Hence, the range of concerns shown here although have their origin In the municipal context, they reflect emancipation of values of universal application.

The Anthology, under review, essentially delves into: Foundations and underlying essence of human rights; Protection of human rights at the global and stale levels, and Niceties of contrast between public and private law.

Justice V R Krishna Iyer, in his article titled 'Juristic manifestation of the human persons reflecting his deep concern for the universally recognized values condemning the prevailing human suffering and indignity, reiterates the idea of *'Dharmd* from ancient Indian jurisprudence and establishes the integral relationship between law and justice. He, in this paper, makes an earnest call to effectively utilize the human rights instruments to combat, if elimination is not possible, issues of socio-economic concern including starvation, ill health, poverty, and homelessness to dispense 'humanitarian'justice.

Rolve Dryssdal, former President of the European Court of Human Rights, Strasbourg, narrates the efforts of, and mechanisms designed under the European Convention on Human Rights and Fundamental Freedoms for the promotion and advancement of human rights in the European Region. Other essays included in **the** Anthology exhibit Afro-Asian experiences in the promotion and advancement of human rights and sketch the emerging social order in various legal systems of the world. Richard Cullen, through his essay, peeps in the so-called well-defined Western and Eastern perspectives on the relationship between 'individual" and 'social* rights and the difficulties in adapting them under the East-Asian human rights culture.

Allen Phillips calls for an effective networking amongst various efforts so as to effectively promote minority rights. Articles relating to the protection of the rights of women and refugees deserve a special mention as they emphatically address to **the** growing dimensions of the human rights movements. An essay, titled, 'Protection of refugees and the challenges of International Law' and written by Dennis McNamara, which not only refers to the global and regional efforts for protecting rights of refugees **but** also delves into the Indian experiences, deserves a special mention.

'Judicial contribution' in the evolution of the right to freedom of expression, sustenance of democracy, and rule of law, has **been** focal theme of a series of articles written by prominent authors **like-** Antony Lester, Soli J. Sorabjee, Gilbert Marcus and Justice A. M. Ahmadi. Similarly, a few essays focus on the 'making of democratic constitution', such as the Constitutions of South Africa, Zimbabwe and Namibia, and the manner in which some foundational principles are revisited at critical junctures in the working of these Constitutions.

There is another set of articles that relate to a specific theme "relationship and intricacies of Public Law and Private Law and State experiments in the field of administrative Law'. The essay by Cheryl Saunders not only takes into account the context and influencing factors for administrative law reforms but also refers to the significant role of administrative institutions in the process of Governance.

'Judicial independence and accountability of the judges', an integral part of a discourse on human rights and 'justice', is also dealt in some essays. The essays authored by Cyrus Das and Justice Dr. A S Anand deserve serious attention. The former essay, which delves into 'judges and judicial accountability', explicitly refers to the public and media's criticism of judges and judgments in the context of the use of contempt powers and also distinguishes 'approaches of the courts' in the Asian and Western countries. It analyses the impact of 'cultural factors' and 'attitudinal influence' the criticisms.

The Anthology, under review, thus, offers a range of thought provoking essays attempting an analysis of the emerging approaches within the given legal regime and the democratic institutional set up. It also demonstrates the judicial trends in the democratic governance and quest for the protection human right ands rule of law. Authors, in this respect, have not restricted their attention to the judiciary in India alone but have also extended to a number of other countries. Such an attempt undoubtedly is the strength of this Anthology. It is a treasure of information and ideas for the jurisprudential enrichment for those who are involved in, and concerned with, judiciary and judicial process. It also provides an occasion to a general reader public to observe closely the parameters of a range of legal systems and appreciate the legal developments in specific context and perhaps to arrive at one's own conclusions on the working patterns of the democratic institutions. It obviously reflects the stand and relentless efforts of Soli J. Sorabjee, editor of the Anthology, in arguing for the continuing relationship and importance of protecting the principles underlying various human rights institutions and the most fundamental norm of rule of law. Thus, there is no doubt perhaps to characterize this effort as a living contribution of Soli J. Sorabjee within and outside the Courts in shaping the evolving principles of constitutional jurisprudence and values that strengthen working patterns of democracy institutions.

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Avtar Singh, *Company Law* (Eastern Book Company, Lucknow, 2004. 14th Edn., 2004). Pp. cxxvii+ 736. Price-Rs. 265.

