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BOOK REVIEWS

FROM THE EDITOR'S DESK

Research and publication are integral parts of academic life. These two assist as well as serve as an impetus in scaling the ladder of academic success. The credentials of a young University like ours are measured in terms of its research and publication output.

Scholasticus is our endeavor to promote publication of multi-disciplinary research in conventional as well as emerging areas like IPR, cybercrime, international laws etc. The aim of this journal is to integrate and amalgamate various facets and perceptions of research in law and its allied fields. In order to maintain academic standards utmost care is taken in the selection of articles. We are making efforts to make this journal a peer-reviewed one in the near future. For this we solicit your cooperation. We will soon approach leading academicians and professionals for their consent to act as honorary reviewers. Pre-publication review is likely to cause some delay in finalizing the fate of articles but it is essential to raise the standard of the journal. We are planning to make Scholasticus a bi-annual journal; the next issue will be published in February 2010.

Scholasticus is a small effort to bring together the views of academia with legal orientation and we hope to gradually build up its database and reputation to make it a truly international journal of repute.

THE PERSONALITY OF A JUDGE*

JUSTICE K.G. BALAKRISHNAN*

It is a great honor to deliver the Shri M.C. Bhandari Lecture. One of the most respected members of the Bar, Shri Bhandari was a gifted judge of matters and of people, and had a plain, clear and distinct writing style. His epigrammatic writings reflect the agitations of a changing civilization and social order that demanded from its members an expression in the forever altering forms of law and a jurisprudential philosophy sufficient to justify the changes. He ensured that the rule of law was always placed on the highest pedestal, and given the greatest regard while deciding a matter. He had the innate ability to balance the values of liberty, freedom and democracy and sustain the social fabric that our Constitutional Framers toiled hard to create. This requires not only a profound knowledge of the law, but also an equally profound allegiance to the Rule of Law. Moreover, that two of Shri Bhandari's chamber juniors have risen to be my Brother Judges at the Supreme Court of India bears testimony to his diverse abilities and adherence to moral and legal values.

The life and works of Shri Bhandari reveal the profoundness of an unblemished character that is fashioned through years of meticulous work towards improving humanity through the relentless pursuit of justice. This Lecture Series forms a fitting tribute to the great eruditeness and adroitness that stood as the hallmarks of Shri Bhandari. He was a friend, guide and philosopher to all whose lives he helped shape. His sense of duty towards the profession serves as constant inspiration for those who knew him and shared in his intellectual humility and open, receptive mind. He will forever be revered for his courage and infallible moral fiber that stands as a guiding light for all those striving to do constructive service to the legal profession. The Bar Council of

*Shri M.C. Bhandari Memorial Lecture, 2007
*The speaker/author is the Chief Justice of India.

Rajasthan, of which he was a distinguished member, has been greatly enriched by the spiritual and intellectual harvest of Shri Bhandari's life.

I will attempt to bring into perspective the essence of the personality of a Judge and how, through its fluidity and dynamism, it attempts to maintain a continuous fruitful contact with the changing perceptions of society and law, which form the background of most legal controversies. Though the mosaic of traits that judges possess can never be exhaustively dealt with on paper, it will be my endeavor to give some psychological insight and depth into the vicissitudes of a personality required for one human being to judge another.

Judging is a great art, and not all are adept at it. Judges are humans, who, as a result of long years of legal practice and intellectual exercise, are able to exercise the delicate and exquisite skill of judging the conduct of others. Despite its frustrations and the difficulties it entails, judicial work, in the words of Lord Halisham, is "a *privilege, a pleasure and a duty".* As Justice Learned Hand explained eloquently in his work, *"The Preservation of Personality"*, a judge's life is strewn with "senseless bickering" and "captious pettifogging". However, he goes on to say that if that were the only thing in a judge's life, it would be reduced to misery. On the other hand, says Justice Hand,

"...there is something else that makes it...a delectable calling. When the case is all in, and the turmoil stops, and after he is left alone, things begin to take form. From his pen or in his head, slowly or swiftly as his capacities admit, out of the murk the pattern emerges, his pattern, the expression of what he has seen and what he has therefore made... That is a pleasure which nobody who has felt it will be likely to underrate. "

Thus, in order to create one's own "expression", the judge must administer justice according to constitutionally mandated systems and rules laid down by society. This cannot be achieved by the performance of a mere mechanical craft, but with the intellectual implementation of an innovative and refreshingly creative art, which requires great objectivity, and 'the ability to look at a dispute without fear or fervor. In *Rochin* v. *People of California*, [342 U.S. 165, 171-72 (1951)], the Supreme Court of the United States, speaking through Justice Frankfurter, stated,

To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance *toward views not shared... They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.*

Though Justice Frankfurter spoke in the limited context of interpretation of the due process clause, what he says can well be applied generally to judges and judging. A judge of any court, subordinate or superior, exercises great power when, through his judgments, he gives life to the inert, black-and-white words of the'law. He exercises greater power when he strikes down *ad hoc* and arbitrary measures of the Legislature or the Executive which breach constitutional or statutory rights. In exercising this immense power, the judge must apply great caution and necessarily limit himself to, in the words of Justice Frankfurter, in the case of *Malinski* v. *New York*, [324 U.S. 401, 417 (1944)],

"*... the limits of accepted notions of justice...* "

A judge's personality is often dissected by a nation's vast populace, who often make arduous attempts to demystify the complex contours of his persona, by a thorough analysis of his judgments, in order to ascertain which facet of his personality held sway above all others, and which part of him influenced his decision the most. Ever since time immemorial, scholars have tried hard to ascertain various facets of human personality, from the four "temperaments" of the ancient Greeks, to Spranger's "six life types" and Jung's "psychological types". Many have undertaken scientific experiments on personality, dissecting various glands as well as analyzing build, voice and other physical and mental aspects. Others have attempted to create personality tests that would ascertain a minimum level of intelligence required to be a judge. However, what is most important while discussing a judge's personality is the human underneath the robe. No part of a judge's personality can be alienated from the rest, and no part plays a more significant role than the other. It is his person, his inner being, "him", that influences his decisions, and it would be impossible to segregate one facet of the personality from another. Each judge is unique and distinct from his Brothers, and his beliefs may even change with change in his intellectual, cultural, political and social surroundings. Many a time, a Judge may exhibit varying personalities, reacting differently towards different types of cases, seemingly, like a new leaf. This can be understood only if we first assume that judges, like all other people, are the products of upbringing and surrounding interactions, which constantly intermingle and enrich each other. No one can dispute that the personality and interests of a judge critically influence the manner in which he decides a particular case before the court. To say that by taking the oath to a judicial office, and putting on a robe, the individual loses his individuality and becomes a thinking machine would be a dangerous proposition indeed.

The Deuteronomic Code of the Old Testament aptly summarizes the personality of a judge in the following words:

"And I charged your judges at the time, saying, Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man...." [DEUTERONOMY c. I, vs. 16-17]

It must be remembered that the fullness of a judge's personality comes to fore only after he assumes office, and never before. In the words of Lord Coleridge,

"It is one of the curious things about our profession that you can never tell what sort of a man a judge will be ".

However, Judge Shientag, in his Cardozo Memorial Lecture on "The Personality of the Judge", answers Lord Coleridge by stating that one can tell,

"what sort of a judge a man will be ".

While saying this, he directs us towards certain traits that a lawyer must be imbued with, in order to be allowed to assume judicial office. It is these essentials that every judge must possess, as vital aspects of his personality, and it is these that I will explore today.

A personality has various facets. It may be endowed with characteristics that reflect skills and assets, which may be acquired by practice or self-control. It may also possess certain unique gifts and virtues which might even be inborn. Out of this kaleidoscopic mosaic, I will highlight one important facade of each skill, asset, gift and virtue. In the end, I will examine the necessity for the personality to be imbued with knowledge, such that every word, spoken or written, echoes of the individual within.

THE SKILL OF CREATIVITY

Society is always in a state of continuous change. As each day passes, conditions arise, which lead to new legal disputes. Each such dispute gives birth to new laws, or new interpretations of existing precepts. Thus, law becomes a living entity that is forever trying to satisfy the diverse and dynamic needs of society, a process that Roscoe Pound refers to in his magisterial work "The Philosophy of Law", as

"a continually more efficacious social engineering. "

For interpreting the law, Pound, in an article in the Harvard Law Review *[The Theory of Judicial Decision* 36 Harv. L. Rev. 641] identifies three crucial elements; viz., a set of "more or less defined" legal principles, a "body of traditional ideas" and "a traditional technique of developing or applying them" and lastly, a "body of philosophical, political and ethical ideas as to the end of law...with reference to which legal precepts and the traditional ideas of application and decision and the traditional technique ..." are shaped and applied. Among these, the third, i.e. the philosophical, political and ethical view of a Judge is the most important and this forms the core of his personality because judges reflect the philosophical, political and ethical view of their time and their judgments mirror the needs of a dynamic society, forever improvising and venturing to discover various ways to fulfill those needs.

Therefore, it is essential for a judge to be creative in his ideas, and also be a great thinker, ahead of his times, who is able to identify and justify the needs of society, and suggest ways to address them. This not only requires an application of knowledge, but also necessitates immense personal integrity. The great Justice Cardozo, in his excellent and forever relevant work, *"The Nature of the Judicial Process"*, presents an admirable insight into the creative personality of a judge when he states that,

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them-- inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense of James' phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter."

To be creative means to be original, to free oneself from the shackles of established norms and delve deep into the pursuit of new ideas that reshape the norm of the day and provide a new vista of law and legal understanding and interpretation to the world. For this creative legal development to find success, the judge must have this skill deeply engrained within his personality, in order to subconsciously apply it and hone it with each passing day. A creative mindset makes the legal process purposive and solution-centric. Lord Radcliffe, in his work, "Not in Feather Beds", opines,

"The law has to be interpreted before it can be applied, and interpretation is a creative activity. "

However, it is important that this creativity be exercised with restraint, and a judge must be careful not to tread upon the feet of the legislator. He must limit himself to the application and development of the fundamental principles that form the core of our legal values.

THE ASSET OF INDEPENDENCE

For a judge to make a decision without fear or fervor, his personality must be assisted by the asset of an independent nature. "Independence" does not refer merely to an independent attitude, but includes one's behavior towards others, including family. In *C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee* [(1995) 5 SCC 457], the concept of judicial independence was described in the following manner,

"To keep the stream of justice clean and pure, the Judge must be endowed with sterling character, impeccable integrity and upright behaviour...They should be men of fighting faith with tough fiber not susceptible to any pressure, economic, political or any sort. The actual as well as the apparent independence of judiciary would be transparent only when the office holders endow those qualities which would operate as impregnable fortress against surreptitious attempts to undermine the independence of the judiciary. "

An independent character is the bedrock of impartiality, and the former forms a means to the latter. No judge worthy of the seat he sits on would allow himself to be darkened by the cloud of prejudice that may loom above him, trying to influence his decision. Justice Gajendragadkar, in his memoirs, fondly recalls various incidents and strongly emphasizes on the necessity of independence for a judge, who must always maintain a cautious discretion, especially in social gatherings, where any of the guests could later be a party to a case before the very same judge. However, this does not imply that a judge should be so aloof from social ripples that he becomes distant from the realities of society. Rather, independence implies caution, it implies restraint.

Independence from oneself is another facet of this asset, and perhaps the most challenging. A judge often faces great pressure not only from society, but also from within himself. In such circumstances, it is imperative for a judge to stand by his conscience, and do what it says is right. To be concerned with how a decision would appear in the eyes of others would be quite damaging to the concerns of justice. It is worth quoting Lord Mansfield, in *Rex* v. *Wilkes* [98 Eng. Rep. R. 327 (1770)]. He said,

"/ *will not do that which my conscience tells me is wrong...to gain the huzzas of thousands or the daily praise of all the papers which come from the press. I will not avoid doing what I think is right though it should draw on me the whole artillery of libels... "*

A strong sense of independence goes a long way in cultivating the habit of "closed eyes and open ears", that is, blind towards the parties, but open ears to law. For a judge, there should be no other power greater than that of the law, and it is this power which he must exercise at all times, sometimes standing alone in the midst of a great tempest of political or social fervor trying to make the judge succumb this way or the other. Impartiality, I reiterate, like independence, does not imply that a judge shuts himself from the winds of his own personality and assumes the demeanor of a machine. While coming to a decision, the judge's individuality, character, interests and his overall persona all come to play and this is part of human nature. Harold Laski, in a letter to Justice Holmes once wrote that he

"wished that people could be persuaded to realize that judges are human beings; it would be a real help to jurisprudence ".

Impartiality implies that the judge has a clear understanding of the differing viewpoints involved in a dispute and is able to appreciate them fully, before coming to a reasoned decision. To achieve this end, a judge's creative faculties and his personality play an important role in balancing competing analogies. A diverse and vibrant personality leaves an indelible mark on the judicial process. It is important the judges realize that all men have a natural bias of mind. Once this is understood, a judge will make a more determined and conscious effort to ensure impartiality as opposed to one who believes that judges are infallible ethereal figures. Independence and impartiality mean a greater understanding of one's emotional tremors, making a thorough foundation for a judgment with effective research, openness to differing viewpoints, a stately detachment from presumptions and instant conclusions and a reflective thought process. All of these working conjointly ensure impartiality and independence.

Another facet of impartiality is to remain free from pressures and influences by the other arms of the state, i.e. the. Legislature and Executive. The duty of judges, as upholders of the rule of law, is different from that of public servants. Though judges are public servants, they do not have an obligation to serve the public *per se,* but rather have an obligation to serve the will of the Parliament and the Constitution, and to administer justice with independence and without prejudice to policy. On the other hand, "public servants", like bureaucrats, ministers and the like are obliged to further the policy of the government.

It is the duty of all judges to respect and maintain this independence.

THE GIFT OF COURTEOUS DEMEANOR

As repositories of the rights of people, courts rest on the bedrock of public confidence and faith. Judges, therefore, must make all efforts to maintain this confidence. A judge who is arrogant would soon lose his credibility. Sobriety in behavior is the hallmark of a judge. I refer to Courteous Demeanor as a gift because often, it is difficult for those reposed with great responsibility and power to refrain from "wielding the sword" of that power in places where it would be better to sheath it. The demeanor of a judge includes patience, decency, decorum and other like traits. The conduct of the Bench towards society in general, towards the Bar, and towards litigants and court staff, is significant. All must be treated with courtesy and respect. The bench should command respect from others, and not demand it. Since no human is alike, it is difficult to gauge the framework of courtesy, because for one, consideration for the feelings of others may be an inherent part of his personality, and for another, it may have to be imbued and practiced until it is firmly welded , into routine behavior. An offensive demeanor often leaves the receiver with a sourness that greatly affects his faith in the person, as well as the system at large. All who approach the doors of the court must feel relaxed and at ease at once, and judges in particular have a great role to play in advancing this, for with a superciliousness of manner, a judge can easily destroy the serenity of the courtroom. In the words of Lord Macmillan, in *Law and Other Things,* which he penned in 1937,

"Courtesy and patience must be more difficult virtues to practice on the Bench than might be imagined, seeing how many otherwise admirable judges have failed to exhibit them; yet they are essential if the courts are to enjoy public confidence ".-

It must be remembered that the greatest social service that a judge renders to society is the maintenance of social equality and removal of social injustice. Most litigants appearing before the courts are lambs threatened by the lion. Thus, while hearing these people, a judge must be extremely patient and courteous towards them, while at the same time show firmness in maintaining the decorum of the court. He must appear, at all times, to be serene. In the words of Devlin, in his reflective work, "The Judge",

"The judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is no use at all. "

Thus, every judge must bear in mind what is before the public forms public impression. For this impression to be secured with confidence, a judge's demeanor, natural or practiced, must at all times be civilized and courteous. It must also be understood at the same time that as human beings, judges too have occasional outbursts. However, these instances are few and far between, and arise only on account of extreme mental pressures, which are immediately addressed by the judge's strong inborn sense of dignity and respect towards the office that he holds.

According to Hindu philosophy, a judge is one who is possessed with a rare elan and calmness that fuels his intellectual clarity and gives him self confidence. Thus, when a garland of flowers is placed around his neck, they would remain fresh forever, because his demeanor would be like the soothing fresh water of a spring that brings exhilaration to those who drink from it, and would preserve, for posterity, the freshness of the flowers.

The courtesy of a judge must also extend towards his fellow judges, as well as towards lower courts. This is essential for maintaining the solidarity of our independent institution, and fostering a spirit of fraternity. Judicial propriety is one of the most noteworthy aspects of judicial courtesy, and must form the bedrock of judicial institutions. Judgments by earlier benches, whether the bench is equal or superior in number, should not be made subjects of unnecessary criticism. Academic and informed criticism of judgments is the role of the nation's academia, and they perform it laudably. However, to criticize its own judgments, past or present, is not a function of the judiciary. If a judge is of the opinion that previous judgments differ from his own view on the subject, then he ought to state his differing view with reasons thereof, paying utmost courtesy to the judges of the past judgment. It must be remembered that past judgments are not incorrect in law; they reflected the law as it then was, and as it then stood. To differ from them is to record a change in social, cultural and legal philosophy, but at the same time, full respect must be accorded to past benches. It is the judgments that are differed from, not the judges themselves.

Moreover, as the guardian of fundamental rights of the people, the Supreme Court is endowed with great responsibility. Along with this responsibility comes caution in exercise of power. A judge must draw a balance between when to exercise the power of his pen and when not. In the highest court of the land, this is fundamental. However, the judge must be unhesitant in exercising his powers whenever an apparent need arises, and whenever the fundamental rights of the people are infringed by other private or state actors. This is the cardinal duty of the Supreme Court of India, and this is what differentiates its functioning from other courts. Furthermore, judicial review has long been upheld to be a part of the basic structure of the Constitution, and to say that judicial review infringes on the doctrine of separation of powers is an argument that holds no ground. The doctrine of separation of powers is widely misunderstood to mean a staunch separation between administrative, legislative and judicial functions. However, this is not so. These functions cannot operate independent of each other, and, like spokes in a wheel, play their own independent, yet indispensable role in the governance process. Effective governance requires that all the abovementioned organs function towards the constitutional goal of ensuring that each citizen enjoys the fundamental rights available to him. Whenever this constitutional goal is not espoused, partly espoused or infringed with arbitrariness, it is the inherent duty of the Supreme Court to take cognizance of its function as the upholder and protector of the Constitution, and eschew the act which curtails fundamental rights. Particularly, realization of the Right to Life, which has been interpreted to mean not mere animal existence, but fruitful living, can come only if the people enjoy their fundamental rights such as living in a healthy, clean and safe environment, compulsory education and access to basic amenities of life. Without these rights being protected, the spirit of Article 21 can never be realized. On various instances, the State failed to exercise its duty of providing these rights to the people, who often had to suffer for no fault of their own. Therefore, it became an imminent necessity for the Supreme Court to intervene at a timely hour and curtail the violation of fundamental rights, and further its duty to protect the rights of the people.

THE VIRTUE OF SYMPATHY FOR SOCIETAL NEEDS

To lend a sympathetic ear to the most pressing needs of society is a quality that every judge ought to inculcate in his personality. A judge is a crusader and a saint at the same time, relentlessly striving to correct arbitrary measures and wrongs that often plague our social system and bring about inequality, dissatisfaction and frustration for the common man. Social consciousness is thus a prerequisite for a judge in our diverse societal system that has suffered since centuries because of man-made divisions, often fuelled by the invaders. Our diversity is our strength, but when we reflect upon our great nation, we find that it is fraught with tensions and frictions that are often deliberately designed by one group to gain dominance over another. So it becomes necessary for judges to look at the future through the lens of the past, in order to understand the present and attempt to forge a brighter future.

We have pledged ourselves to one nation and one Constitution that governs us all, big or small. Therefore it is incumbent that we look at those who are distanced from the promises of the Constitution. For a judge, this is paramount, for it is his inherent duty to act as a harbinger of light for those shrouded with darkness and for those, in the words of Justice Krishna Iyer, "dismally depressed" sections of society. In the words of Louis Craco, while delivering the 2006 Orison S. Marden Lecture at the New York Bar Association,

"To balance the equally proclaimed values of liberty and justice, freedom and democracy, in short to sustain the social order to which we pledge our allegiance requires an equally sturdy allegiance to the Rule of Law."

The need for this allegiance arises from a need to be aware of social tensions and strive to remove them, thus alleviating the deprived millions of their misery. Societal consciousness, as an engrained virtue at the very root of a judge's personality, would enable him to create indispensable instruments by which he pursues the path to infuse equality in society, creating conditions which enable all to enjoy the fruits of our constitutional promises to the fullest. The work of a judge is delicate, for he has to provide a solid foundation for a just social order while leaving as much space for freedom, exchange of ideas and innovativeness in society, which are essential for development. A judge creates a system which can give stability and allow ordinary people to flourish to the best of their abilities, and resolve disputes amicably. The judge, therefore, belongs to a very society-centric profession, and therefore his personality must be imbued with this value, above all others. In India, the role of the judges is in a state of constant change, and Supreme Court of India has, through the advent of techniques like public interest litigation, continuous mandamus and expansion of the scope of Article 21 tried to come at par with changing needs of society.

The Chief Justice of Canada, the Right Honourable Beverley McLachlin, in a speech on *"The Role of Judges in Modern Society"*, commented that,

"In the latter part of the twentieth century, the lawmaking role of the judge has dramatically expanded. Judicial lawmaking is no longer always confined to small, incremental changes. Increasingly, it is invading the domain of social policy, once perceived as the exclusive right of Parliament and the legislatures. "

A judge must thus be sympathetic towards his fellow beings, and also have a strong sense of social engineering. He ought to be able to sense social forces and should strive to attain the aspirations that the fathers of the Constitution have set before us.

THE QUINTESSENCE OF KNOWLEDGE

While courts are the repositories of the rule of law, judges are the epitomes of knowledge. They must necessarily possess the quintessence of knowledge as an essential trait in their personality, such that it is reflected in every word penned by them. Arguably, knowledge is not a personality trait, but is rather something which is acquired through learning. However, for a judge, it is important for his personality to be embedded deeply within the spheres of knowledge, if he is to be able to make reasoned judgment. As Justice Learned Hand said, during Chief Justice Stone's Conception of the Judicial Function in 1946,

"...it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant.........For in such matters everything

turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than mere verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined. "

The value of knowledge, especially for judges, has also been noticed by the Supreme Court of India in *Hindustan Times Ltd.* v. *Union of India,* [(1998) 2 SCC 242], where the court emphasized on the need forjudges to equip themselves with the necessary tools required to write qualitative and thought provoking judgments.