Dr. Avtar Singh, a prolific writer, is known for his well-received contribution in the area of commercial laws. The book under review, which is the fourteenth edition of the author's *Company Law-*, is a comprehensive compendium for students of corporate law as all the chapters not only take stack of the changing scenario in corporate legal system of the country but also are more focused.

The book is divided into twenty chapters with the sub-heading underneath. The first four chapters deal with formal requirements of incorporation of a company, the characteristics of corporate personality and a few pertinent doctrines, like *ultra vires,* lifting of corporate veil, indoor management, which are evolved through judicial process for providing safeguards to company, shareholder and outsider from misuse of process of law. However, at places, in the opinion of the preset reviewer, the author is not very expressive about applicability of these doctrines in the contemporary changes.

The chapters fifth to seventh, ninth, twelfth, thirteenth and fourteenth are devoted to corporate finance. The fifth chapter, which deals with 'prospectus', is written in the light of all the latest amendment in Company Law. However, a little pace is accorded to the regulatory law. Listed companies required to follow mandatory guidelines provided by the Security Exchange Board of India (SEBI) for public issue. Role of SEBI intermediaries in public issues, provisions relating to listing requirements, adequate discloser in the offer document are not discussed in the present chapter. The chapters seventh, ninth, and thirteenth delve into different kinds of securities issued by a company. Surprisingly, the author also failed to discuss fundamentals of designing different kinds of security instruments. Adequate emphasis is also not given on the D-materialization of shares and the processes involved therein. No deliberations on ADR (American Depository Receipt) and GDR (Global Depository Receipt), which are now one of the important instruments in public issues, can be traced in the book. Role of institutional investor in the public issues is not at all mentioned. Chapter twelfth offers a detailed discussion on Dividends, Accounts and Audit. A discussion on accounting standards is absent.

The chapter numbers eight, ten, eleven do deal with corporate management. An illustrative discussion relating to the provisions of shareholder and member helps a reader to understand these aspects of the company law. But the concept of depository holding of share and consequence thereof on ownership right becomes difficult to understand, as they are not discussed with clarity. The author, in the opinion of the present reviewer, is required to give more stress on board of director on corporate governance issues.

The fifteenth, sixteenth and seventeenth chapters, which delve into corporate mismanagement, offer illustrative information, in the light of appropriate statutory provisions and case law, regarding majority rule, oppression and mismanagement and investigations by government agencies. It would have been better if the author could have given some more stress on the derivative action and class litigation. While the chapters eighteenth, though its sequential position in the book does not appeal, gives an account of 'kinds of the company'.

Two chapters following the seventeenth chapter and the nineteenth chapter, deliberate upon 'reconstruction of a company'. Discussion relating to 'takeover', however, seems to be superficial. The author has also not given due weightage to insolvency process. And the twenty-first chapter is dedicated to an authoritative discussion on winding up.

The book under review, which is published with careful editing and offered at very moderate price, will be a good reference, rather a textbook, for a student of company law.

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SUNSET **AT MANDORE**

After his day long toiling labour of
creative anger and hailing sweat, he
stands up.
The agile but aging gardener looks up,
the setting Sun at Mandore in its
evening flight, behind the sandstone
hills-He sees behind his lingering
shadow beyond his garden of life.
Flowers bending, dancing round,
touching his body and misting mind. His
lovely feeling into ecstasy!

The sun setting at Mandore,
the glory of garden of life,
the blooming flowers, the breezing dive!
The gardener and his intense faith on toilsome life
walking miles before he goes to sleep.
He sprawls his fangs
with strong feathers from Eagle
covering crops from dreary sand-winds
of scorching desert Sun!

The old gardener looking overhead the sandy
blurred sky-Suddenly, aghast, he stares at his
falling shadow on his budding plants
twisting, as if gasping and nodding head
violently,
between yellow life in dying Sun
and lingering heavy shadow, in
labouring pain for extra oxygen For
the longing life!

The old gardener looks up to the sky
to the heaven ? he has to pass by
with his candid stern and Rockey face,
thinks a while with hardened face,
to save his creation form the hazards of his
own lingering shadow!
He comes out, salutes life behind!
his emotions evaporated, tears dried -
He leaves back his happiness, love, ego, joy
and his cry,
to his garden of life,
never to come back again.
He walks towards the dying Sun
in growing darkness!

The old gardener now shall meditate
and wait
for whom he knows not, how long -
who would lead him through the
darkness of balance of life
to the eternal bliss!
His garden and flowers live behind!

N.L.Mitra
Misty morning, Bangalore September 8, 2004

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