All that I have spoken of above-Creativity, Independence, Courteous Demeanor and Sympathy for Societal Needs, would lose their meaning without being infused with the nectar of Knowledge, for it is knowledge that permeates all- the person, the personality and its personification. Without knowledge, a lawyer would soon find himself in the midst of darkness, and would never transcend to the bench. Moreover, the decisions that judges take often affect the lives of many, for whom the courts are the last bastion for justice and hope. Thus, it becomes imperative for a judge to be knowledgeable, in order to make informed and articulate decisions, for judgments are not smorgasbords of issues or ideas, they are specific, subject oriented and coherent, playing the important role of interpreting the law of the land. This is a great responsibility indeed, one that every judge ought to perform with extreme caution and diligence, which can come only with knowledge.

I would like to conclude this address with the words of Benjamin N. Cardozo, the great American Judge, who, in his everlasting work, "The Nature of the Judicial Process", noted that,

"The future, gentlemen, is yours. We have been called to do our parts in an ageless process. Long after I am dead and gone, and my little part in it is forgotten, you will be here to do your share, and to carry the torch forward. I know that the flame will burn bright while the torch is in your keeping."

LAW AND MORALITY AT CROSSROADS -SOME CRITICAL REFLECTIONS WITH REFERENCE TO INDIA

DEEPA DUBEY*

India has recently witnessed violent outbursts over trivial incidents ranging from kissing in public, to holding hands or dancing in bars. The criminal justice machinery has been put in motion in almost all cases. The author has tried to examine this rising trend in light of the eternal law and morality conflicts. It has been argued that the over-pervasiveness of morality in legal domain, especially criminal law, is the predominant factor behind such unfortunate occurrences. Infact, law and morality must remain, so far as practicable, exclusive of each other. The paper is based on doctrinal research. It analyses the theories and juristic notions of law and morals and critically focuses on the criminal law framework of the sub continent, to reveal that the over pervasiveness of morals in law, as existent since the colonial construction of the statutes in 19th century, has been one of the main causes for social outbursts and wrongful or illegal enforcements. The writer, therefore, suggests, exclusion of morals from legal domain, especially criminal law and lays down parameters for a vigilant and vibrant system.

INTRODUCTION:

> *"Society must guard against State prescribed morality, a remedy more dangerous than the malady. This is an issue which confronts us today most seriously with the emergence of a moral police and self styled protectors of Indian values."'*

The conflict of law and morality has, possibly, never been more prominent than in the recent past. Just a few months back, the country witnessed a TV channel showing Richard Gere kissing Shilpa Shetty in an 'alluring' manner in an AIDS awareness program.[2] The scene was

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[1] Madhavi Divan, Morality, *Obscenity and Censorship,* (2003) 1 *SCC* (Jour)3.

[2] *"Gere kiss sparks India protest",* BBC, Monday, 16 April 2007.

repeatedly telecast by media channels, thus drawing unwarranted mention from the public. Unfortunately, however, it took an unexpected turn with a case being filed in a court of Jaipur for 'obscenity' under the Penal Code and warrants being issued against the protagonist, Mr. Gere. Effigies of the artists were also burnt in various parts of the country with people protesting against such un-Indianess in public. In yet another distressing incident, when a South Indian actor went on to comment, on the basis of a survey, that "No educated man will expect the woman he marries to be a virgin", a huge public outcry was witnessed with demonstrations and dharnas for the bold comment against acceptable social traditions and moralities. Few petitions were also filed in court against the unsavory statement of the actor and the same are still continuing. Another instance equally disturbing was closure of dance bars by the State of Maharashtra. "There are reportedly 75,000 women working in the dance bars of Maharashtra, where customers are served alcohol while the women dance to the latest film music. ...While the Maharashtra Government... defended its action purely on legal grounds, saying that a lot of these bars don't have licences, it is well known that the bars have been closed as they are seen as morally corrupting the fabric of society. What has conspicuously been overlooked is the human rights of the women."[4]

This article is an attempt to probe into the dangerous interplay of law and morals in contemporary Indian society. The first part probes into the meaning and conflicting notions of law and morality; the second part delves into the fusion of morality and criminal law and the concluding paragraphs evolve exclusionary parameters in the interplay of law and morals for a vibrant and vigilant legal system.

LAW AND MORALS: MEANING

Law is a code of rules governing human conduct. It consists of affirmative and negative directions imposed by the sovereign on the people. "All definitions or characterizations of law veer between two extreme positions. One extreme emphasizes its coercive character; the other lays stress on the social acceptance, the actual observance of law by the community to which it is addressed. The coercive aspects of the

[3] "Moral Policing", Frontline, Volume 22-Issue 22, Oct.22-Nov.04,2005 available at http://www.flonnet.com/il2222/stories/20051104002904000.htm. [4] Duhita Das, Moral Policing or Moral Terrorism, Commonwealth Human Rights Initiative, Volume 12 Number 2, 2005.

legal norm rests both on the source of authority and on the enforceability by sanction, which may be civil, criminal or administrative."[5]

The sphere of morality denotes "rules or principles governing human behavior which apply universally within a community or class." A minimal conception of morality limits itself to those rules which are "a condition of the existence of society", "where as a more comprehensive conception of morality would embrace the entire body of rules governing a community or class."[6] The aims of morality in its social signification are directed towards increasing social harmony by diminishing the incidence of excessive selfishness, noxious conduct towards others, internecine struggle, and other potentially disintegrative forces in societal life.[7]

SPHERE OF LAW AND MORALITY:

According to the influential theory, the distinction between law and morals is found in the fact that the law regulates the external relations of men while morality governs the inner life and motivations.[8] "The norms of morality" says Julius Moor, "do not threaten the application of external means of compulsion; no external guaranties for the enforcement of their postulates are of avail to them. The guaranty of their enforcement rests exclusively within the soul of the individual concerned. Their only authority is grounded on the insight that they indicate the right way of acting." Law, on the other hand, says Moor, demands an absolute subjection, irrespective of inner individual approval.[9]

However, the theory of the respective spheres of law and morality being exclusive to the external and internal conditions of man is not acceptable. Inner conscience of man, as translates into actions, becomes the concern of law; so also, law often imposes standards and actions on proof of internal intentions.[10] Law and morals, therefore, often come in close

[5] W. Friedmann, *Legal Theory* (Universal Law Pub., 5th Edn., Rep. 1999) p.14.
[6] ibid., at pp. 26-27.
[7] Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (Universal LawPub.,2006),p.291.
* id., at pp.291-2
[9] ibid.
[10] Premeditated murder is punished more harshly than a homicide in heat of passion. Similarly, culpable homicide due to rash or negligent act deserves leniency in comparison to intentional act of homicide. See also, A.H.C. Chroust, Law and Morals, 25 *Boston University Law Review,* 348 (1945).

contact with each other. Infact, Bodenheimer has postulated two categories of morals:[11] one, which consists of requirements of social ordering deemed to be indispensable, necessary or highly desirable for an effective discharge of the tasks an organized society has to cope with, and second, norms which add to the quality of life and bind them closely. The former includes avoidance of violence and injury, the keeping of faith in performance of contracts, regulation of f*» ^ily relations etc., while the latter is illustrative of values of generosity, unselfishness, love, kindness etc.. "The prohibition of murder, rape, robbery, and physical assaults, the ordering of relations between the sexes, the interdiction of fraud and bad faith in the conclusion and performance of consensual agreements are examples of such transformations of moral ideas into legal prescriptions."[12]

CONFLICTING LAW AND MORALS:

The conflicting concepts of law and morality have risen to in prominence in the past in two situations. First, in *Shaw* v. *DPP*,[U] the defendant had composed and procured the publication of a magazine called the Ladies Directory which gave the names and addresses, as well as nude photographs of prostitutes, supplemented by coded indications of the sexual practices. Although Shaw was clearly guilty of two statutory offences, publishing an obscene libel and living on the earnings of prostitutes, the House of Lords, convicted him of "a conspiracy to corrupt public morals". The House of Lords here emphatically asserted a "residual power where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to. the public welfare." The other situation was raised by the Wolfenden Committee Report which recommended that homosexual behavior between consenting adults in private should no longer be treated as a criminal offence. In the words of the Committee, " Unless a deliberate attempt is made by society acting through the agency of law to equate this fear of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[14]

Supra, n. 7, p.294. See, W. Friedmann, *Legal Theory* (Universal Law Pub., 5th Edn., Rep. 1999) Chapter 3. -*id.*

[3](1962)A.C220.

* W. Friedmann, *Law in a Changing Society* (Universal Law Pub., 2nd Edn., Rep 2OO3)p.201 ."The Law's function, as we see it, is to preserve public order and decency, to protect the citizens from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are

The latter turned into a debate between Prof. Hart and Lord Devlin. The former said that the "only purpose for which power can rightfully be exercised over any member of the civilized society against his will is to prevent harm to others."[15] By contrast, Lord Devlin maintained that the State may claim two grounds to legislate on matters of morals. It could function to promote virtue among its citizens-the Platonic ideal- and therefore claim "the right and duty to declare what standards of morality are to be observed as virtuous and must ascertain them as it thinks best." Alternatively, "society may legislate to preserve itself."[16] Devlin's argument was that a society is entitled to use the criminal law against behavior which may threaten its existence; that there is a common morality which ensures the cohesion of society; that any deviation from this common morality is capable of affecting society injuriously and that therefore it may be justifiable and necessary to penalize such behavior.[17] Devlin's opponents, however, adopted the individualistic liberal tradition, linking Mill's principles to Kantian ethics, arguing that law should respect the autonomy of each individual above all; it should treat persons as individuals and allow each to pursue his or her own conception of the good life subject to the minimum number of constraints necessary to secure the same freedom to other individuals.[18] Joseph Raz approaches the matter from a different angle. The State cannot and should not attempt to force citizens to be moral, but it should strive to provide conditions of autonomy. Any use of coercion invades autonomy and thus defeats the purpose of promoting it, unless it is done to promote autonomy by preventing harm. This approach recognizes that although it may be right to pursue certain moral ideals so as to provide the conditions for the exercise of autonomy, it is rarely justifiable to use coercion (or for that matter manipulation) so as to achieve this.[19]

specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence. It is not, in our view, the function of criminal law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior, further than is necessary to carry out the purposes we have outlined." HMSO, Report of the Committee on Homosexual Offences and Prostitution (Cmnd.247,1957)9-10 paras 13-14.

[15] Basil Mitchell, *Law, Morality and Religion in a Secular Society* (Oxford Univ. Press, 1970) p.12.

[16] *Supra* n. 5, pp.46-47.

[17] Andrew Ashworth, *Principles of Criminal* Law(Oxford University Press, 5th Edn., 2006)p.40

[18] ifeid., atpp.40-41.

[19] Supra n. 17, p.42.

MORALITY IN LAW: INDIAN LEGAL FRAMEWORK

The Indian Legal Framework largely premises itself on the then common law policies, prevalent in Britain.[20] In fact the spirit, ethos and letters of law in its application to India smells of the English soil, which was largely influenced by conservative concepts of life and morals. A good reflection of the influences is evident in the criminal law of the land.

Homosexuality is an act declared punishable under Section 377 IPC, I860.[21] It lays down that "carnal intercourse against the order of nature with any man, woman or animal" shall be punishable. The interesting aspect herein is that 'consent' amongst adults is immaterial for the purposes of the offence. The mere fact that the act in question is unnatural and therefore, immoral and socially unacceptable, brings about liability under the provision. The High Court, also, in a petition by Naz Foundation India Trust, on the unconstitutionality of the section has relented from interfering on the ground that the country has still not accepted such behavior.[2] Nevertheless, the Law Commission of India in 2000 recommended the deletion of Section 377 IPC 1860 and inclusion of all forms of sexual assault within the suggested contours of rape law.

K.I. Vibhute, Incest; *A Blissful or miserable omission in the Indian Penal Code of 18607* 44 *JILI* 85(2002).

[21] Section 377 IPC 1860 reads as: 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 term which may extend to ten years, and shall also be liable to fine.

[22] Naz Foundation India Trust, a NGO, moved the Delhi High Court by a public interest litigation asking that Section 377 be read as not covering private consensual homosexual intercourse. The Union Government filed an affidavit in response to the petition. Para 24 of the reply says: "...deletion of the said section (section 377) can well open flood gates of delinquent behaviour and be misconstrued as providing unbridled licence for the same." Para 32 thereafter reads: "Infact, the purpose of this Section 377 IPC is to provide a healthy environment in the society by criminalizing unnatural sexual activities against the order of nature." And then Para 33 adds: "If this provision is taken out of the statute book, a public display of such affection would, at the most, attract charges of indecent exposure which carry a lesser jail sentence than the existing imprisonment for life or imprisonment of 10 years and fine. While the Government cannot police morality, in a civil society, criminal law has to express and reflect public morality and concerns about harm to the society at large. If this is not observed, whatever little respect of law is left would disappear, as law would have lost its legitimacy." The high court said that there was no reason to interfere with the provision because the petition was filed by an organization and not by individuals and the matter was not of "public interest." On appeal, the Supreme Court sent back the petition to high court saying that it's a matter related to public interests http://us.rediff.com/news/2006/feb/03gay.htm>

[23] Law Commission of India, One Hundred and Seventy Second Report on Review of Rape Laws, March, 2000.

Adultery, in India, is both a crime and a civil wrong. Section 497 IPC 1860[24] entitles the husband to prosecute the paramour for illicit relations with his wife. The wife is however exempted from criminal proceedings, on the justification that the inviolable bond of marital tie may be preserved on the choice of the parties. However, the remedy by way of divorce is available in civil laws. Adultery law also disqualifies a legally wedded wife from claiming maintenance from her husband in cases where she is found to be living in adulterous relations. The reasons for adultery to find a place in the criminal book are many: "First, it is believed to be a threat to the institution of marriage and family. Second, it is believed to endanger the mother child relationship. Third, it is seen as a source of direct conflict between the marriage partners, leading to personal disillusionment, unhappiness and broken marriages. Fourth, it is considered deviant and immoral..."[25] "However, many sexual patterns formerly considered perverse or immoral are being examined anew; some are being redefined as desirable in certain set of circumstances. Today, many people are redefining extramarital sex as permissible alternatives to broken marriages."[26] In *Smt. Sarla* v. *Mahendra Kumar?*[1] the Rajasthan High Court, while awarding maintenance to a wife who was leading an adulterous life held, "It is not unnatural that when a husband leaves his newly wedded wife alone and himself goes away at a distant place to earn his livelihood, a lady who is suffering sexual deprivation may develop intimacy as well as illicit relations with a stranger." The National Women's Commission has also recommended that "... adultery should be treated as a civil wrong and not as criminal offence. There may be many instances in which the woman wants to save marriage and sees the adulterous relationship as an aberration. The issue of adultery should be viewed as a breach of trust and treated as a civil wrong rather than as a criminal offence."[28]

[24] Section 497 IPC reads as: Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall be punishable as an abettor.
[25] Subhash Chandra Singh, *Can Adultery be Justified!* *\999Cri.LJ.* Journal/ 109. See, K.I. Vibhute, *"Adultery" in the Indian Penal Code: Need for a Gender Equality Perspective* (2001) 6 *SCC* (Jour) 16.
[26] *Ibid.*, at p. 110.
[27] 1989 *CrlL.J.* 729.
[28] *"NCW rejects proposal to punish women for Adultery"*, The Hindu, Tuesday, Dec 26, 2006 available at http://www.hindu.com/2006/12/26/stories/2006122603270900.htm. See also, Draft National Policy on Criminal Justice, Ministry of Home Affairs, " Government of India, 2007.

Thus, in view of the changing social morality, the crimes and perversions of yesterday are becoming the joyful and imaginative play of today. Consequently, the discussion of sexual deviations, such as adultery or homosexuality, may be considered normal in the context of changing values and norms.

Obscenity is a sphere wherein the law has stuck to its parameters, while subtly acknowledging the strains of change. The Indian Penal Code, 1860, has proceeded to criminalize any 'obscene act in any public place' (Section 294) or the publication, sale, distribution etc. of any obscene book, drawing, painting, representation or figure (Section 292).[29] The

29 Section 292 IPC 1860 reads as: (1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. (2) Whoever-
(a) Sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or
(b) Imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or
(c) Takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or
(d) Advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or
(e) Offers or attempts to do any act which is an offence under this section,
shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.
Exception-This section does not extend to-
(a) Any book, pamphlet, paper, writing, drawing, painting, representation or figure-
(i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art of learning or other objects of general concern, or (ii) Which is kept or used bona fide for religious purposes;
(b) Any representation sculptured, engraved, painted or otherwise represented on or in-
(i) Any ancient monument within the meaning or the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or

term "obscenity" has been defined in the Penal Code to mean anything "lascivious or appeals to the prurient interest or ...tends to deprave and corrupt persons..."[30] The Supreme Court of India has defined the term as "the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive."[31] However, the Court has accepted that notions of obscenity or indecency[32] vary from country to country depending on the standards of morals of contemporary society.[33] In *K.A. Abbas* v. *Union of India*[34] the Court held that sex and obscenity are not always synonymous and that it was wrong to classify sex as essentially obscene or even indecent or immoral. Again, in *Bobby Art International* case,[35] regarding the depiction of the rape scene in the film Bandit Queen, the Court held that the object was not to arouse prurient feelings but revulsion for the perpetrators. While the object of the sections on obscenity and indecency may appear rationale by all standards as well as their judicial interpretations, the application of rationality[36] in determination of 'obscene' acts leaves much to be said in recent times. Thus, where Richard Gere lands a kiss on the cheeks of a lady in a public show, it smells of obscenity; or, where young lovers sit closely in a park to enjoy the hues of the setting sun, it smells of obscenity; or, where an

(ii) Any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose. Section 294 IPC 1860 reads as: Whoever, to the annoyance of others-

(a) Does any obscene act in any public place, or (b) Sings, recites or utters any obscene song, balled or words, in or near any public place, Shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both

See also, 293 IPC, 1860, Section 5B Cinematograph Act 1952, Dramatic Performances Act 1876.

[30] Section 292(1) IPC, 1860.

[31] *Ranjit D. Udeshi* v. *State of Maharashtra* AIR 1965 SC 881 at p.885.

[32] Indecency, it appears, is wider than obscenity. While indecent may signify non conformance with accepted standards of morality, obscenity refers to that which is prurient or lascivious appeal. *R.* v. *Stanley* (1965) 1 All E R 1035; *R.* v. *Greater London Council* (1976) 3 All E R 184; *FCC* v. *Pacifica Foundation* 438 US 726 (1978).

[33] *Chandrakant Kalyandas Kakodkar* v. *State of Maharashtra* (1969) 2 SCC 687 at p. 693.

[34] (1970) 2 SCC 780

[35] *Bobby Art International* v. *Om Pal Singh Hoon* (1996) 4 SCC 1

[36] "The standards that we set...must make a substantial allowance in favor of freedom ...If the depraved begins to see in ...things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped." *K.A. Abbas* v. *Union of India* (1970) 2 SCC 780; "Art, morals and law's manacles on aesthetics are a sensitive subject where jurisprudence meets other social sciences and never goes alone to bark and bite because State made strait jacket is an inhibitive prescription for a free country unless enlightened society actively participates in the administration of justice to aesthetics."./?^' *Kapoor* v. *State (Delhi Admn)* (1980) 1 SCC 43.

artist gives expression to his creativity with the nude representation of human or divine beings, it smells of obscenity.[37] And, in all cases, harassment through institution of criminal charges or police thrashings or mob reactions follows. The roots, if any, behind the entire episode is the excessive pervasiveness of morality in our legal domain and correspondingly, our thought process.

Suicide and euthanasia also merit consideration in the context of the current discussion on the interplay of morality and law. If the law ensures right to life, should it also grant right to die? Suicide is always a situation of extreme depravity and frustration where all hopes and expectations end. Punishing a person who attempts to commit suicide may not seem justified in such circumstances. Yet, the law has preferred to keep the morally reprehensible act as forbidden and criminally punishable.[38] Euthanasia is still treated as illegal and nothing less than murder. Thus, a doctor who assists a terminally ill person to die, a less painful and easy death, incurs the risk of being charged and prosecuted for the 'intentional causing of death". "But the question is whether we should regard human life only in biological sense, overlooking the quality of life aspect....It may be suggested that suicide and euthanasia should be re-evaluated in the context of modern approach to life and death. It may be said that there are good reasons for all cultures to be sensitive to the human dilemma involved'in the dying process. The issue involves not only the individual but also family and society."[39]

Instances may be innumerable of legislations or provisions in statutes which are reflective of moralities[40]; yet they have continued to be operative. Some of them continue to hold good even at present times, being part of the eternal, while many others are mere reminiscent of past morals held on to, even forcefully, at present times.

[37] *"MS University Dean suspended in Gujrat",* Hindustan Times, May 12, 2007 available at http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=9cb71 e3b-4392-4d4b-95bc-f9730065c67e&&Headline=MS+University+dean+suspended+in+Gujarat; See also, Fine Arts faculty of MS University under siege", http://www.pucl.org/Topics/Academia/2007/ms-university.html.

[38] Section 309 of IPC 1860 reads as: Whoever ^attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for term which may extend to one year or with fine, or with both. In England, however, the Suicide Act, 1961 has removed the century's old stigma of criminality from self destruction.

[39] Subhash Chandra Singh, *Some Moral Aspects of Criminal Law: Some Opposing Viewpoints,* 2000 *Cri. L.J. Journal*/17.

[40] Laws relating to prostitution, sati, abortion, sex determination of foetus, child marriage, alcohol and substance abuse may be cited as examples.

THE DEMARCATING LINE

Law has to strike a balance between individual freedom and societal interests, keeping in mind the morals of the society. While morality may have a bearing on the construction of legal statutes and determination of acts and offences, it cannot be the only criterion for the purpose. In fact, moral precepts which tend to perpetrate more harm than good, must be abstained from legal enforcement. In this respect, if one wants to draw a guideline of areas where legal recognition of moral values must be restricted, they may be as under:

a. Morals which are harmful
b. Morals which thwart change
c. Morals based on fallacious and superstitious beliefs
d. Morals which reinforce conservative outlook
' e. Morals within exclusive private domain of individual

Thus, laws based on morality of the society at large must not get recognition, being the view of the masses, but must be tested against the touchstone of humanity, rationality and liberty.[41] Law must be used as an instrument to steer the society and State to an improved social order, rather than to inhibit the process of change.[42]

A vigilant and vibrant legal system is the best armory in a democratic set up. It is the legal system which can pave the way for a changed perception of life and thought process. In a sense, law can mould the values and morals, so as to strike a balance. If law wields the sword of

[41] "It may be suggested that the values with which the law should concern itself, although not universal, should nevertheless be 'rational'...when a change in the law is under consideration it should be approached in a reasonable spirit. Arguments should be logical, irrelevant appeals should be excluded, all possible empirical evidence should be collected and assessed in an unbiased fashion." Basil Mitchell, *Law, Morality and Religion in a Secular Society* (Oxford Univ. Press, 1970) p.121.

[42] "l.The function of the law is not only to protect individuals from harm, but to protect the essential institutions of a society...

2. The law should not punish behavior on the sole ground that it is, or is generally thought to be, immoral, but it cannot be, in all respects morally neutral...

3. The morality which the law presupposes is not beyond criticism and ought to be open to informed discussion and debate together with the fullest use of social research where this is relevant. -o-

4. The protection of institutions, and legitimate concern for the ethos of society, may sometimes justify...'the reinforcement of morality'. ...But the onus ought to lie heavily upon those who would interfere in private behavior, even though a clear line cannot be drawn between public and private morality." Basil Mitchell, *Law, Morality and Religion in a Secular Society* (Oxford Univ. Press, 1970) pp.134-5.

destruction by supporting and legitimizing acts, which are otherwise immoral, howsoever popular and pervasive the opinion might be, the result will be anarchy and violence. But if the same law changes itself to adjust to new notions, any reinforcement of old, archaic and inhuman notions will die its own death.

CONCLUDING NOTE:

The recent turn of events reflecting a violent India, using the instrument of law to further illigitimize perceptions of morality, is extremely sad and shameful. Morality does find a place in law; but law is not exclusively moral values. Changed notions of life, liberty, freedom, and rationality all find a place in law. The legal statutes, whether colonial or contemporary, must reflect the aspirations of a new India. Thus, offences like homosexuality, adultery etc. must be obliterated from the criminal law texts. In a similar manner, the scope of laws of obscenity must be restricted to the minimum, so as to limit encroachment of individual freedom. A radical legal system has an advantage. It can act as an instrument of reforming people's ideas, thoughts and in turn, moral perceptions. That is what a purposive legal system stands for. To conclude, it may be asserted that every legal system and the laws therein, must be devised to institute positive changes and not act as catalysts of (im) moral beliefs.

ACTUARIALISM: A NEW PENOLOGICAL APPROACH

MUKUL SHASTRY*

In the modern world where penology is shifting its focus on individualization, it is inevitable that Indian penology too shifts to aggregation. More so, Feeley and Simon's (1992) "new penology" paradigm plays out at the level of implementation, given competing pressures on agents to be tough on crime as well as successful danger/risk managers. Findings suggest that agents embrace a traditional law enforcement role for themselves that primarily takes an individualistic approach to the clientele and an intuitive approach to their management, rather than taking on the new penological role of actuarial risk managers defined by upper management. The present article seeks to explore actuarial justice under Indian penology in the context of parole, probation and sex offences.

I. INTRODUCTION

The turn of the twentieth century marked a new era of individualization in the field of criminal law. Drawing on the new science of positivist criminology, legal scholars called for a diagnosis of the causes of delinquency and for imposition of individualized courses of remedial treatment specifically adapted to these individual diagnoses. Leading criminal law scholars would declare that "Modern science recognizes that penal or remedial treatment cannot possibly be indiscriminate and machine-like, but must be adapted to the causes, and to the man as affected by those causes...". Thus the great truth for the present and the future, for criminal science, is the individualization of penal treatment, "...for that man, and for the cause of that man's crime." The turn towards individualized punishment gave rise to the rehabilitative projects of the first three-quarters of the twentieth century- to discretionary juvenile courts, indeterminate sentencing, probation and parole, rehabilitative treatment, and the overarching concept of corrections.[1]

* Assistant Professor, Faculty of Law, Coordinator Center for Criminal Law and Studies. [1] Bernard E. Harcourt, *"The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty First Century",* The University of Chicago Law Review, Vol. 70, No. 1,2003

Tins new phenomena of individualized punishment was referred to as *Actuarialism* by Feeley and Simons. [2] They delineated three distinct dements of new penology. First, it is manifested in a new discourse that emphasizes risk and probability as applied to a criminal population rather man diagnosis or moralistic judgments of individual wrongdoers. Second, they posit that the new penology is reflected in objectives transformed from an earlier emphasis on punishing or normalizing deviants to a current focus on identifying and managing classes of criminals. Finally, fey argue that this shift in objectives has triggered the development of a ■ew set of techniques for carrying out the goals of classifying and controlling aggregate risk, including the use of drug testing to measure risk and statistical/ actuarial methods for setting risk level. At the heart of what distinguishes the "old" from the "new" penology is the relative abandonment of the individual in defining and managing criminal populations. The individual, in old penology, is a volitional actor who can be reformed, treated, or punished; thus, his motivation for criminal behavior is an important element to determining appropriate penal action. While old penological policies may refer to aggregates and categories of criminals, the interventions are distinctly aimed at changing the criminal actors or "individuals."' In contrast, new penological strategies, according to Feeley and Simon (1992), are not concerned with why criminals commit their illegal acts but rather with how to most efficiently manage the level of re-offending risk posed by them.[3]

But before proceeding further injhe analysis it is pertinent to note the meaning of the word actuary. The word *"Actuary"* is defined to mean "a person who computes premium rates, dividends, risks, etc., according to probabilities based on statistical records."[4] This looks very strange that a word, which has a meaning synonymous to insurance, has to do something in penology. It is true that penology is a discipline dealing with punishment for various crimes, but it is equally true that the theories of past now have to be re-looked. It is well known that the entire penal policy of various criminal jurisdictions are based on four popular theories, namely, retributive, deterrent, preventive and reformative. In

[:] **Feeley,** Malcolm & Jonathan Simon (1992) *"The New Penology: Notes on the Emerging* ***Strategy*** *of Corrections and Its Implications"* 30 Criminology 449-74.
[1] **Mona** Lynch, *"Waste Managers? The New Penology, Crime Fighting and Parole Agent* ***Ucrttity",*** Vol. 32 Law and Society Review, 1998, p.839
* **actuarial,** (n.d.). *Dictionary.com Unabridged (v 1.1).* Retrieved August 28, 2007, from Dkxionary.com website: http://dictionary.reference,coni/browse/actuarial

this context, this article intends to highlight that now we should be doing some kind of an out of the box thinking and look at new theories from a new perspective to improve our understanding of penal behavior.

However, before analyzing the penological perspective of actuarialism it is better to have a basic understanding of actuarialism. Every one has faced the situation when people have asked them to blacken the dots for standardizing tests. Likewise insurance agents asking for details or pollster inquiring about the magazine we read and how many children we have. At the root of all this questioning is the technique of comparing that uses statistics to represent the distribution of variables in a population. These techniques may be referred to as actuarial, and the practices that rely on them as actuarial practices. These practices are so familiar and banal that it is difficult to notice them at all, let alone see them as central components of a new regime of social ordering linked to myriad exercises of social control and power, e.g., hiring, admitting, campaigning, selling, sentencing, and educating. Yet these practices are generating fundamental changes in our political, social, family and national cultures. Through the lens of representations thrown in by these practices, individuals, once understood as moral or rational actors, are increasingly understood as locations in actuarial tables of variations. This shift from moral agent to actuarial subject marks a change in the way power is exercised on individuals by the state and other large organizations. Where power once sought to manipulate the choices of rational actors, it now seeks to predict behavior and situate subjects according to the risk they pose. The effects can be discerned in the way we understand ourselves, our communities and our capacity for moral judgment and political action.

One's first response might be to point out that actuarial techniques are forms of knowledge gathering; the actions that are taken on the basis of this knowledge should not be blamed on knowledge. But actuarial practices cannot be dismissed as merely forms of knowing, when to be known is to be subjected to significant alterations in life opportunities. The relationship between knowledge and power is interactive. The statistical processing of information allows the exercise of power to be targeted quite precisely. Experts in marketing products and managing populations constantly give rise to new categories of people such as BUPs (black urban professionals), DINKS (double income no kids), high rate offenders, CHINS (children in need of service), and LDs (learning disabled children). Placing people in an actuarially defined category helps mark them as a new subpopulation that calls, in time, for new forms of testing, comparing, and ranking. Thus, school children may be placed in a particular track on the basis of standardized testing, but the track itself becomes a subject for further testing, comparison and ranking. If the recent advertisement of a potato chip (Frito Lays) is examined carefully wherein Mr. M. S. Dhoni, the Indian Cricket Captain, and Mr. Saif AH Khan, Bollywood actor, are trying to woo the consumers and fighting each other about the peculiar taste of that potato chip. It suggests that the idea of the marketing mind is to divide consumers into actuarial categories.

Actuarial techniques play a central role in a proliferating set of social practices. They are at the same time a regime of truth, a way of exercising power and a method of ordering social life. Actuarial practices have not seemed very important nor attracted much interest from social observers in part because they were already so familiar, and in part because they fit so unobtrusively into various substantive projects (e.g., educating, hiring, premium setting) in which they are subordinated as a means to an end. Yet this unobtrusiveness is precisely why they have become so important; they make power more effective and efficient by diminishing its political and moral fallout.

The proliferation of actuarial practices within our society have not taken place without resistance. While they provide a highly efficient means of management, actuarial practices also conflict with other powerful traditions in our cultural background. Since they operate on the basis of aggregate data, they conflict with the strongly held value that people be considered primarily as individuals. Because they operate in terms of predicted future outcomes, they conflict with the related value that those aspects of a person that reflect her intentional efforts be privileged over those aspects that are involuntary. Finally, because they de-moralize the differences or treat the differences as morally neutral, that carry highly-charged political and social significance (such as race and gender), they threaten to obscure the historical effects of domination and conflict with modern efforts to remedy discrimination.

The recent debate on legalizing homosexual behaviour of men, which is in news because of the statement of Health Minister Ambumani Rama Doss, to the effect that it should be legalized. This was opposed from every nook and corner of the country. This statement if tested on the criterion of pure actuarial science, would have given a new public opinion that gay sex should not be treated as pure taboo. More interestingly, the Hindu Marriage Act, 1955 nowhere talks about marriage between a male and a female but talks of marriage between two Hindus only.

Thus the objective of this article is to strive for an answer of this new penology of individualized treatment in the Indian Perspective. The entire article is divided into five parts. The first part deals with the introduction, second deals with understanding actuarial practices in the legal context, third develops the idea of Actuarialism as new penology, focusing on US perspectives (as Feeley and Simons conducted their studies in US environment), fourth talks about the Indian perspectives and finally fifth states the conclusions and suggestions.

II. **LAW** AND ACTUARIALISM

Law plays a central role in our political culture as the place wherein the rationality of social practices can be discussed, and thus it is not unexpected that resistance to actuarial practices has found its way into legal discourse. Value conflicts are entailed in the production of social policy whether it concerns the placement of a highway or a mechanism for military conscription. These choices are challenged, tested, and legitimized in the discourse produced by courts and lawyers. Yet our legal discourse is itself a medium structured by historical practices and ideologies. Certain effects of social practices will be seen as important, while others remain obscure. As a result it shapes in advance the way in which the policy debate can be articulated. With respect to actuarial practices, the first two forms of conflicts, that express the importance of individual autonomy, are easily expressed within the usual categories of legal understanding. The third conflict, which concerns the political meaning of social categories and their relevance for discrimination, is far more difficult to fit into a legal dispute. While it is undeniable that law has grown through the pressure of social movements, the political reality of these movements is generally covered up by these same laws. The tendency of legal discourse is to express the hard won gains of social movements as a priori universal rights-previously existing, newly articulated or discovered rights-that have no connection to the contingencies of historical struggle and change. In addition, these rights are granted to individuals rather than groups. Those examples of legal opinions that have come close to acknowledging the social and political basis of law have been denounced for precisely that reason.

The exclusion of this third dilemma from the legal debate over actuarial practices forces us into a choice between individual and group models of equity. This choice necessarily suppresses what is most invidious about actuarial practices, i.e., the ideological effects it has on group identity. The leading case to consider actuarial practices arose in the context of gender discrimination. In *City of Los Angeles Department of Power and Water* v. *Manhart,*[5] the US Supreme Court struck down the use of gender as an actuarial variable in establishing the amount of employee contribution to a retirement benefit plan as a violation of Title VII of the Civil Rights Act of 1964. The benefit plan provided by Los Angeles Department of Water and Power required higher contributions from female employees because statistically they live longer than men. Since it disadvantaged women on its face, the plan seemed to violate Title VII's proscription against discrimination in the terms or conditions of employment on the basis of sex. As individuals, women were disadvantaged by paying higher contributions to the plan while having no certainty that they would live the additional years required to reach parity. As an aggregate group, however, female employees could expect to receive the same benefits as male employees. Indeed if, statistically, men die at a younger age than women, a plan requiring equal contributions and providing equal payouts will tend to favor women. Because the Court took the gender gap in longevity to be statistically accurate, its determination of whether or not Los Angeles Water and Power discriminated rested on the question of whether Title VII is really aimed at groups or at individuals.

Furthermore, the facts in *Manhart* posed a distinction that seemed without any discriminatory prejudice or stereotyping of women. Justice Stevens's majority opinion assumed that longevity-correctly or incorrectly asserted-is morally neutral, i.e., it is unlikely to stigmatize those to which it is attributed. Since *Manhart* posed a classification that did not incorporate a disfavored social attribute (no one argues that longevity is bad), it strained the traditional justifications for anti-discrimination laws.

Stereotyping, or the imposition of assumptions about a group on an individual, has been central to anti-discrimination laws because of the prominence of individual autonomy as a juridical value. *Manhart* stretches this conception in order to fit actuarial representation into the mould of devaluing moral attributions (blacks are violent, *banias* are misers, women live longer). This strain, however, allows *Manhart* to

[5] 435 U.S. 702(1978)

articulate the nascent cultural resistance we have to actuarial practices in the traditional values of individual autonomy.

On the surface the opinion in *Manhart* has no problem accommodating traditional values. Justice Stevens argued that the use of gender is unlawful where it negatively affects an individual for whom the classification is inaccurate. Stevens argues that the individual, rather than the group, is the appropriate subject of anti-discrimination laws. *"The question ... is whether the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics ....The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class .... Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply ".*[6]

Despite his acknowledgement that the actuarial classification of women in terms of longevity differs from traditional prejudiced classifications, Stevens manages to fit the case back into the traditional analysis of stereotypes. "Practices that classify employees in terms of religion, race, or sex, tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals" By focusing the legal analysis on whether the statute is concerned with groups or individuals Stevens's opinion covers up the ideological effects of the actuarial practices at issue in *Manhart.*

Stevens' reading of Title VII, however, creates a number of problems. First, it contradicts cases in which the Court has allowed a Title VII violation to rest on a showing of group disparity without evidence of a specific intent to discriminate against individual members of that group.[7] As Justice Powell has pointed out, insistence on a rigid individualism concerning the aim of Title VII renders this important "disparate impact" line of cases incoherent.[8] If Title VII is exclusively aimed at protecting the individual it is difficult to see how a showing of disadvantage on the aggregate should have any bearing.

Second, Stevens's focus on the individual would seem to bar remedial solutions that redress historical discrimination against groups at the cost of treating individuals on the basis of their group membership,

[6] Justice Stevens in *Manhart,* 435 U.S. at 709.
[7] *Griggs* v. *Duke Power Co..* 401 US 424 (1971)
[8] *Connecticut* v. *Teal,* 457 U.S. 440 (1982), 458-459, Powell, J., dissenting

Affirmative action plans justified on the basis of past discrimination against a group would seem to violate Title VII if they result in the disadvantaging of individuals on the basis of their race, or other proscribed difference. Yet the Court upheld just such a scheme in *United States Workers* v. *Weber*[9].

Manhart gave rise to a storm of controversy. One group of writers, whom I shall refer to as insurance-oriented critics, attacked the decision as destructive of the rational calculation of risk on which "fair" insurance is based. More strongly, they expressed a kind of shock that what appeared in their paradigm as a value-free technical decision (to use gender in setting benefit premiums) had been adjudged as discrimination. A second group of writers, whom I call rights-oriented critics, defended the decision as a logical extension of the field of anti-discrimination law. These writers celebrated the decision as a sign of the Court's willingness to look beyond the authority claims of a technical elite to root out biased treatment of women. Therefore the focus could shift from group to individual concept of equity. Hence individualized treatment in the penological sense is possible.

III. ACTUARIALISM AS NEW PENOLOGY - US PERSPECTIVE

Jonathan Simon and Malcolm Feeley pioneered a new understanding of contemporary criminal law enforcement, procedure, and punishment that accounts for an enormous shift in institutionalized practices that, over the past three decades, produced zero-tolerance law enforcement, draconian criminal sentences, and mass incarceration vastly disproportionate to the crime rate.[10] These new practices break from traditional concerns for an individual offender—his fault or guilt, his rehabilitation, his post-confinement reintegration into society—and are instead concerned with identifying, classifying, and managing aggregates of risk." In the process, concern for prevention of criminal deviance falls by the wayside, as a certain level of criminal offending is considered inevitable.[12] The issue instead has become simply how to manage it.

* 443 US 193(1979)

" Michael Welch, *The Role of the Immigration and Naturalization Service in the Prison-Imiustrial Complex,* 27 Soc. Just. 73, 78 (2000).

Feeley & Simon, *supra* note 2, at 455. The new penology's goal "is not to eliminate *arme* but to make it tolerable through systemic coordination."

" Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology,* 4 Ps>chol. Pub. PoPy & L. 452, 453 (1998).

Thus, the new penology, at its core, is managerial, actuarial, and statistical—concerned not with individuals, but with managing sub-populations considered dangerous or risky.

Feeley and Simon demonstrate the managerialism and actuarialism of the new penology operating in several aspects of crime control. Law enforcement targets "high-risk" subjects and arrests suspects defined by "racial profiles." Prisons no longer rehabilitate offenders through therapeutic, academic and vocational programs, but incapacitate them based on risk classification. High rates of recidivism no longer demonstrate failure of the parole system's ability to reintegrate offenders, but rather success in efficiently restoring offenders to prisons that manage the risk of their inevitable re-offending.

The new penology's focus is the maximization of social control and efficiency of the criminal justice system. In Feeley and Simon's view, the new penology "manages a permanently dangerous population while maintaining the system at a minimum cost." Through surveillance, classification and containment, the system maintains control over specific populations that cannot be disaggregated from society or transformed.

Such fundamental transformation in the goals of criminal punishment has parallels in deportation laws, the most "criminalized" sector of immigration laws.[13] Consistent with the criminal justice system's abandonment of individualized treatment and rehabilitation for criminal offenders, and its simultaneous embrace of an actuarial approach that simply manages high-risk groups, the immigration system attains social

[13] Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (holding that 8 U.S.C. T^'/J 1231(a)(6) Contained an implicit "reasonable time" limitation of six months, the application of which was subject to federal court review). Although *Zadvydas* restricted the government's authority to hold immigration detainees indefinitely, it did not overrule Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953), which authorized the indefinite detention of immigration detainees determined by Congress or the Executive to pose a threat to national security. See *id.* at 694; see *also* Gavin M. Montague, *Should Aliens Be Indefinitely Detained Under 8 U.S.C. Xi'/i 1231? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny,* 69 Fordham L. Rev. 1439, 1444 (2001). *See generally* Michelle Carey, *You Don't Know If They '11 Let You Out in One Day, One Year, or Ten Years... Indefinite Detention of Immigrants After* Zadvydas v. Davis, 24 Chicano-Latino L. Rev. 12 (2003); Christina DeConcini, *Post September 11: Sea Change in Attitudes and Approach by Government Toward Immigrants,* 1390 PLI/Corp 109 (2003); Joshua W. Gardner, *Halfway There:* Zadvydas v. Davis *Reins in Indefinite Detentions, But Leaves Much Unanswered,* 36 Cornell Int'l L.J. 177 (2003); Susan Marx, *Throwing Away the Key: The Constitutionality of the Indefinite Detention of Inadmissible Aliens,* 35 Tex. Tech L. Rev. 1250 (2004).

control through the mass expulsion of undesirable non-U.S. citizens, while largely ignoring the significance of individualized, mitigating factors.[14] For the small percentage of deportable aliens the United States cannot expel, social control, which is exercised through indefinite detention or warehousing.[15]

In the 1980s and 1990s, undocumented aliens were deemed undesirable, perceived as either taking scarce jobs away from Americans or adhering to the welfare magnet. Criminal aliens, in turn, were undesirable for their criminal, often drug-related, conduct.[16] Immigration reforms have sought to expel both groups of deportable aliens retroactively and to contain individuals in immigration prisons and local jails to minimize the likelihood of evading deportation, all the while drastically limiting avenues of relief.[17]

[14] *See* Miller, *supra* note 12, at 650-51; *see also* Nora V. Demleitner, *The Fallacy of Social "Citizenship" or the Threat of Exclusion,* 12 Geo. Immigr. L.J. 35, 45-46 (1997); Peter H. Schuck, *Alien Rumination,* 105 Yale L.J. 1963, 1985 (1996) (reviewing Peter Brimelow, Alien Nation: Common Sense About America's Immigration Disaster (1995)).
[15] Ellis M. Johnston, *Once a Criminal, Always a Criminal?: Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens,* 89 Geo. L.J. 2593, 2594 (2001).

[15] Ira Kurzban, Kurzban's Immigration Law Sourcebook 49, 53 (8th ed. 2002). A crime of moral turpitude refers generally to: [C]onduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.
[17] Susan Levine, *On the Verge of Exile: For Children Adopted From Abroad, Lawbreaking Brings Deportation,* Wash. Post, Mar. 5, 2000, at Al (chronicling the deportation of Joao Herbert, a Brazilian child adopted by U.S. citizens, deported for a drug conviction, and later killed in Brazilian gang violence). The retroactive nature of deportation for aggravated felons after 1996 socially controls immigrant communities by expanding the screening of non-U.S. citizens for criminality from admissibility determinations made at the border to interior deportation proceedings. *See* Levine, *supra.* The old regime for criminal alien deportation focused on screening for criminal propensities at the border, and excluding those aliens with past criminal convictions or conduct. Under this regime, aliens admitted to the United States could be deported if they were convicted of a single crime of moral turpitude within five years of entry (where a sentence of one year or more is imposed). If a resident alien committed a crime of moral turpitude six years after admission, he or she would not be deportable. One explanation for this rule regime is that immigration officials screened for criminal propensities at the border, permitting deportation on the basis of some post-entry criminal conduct as a way of ensuring that criminal propensities acquired abroad, but not detected at the border, can

Criminal aliens are particularly vulnerable to new social controls within immigration law. Prior to the immigration reforms of 1996, a criminal alien committing a single crime of moral turpitude was deportable only if the crime was committed within five years of entry and a sentence of one year or more of confinement was *actually* imposed. This condition thus associated criminal propensities with proximate cause: criminal offenses committed long after entry were considered unlikely to result from criminal propensities developed in a foreign country. In other words, an alien's criminality would most likely manifest itself within five years of entry.

Since 1996, however, the length of time between entry and offense is irrelevant for most crimes. Moreover, crimes with no deportation consequences prior to 1996 were suddenly and retroactively made deportable offenses. Conviction of a crime for which a sentence of one year or more *may* be imposed is sufficient to trigger deportation, and a lighter sentence nonetheless triggers harsh immigration consequences.

These measures reflect a broader transformation resulting largely from changes in perceptions of non-citizens and the risk they present to the U.S. economy, public safety, and—after September 11—homeland security.[18] Although non-citizens are being treated increasingly punitively, the causal relationship between the severity revolution in crime control and enhanced punitiveness within the deportation system remains subtle. The new penology explains a great deal about this relationship, particularly in the post-9/11 context. First, the government's use of immigration law as a tool in the War on Terror is managerial. Despite great efforts to better secure U.S. borders, the likelihood that foreign terrorists will enter the United States is still considerable. To manage that risk, the Department of Homeland Security (DHS) subjects

be caught soon after admission and addressed through deportation. After 1996, retroactive deportation of aggravated felons is permitted, without regard to when the conviction occurs.

See generally National Commission on Terrorist Attacks upon the United States, 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States (2004). Efforts to better secure U.S. borders include more aggressive law enforcement, greater documentation requirements, and technological innovations such as the US-VISIT program, NSEERS, and new biometric technologies. DHS officials employ the aphorism "safer, but not safe" extensively to emphasize the need for continued vigilance, while reassuring the public that security measures are justified.

a broad spectrum of non-citizens to harsh immigration consequences that are often only indirectly related to terrorist conduct.

Second, the War on Terror is actuarial, relying upon statistical predictions of risk. The apotheosis of this actuarialism is the terror threat warning system that identifies daily the risk of a terrorist attack. Furthermore, immigration law enforcement relies heavily upon religious and ethnic "profiles" of potential terrorists that are both under- and over-inclusive.[19] Targeting Muslim and Middle Eastern men of foreign nationality not only neglects Arab women and U.S. citizens, but also affects adversely a range of immigrant communities, particularly Mexican immigrants with brown skin and dark hair.

Third, the War on Terror relies on surveillance, classification, and containment to maximize control over populations that can be neither disaggregated from the United States nor transformed. Even before 9/11, immigration authorities surrendered the traditional goal of assimilating all foreigners. The national insecurity fostered by the attacks enhanced the perception that immigrants—particularly those from Arab or Muslim countries—were inassimilable. Conceived of not as individuals, but as aggregates of risk, these foreigners are monitored, classified and controlled through a variety of government initiatives.

Racial profiling and expanded reporting requirements exemplify the new penology at work in the War on Terror. Racial profiling assumes guilt or validates suspicion according to group-based characteristics rather than individual culpability. Governmental reliance upon statistical probabilities forms the core of racial profiling.[20] Thus, the racial profiling of Middle Eastern men since September 11 is both managerial and actuarial, less about prevention than risk management. Prior to September 11, racial profiling of African-American men was publicly

[19] *See* Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DePaul L. Rev. 849, 850-51 (2003) (examining the negative impact of the government's response to the 9/11 attacks on the Mexican immigrant community in the United States) [hereinafter Johnson, *September 11 and Mexican Immigrants]*. [M] *Attorney General Seeks to End Racial Profiling,* N.Y. Times, Mar. 2, 2001, at A20. Both President George W. Bush and Attorney General John Ashcroft condemned the practice of considering a person's race or ethnicity in making traffic stops and conducting criminal investigations. *Id.* During his 2000 presidential campaign and later, in a "State of the Union-style" address in February 2001, President Bush condemned racial profiling, saying, "It's wrong, and we will end it in America." Eric Lichtblau, *Bush Issues Racial Profiling Ban But Exempts Security Inquiries,* N.Y. Times, June 18, 2003, at Al.

condemned at the highest levels of the federal government. Even within immigration law enforcement, where non-citizen targets of racial profiling lacked standing to challenge the practice, race-based enforcement of immigration laws was being questioned. Immediately after the attacks, however, racial profiling of individuals of Arab and Muslim appearance commenced with a vengeance, enjoying wide public support and official sanction. Indeed close to two full years after the attacks, the White House, in an unprecedented announcement, issued guidelines barring federal agents from using race or ethnicity in routine investigations, but expressly exempted investigations involving terrorism or national security.

Similar efforts in the War on Terror have subjected non-citizens to broad reporting requirements that increase their visibility to homeland security and criminal law enforcement authorities. Based on immigration status and nationality, male visa holders from designated "Al Qaeda" countries were selected for scrutiny, a tactic that Karen Tumlin has termed as "immigration plus" profiling.[21] In October of 2003, the INS initiated the National Security Entry-Exit Registration System (NSEERS)—commonly referred to as "special registration"—at all ports of entry. Initially limited to male visa holders aged sixteen and above from mostly Arab and Muslim countries, special registration required non-immigrant visa holders to report to local district immigration offices to be photographed, fingerprinted and questioned under oath, all under penalty of deportation. They were required to present any requested documentation, including that of employment, their lawful admission to the United States, place of residence, title to land, or lease and rental agreements. Before its phase-out in April of 2003, and absorption into the comprehensive, biometrically-based U.S. VISIT system, special registration procedures processed 60,822 non-immigrants. The program effectively flushed out thousands of non-immigrants for technical immigration violations, but discovered few terrorists.

Eight thousand men sought for voluntary interviews by DOJ officials were also chosen based on a combination of ethnicity, nationality, and race. Shortly after the attacks, many Arab and Muslim non-citizens living in the United States, with no known ties to terrorism were required to report to law enforcement officials for interviews related to terrorist

[21] 67 Fed. Reg. 52,584 (Aug. 12, 2002); *INS Publishes Final Rule on Special Registration, Monitoring in Light of Ongoing Terrorism Concerns,* 79 Interpreter Releases 1230,1230 (Aug. 19, 2002).

activities, simply by virtue of nationality or religious affiliation. The voluntary interview process not only makes certain aliens more conspicuous, it simultaneously demonstrates how law enforcement officials target certain immigrant communities on the arbitrary bases of nationality or religion rather than on actual knowledge of terrorism. Indeed, the process has been criticized for spreading fear among immigrant communities while producing few leads on terrorism.

Taken together, these initiatives illustrate the government's post-9/11 homeland security strategy, specifically to cast a wide net for terrorists using the regulatory discretion of immigration law enforcement and harsh criminal law consequences to non-citizens to purge society of noji-citizens considered risky due to nationality, religion or race. Immigration law thus functions to detain vast numbers of non-citizens until their potential dangerousness can be assessed.

Furthermore, the narrow avenues of relief from detention and deportation encourage those non-citizens caught in the counter-terrorism dragnet to cooperate with homeland security officials and in effect, to work for the department. The DHS's use of the S-visa clearly illustrates this social control dynamic. S-visas have become increasingly attractive to non-citizens in the strict, zero-tolerance immigration law enforcement regime after 9/11, because they allow those aliens cooperating with terror investigations and prosecutions to remain in the United States. As criminal and immigration law scholar Nora Demleitner notes, *"Such immigration benefits in exchange for cooperation have become increasingly more valuable as the number of deportable offenses have risen dramatically, and immigration judges have been deprived of much of their discretion to avert deportation. "*

[22] *See Encourage Cooperation Not Fear,* Miami Herald, Sept. 15, 2002, at 4L. Even the approximately 6000 noncitizens chosen for removal as "priority" absconders under the Alien Absconder Initiative were selected from a pool of some 320,000 individuals with final orders of deportation based on Middle Eastern heritage or Muslim religion. Leti Volpp, *The Citizen and the Terrorist,* 49 UCLA L. Rev. 1575, 1579-80, 1580 n.12 (2002). Furthermore, the Bush administration's policy of automatically detaining asylum seekers from thirty-three Middle Eastern and South Asian countries has been criticized as prejudging guilt on the basis of country of origin. *See* Christopher Drew & Adam Liptak, *Immigration Groups Fault Rule on Automatic Detention of Some Asylum Seekers,* N.Y. Times, Mar. 31, 2003, at B15.

Significantly, immigration law and policy—as it converges with criminal law and punishment—has embraced the severity revolution occurring in crime control over the past three decades, and its attendant features of risk management, containment and control. The DHS's social control mechanisms after 9/11—detention, racial profiling and harsh, zero-tolerance immigration law enforcement with very narrow avenues of relief—raises the question whether these initiatives improve or impede counter-terrorism efforts. Zero-tolerance law enforcement breeds fear of the government in communities best situated to investigate and report suspicious activity sponsored by Islamic fundamentalists. Instead of cooperation, however, these policies also breed resentment in those communities that might otherwise denounce terrorism.

IV. ACTUARIALISM AS A PENOLOGY THEORY IN INDIAN PERSPECTIVE

Actuarialism as a concept is now gaining momentum even in India. After the enactment of Actuaries Act 2006, in India we have Actuarialism established as a separate branch of study. The Constitution of Indian Actuarial Institute is also a direction in this regard. Therefore it is imperative to study this new concept of Actuarialism in penological perspective. In the modern age when crime prevention is the most significant aspect of penological policy, the technique of Actuarialism will help in understanding the use of this mode to have a proper policy on penology. The use of science of actuaries will help us understand how wheat can be separated from chaff and how serious punishments can take more space in judicial sphere. In view of the vastness of the issues of penology in all its dimensions and the limitations of an article of this sort, for the purpose of understanding Actuarialism as new penology in Indian perspectives, I have focused, primarily, on three areas, namely, Parole, Probation and the sexual offences.

Present Indian Criminal Jurisprudence believes that criminals are made rather than born, therefore crime is not hereditary but culmination of various socio-economic milieu. These factors may be social and economic, may be due to erosion of moral values by parental neglect, stress of circumstances or doing a criminal activity in the spur of the moment. So, whenever a criminal activity takes place it is not always that the person involved had prior intention to commit the crime; sentencing such a man to prison term may often embitter him and turn him into an enemy of the society. Thus, it is absolutely necessary to rekindle him and bring him into mainstream of life. This rekindling can be tried through parole and probation, community service and creative and employment opportunities. Thus parole and probation services are becoming increasingly popular for many reasons, the most important being the economic cost of maintaining offenders in prison. But the Indian system of Parole as a post conviction relief is much debated and most of the penological writers have questioned its sanctity as a system. As various state wise statistics show that parolees commit crime after being enlarged on parole shows that this system poses a threat to society. Further the parole is misused at times by the prison inmates to strengthen their ties with criminals and with their gangs etc. Thus whether this system in India should be completely done away with for the reasons discussed above, or be continued for its economic cost advantage is a major question that has to be kept in mind.

Parole is a form of conditional release granted to the prisoners after they have served a portion of their sentence. The conditional release involves a service, which includes the control, assistance and guidance the offenders need as they serve the remainder of their sentences within the free community. Statistics suggest that 51822 of the 173575 offenders released in 2001 have committed parole violations.[23] This suggests that some change is required in the present system of parole. This change can be in the view of actuarial techniques. The managerial technique can solve this problem in a much better way. By using the actuarial techniques we can identify actual categories where more focus is required.

The development of parole in Illinois during 1900 to 1935, for instance, is a story of actuarial aspirations; clinical realities by default displaced by a multi-factored actuarial test, leading to a narrower and narrower actuarial model over time. The model gradually shifted from trying to find the most appropriate rehabilitative remedy to trying to predict success or failure on parole-something which can be far more easily operationalized. The formalization of parole guidelines had an important influence on the development of sentencing guidelines, which reflect clearly a political decision to abandon the individualized punishment model and instead to impose uniform, consistent and proportional sentences. Sentencing guidelines have tended to further narrow the focus of the actuarial model on the severity of crime and prior criminal history. The development of criminal profiling in the mid-twentieth century reflects an effort to use a quasi-actuarial approach based on mixed

[23] The figure is gathered from Crimes in India and other publications, and is consolidated of all the States so only approximate and not accurate.

statistical and clinical methods to predict criminal behavior. It shows that parole and sentencing guidelines are aimed at observable conduct and visible attributes associated with crime.[24]

The same can be said about the tool of probation. In India this tool of Probation has been criticized a lot ever since it was incorporated in criminal justice administration. Probation may be defined as, "a method of treating (correcting) suitably selected offender by releasing him into the community upon certain conditions prescribed by the court on conviction, before sentencing (offender) generally under supervision of Probation Officer."[25]

Correctional services like Probation and Parole in reality is a compromise between the twin objectives of punishment i.e. the protection of the community and the rehabilitation of the criminal. The success of the scheme lies in the achievement of fulfilling these two social objectives. Of course an offender can be corrected into a normal citizen only if he co-operates in the procedure. So, the active and willing co-operation of the offender has to be enlisted by the agencies in charge of the Probation system, viz- the Court, the Probation Officer and the social organization which may sponsor his case. The vigilant watch over the offender's behaviour during the period of Probation thus becomes important and also his understanding submission to it. For effectiveness, the application of probation and the follow up, demand the probation officer's activist involvement. The major function that the Probation Officer undertakes include: (I) Making preliminary investigation (II) Making post-conviction supervision (III) Having friendly behaviour and kind disposition towards the accused (IV) Winning co-operation of the delinquent's companions, family and social organization. These objectives can be fulfilled by the techniques of Actuarialism. The actuarial science of registering, notifying and categorizing is of great help in achieving the aforesaid twin objectives.

Recidivism among select criminal subgroups has long been a central focus of Indian Penology and the wording of S.75 of Indian Penal Code definitely focuses on the same.[26] But by use of Actuarial Justice *%nd*

[24] Bernard E. Harcourt, supra note lat p.l 17
[25] Dr. Hira Singh, *Social Defence (Vision 2020)*, article available online at http:/www.planning commission.nic.in/reports/genrep/bkpap2020/21_bg2020.doc. visited on 16/10/2008.
[26] S.75 of IPC: **Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction:** Whoever, having been convicted, (a) By a court in India, of an offence punishable under Chapter XII or Chapter XVII of this Code

techniques the problem of recidivism particularly in sexual offences can be reduced as has been done in US where the sex offenders' registration and notification has helped in checking the problem of recidivism. US uses two basic methods of classifying sex offenders for purposes of notification: compulsory and discretionary. The compulsory method, used in nineteen states, requires all offenders convicted of certain child or sex offenses specified by the legislature to register and undergo notification, without regard for risk of individual offender recidivism. In Tennessee, for instance, individuals convicted of specified sex offenses are required to register, without regard to individual risk. The Tennessee Bureau of Investigation thereafter makes available on its Internet site the registration information collected, including the offender's name, home address, photo, date of birth, and driver's license number. In Oklahoma, depending on which statutorily specified crime an offender is convicted of, the offender is classified as a "sex offender," or a "habitual" or "aggravated sex offender." Sex offenders must verify their registration status annually for ten years, while habitual or aggravated offenders must do so every ninety days for their lifetimes. Information (e.g., name, address, photo, and offense) on all registrants is available to the public by request or by Internet access, but local law enforcement machinery can also provide information on registrants to the community at-large "by any method of communication it deems appropriate."[27]

Similar efforts are required in India too to ensure that these problems can be checked. By having a device for registration and notification that too through e-governance can help Indian justice administration a lot. Therefore in the light of S.75 of Indian Penal Code every police station should be mandated to compulsorily register and notify sex offenders. This database will help in future to minimize the risk of sex offenders and will expedite the entire investigation procedure.

V. CONCLUSION

Law is one of the primary ways in which a sustained effort is made to rationalize choices about which solutions should be employed to manage

*-•_" imprisonment of cither description for a term of three years or upwards, shall be r-
"t} of any offence punishable under either of those Chapters with like imprisonment *.r
the like term, shall be subject for every such subsequent offence to imprisonment for
i. or to imprisonment of either description for a term which may extend to ten years. "
Wayne A Logan, "/I *Study in 'Actuarial Justice': Sex Offender Classification Practice md Procedure"*, Buffalo Criminal Law Review, Vol. 3, p. 593 (4/24/2000)

social problems. Laws do this by subjecting social practices to an inquisition that demands the manner of representation be justified and generalized. Legal discourse spreads and reinforces the logic of those representations that it affirms. In this discourse, the success of actuarial methods in shaping a new ideological basis for the governance of social life will be marked by its ability to colonize legal discourse with its representations. The actuarial framework amplifies the distance between the sentencing framework and the individual offender, it employs a technology that takes aggregate of offenders rather than individual offenders as subjects of penal analysis and it is carried by an ideology with no perception of the individual offender, but of a balance between correctional resources and public safety. It may be that the actuarial strategy produces a larger aggregate inclusion of individual offenders in communities, but it selects offenders using a framework with a perception of offenders as numerical objects rather than morally or socially capable subjects, and it does not operate to restore individual offenders as capable individuals in society.

At present a simple warrant case of theft in a dwelling house and *i* gruesome act of chopping off of hands of a person enters equal judicia sphere. Furthermore frauds, which affect the whole country's economy have even lesser space.[28] Like wise the offences of domestic cruelty b; husband and his relatives, defamation, bigamy, adultery, which ar< private complaints take a lot of time to settle. Therefore the use o actuarial science can have optimal balance with regard to cost-benef analysis. This way Indian penology can take a cue from US penology t go for a full fledged system of registering, notifying and categorizin offenders as a tool for crime prevention.

WOMEN'S RESERVATIONS: A RE-ASSESSMENT

DR. A.P.SINGH

It is around a decade now, since we have been debating the issues relating to reservations for women in Parliament and State legislatures. Everybody would agree that the issues relating to women need urgent attention, but nobody appears to agree on the same thing in the same sense and a proverbial devil apparently lies in the details. Equality in every sense of the term is available under the constitution, there are provisions for special treatment of women, 33 percent reservations in local self governance bodies have also been provided for and some states have already started providing 20/30 percent reservation for women in government services. However a few questions of fundamental importance remain to be properly articulated and answered, i.e. Does a quota for women bring about social change? What is the relation between caste and class? Do quotas bring to prominence people who otherwise would never have attained governance positions? Would men/political system have fared differently in the absence of quota system? Shall the reservations for women lead to eradication of social evils against women? Are the political institutions in the country in a quandary as they are at the moment, in a position to transform the social standard in favor of women? Shall it have any short term or long term impact on the functionality of the system as a whole? This paper is an attempt to address some of such un-articulated and un-answered questions relating to the cause of women.

1. INTRODUCTION

When India is raring to emerge as the economic powerhouse of the world **aid** engine of growth of the entire Afro-Asian region in the globalised village and the world is awakening to the call of enlightened feminism, **Indian** women-hood still wallows in the slime of primordial misogyny.[1] **Woman** who conceives, nurtures the foetus, gives birth, nurses the infant

Associate Professor (Law), National Law University, Jodhpur.

Shobha Saxena, *Crimes against Women and Protective laws,* Deep and Deep 5*ablications, New Delhi 1995 and makes him worthy for human civilization, fosters and chisels its future with her own blood, is discriminated against, treated as an economic drain, exploited or dispensed with as a non-person because she crushes her family with marriage and dowry expenses. Her birth is greeted with silence, nay with sorrow whereas a boy arrives to the sound of conch shells.[2] This is only the beginning of a host of crimes and injustices perpetrated against the womenfolk.

The process starts even before she takes birth and continues till she is buried in the grave. The list of crimes amaranthine as they are, vary from simple harassment, physical and mental to eve-teasing and sexual harassment at work place, to rape and bride burning, cruelty and wife beating and so on. The worst aspect is that these crimes are committed within the four walls of the house where she is supposed to have her emotional roots. This and many other crimes are committed despite the existence of hosts of constitutional guarantees of equality and dignity, an assurance that the state shall not discriminate against any citizen on the grounds of religion and race, caste, sex, place of birth etc.[3] Article 14 guarantees all kinds of equality including equal voting rights and political participation to both men and women. As reflected in the preamble, the Indian Constitution is firmly grounded in the principles of liberty, fraternity, equality and justice and contains a number of provisions for the empowerment of women. Women's right to equality and non-discrimination are defined as justiciable fundamental rights and there is enough room for affirmative action programmes for women. Equality of opportunity in matters relating to employment or appointment to any office under the State is also a fundamental right.[4] The Directive Principles of State Policy stress on the right to an adequate means of livelihood for both men and women equally,[5] equal pay for equal work for both men and women,[6] provision for just and humane conditions of work and for maternity relief.[7] Directives for promoting harmony and renouncing practices derogatory to the dignity of women are also provided for in the Indian Constitution.[8] The political rights of women are recognized without any discrimination, or distinction and they have the right to participate in decision making at all levels equally

[2] Shobha Saxena, *Crimes against Women and Protective laws,* Deep and Deep Publications, New Delhi 1995
[3] Article 14 and 15 of Indian Constitution
[4] Article 16 of Indian Constitution
[5] Article 39a of Indian Constitution
[6] Article 39d of Indian Constitution
[7] Article 39e of Indian Constitution
[8] Article 51A (e) of Indian Constitution

whh men. The right to constitutional equality has been supplemented by legal equality by the passage of a number of Acts through which the traditional inequalities with respect to marriage, divorce and property rights are sought to be eliminated. However, in spite of these constitutional and legal provisions, the ground reality is that women have not obtained adequate and proportionate representation in the legislative and other decision-making bodies.

There is certainly a need for women's more effective role in decision-making processes for the democratic and constitutional assurances of equal citizenship and rights in the Indian Constitution to become a reality at die operational level. Citizenship is linked to political participation and representation. Lack of ability and opportunity to participate in the political system implies a lack of full membership in the system. For true equality to become a reality for women, the sharing of power on equal terms with men is essential. But the reality is that women continue to be marginally represented even in areas where the various policies have a direct impact on them. There is still a great gap between constitutional guarantees and the actual representation of women in the political system in India.

2. EXISTING STRATEGIES: THE LIMITATIONS

The million dollar question, to begin with is, how do we ensure that women play an effective role in the decision making process at the political level? It has been proposed and argued more than once that providing quota for women probably would do the trick. 73^r and 74' Constitutional amendments have already been implemented and have initiated the experimentation on women's role in political decision making process at the lowest level of Indian Democracy i.e. Panchayati Raj and Municipality levels. One has to concede that at least in absolute terms if nothing else, the political representation of women has substantially increased in the wake of implementation of 73^rd and 74^th Constitutional Amendments. However that has not led to an overall improvement in the political decision making process in terms of role of women. Therefore there are certain vital questions that I intend to raise here, Does a quota for women bring about social change? What is the relation between caste and class? Do quotas bring to prominence people who otherwise would never have attained governance positions? Would men/political systems have fared differently in the absence of quota system? Shall reservation for women lead to eradication of social evils against women which we had referred to earlier? Are the political institutions in the country in a quandary in an attempt to transform the social standard in favor of women? Shall it have any short term or long term impact on the functionality of the system as a whole? These and many such questions need to be answered for balanced analysis of the implications of women's reservations in proper perspective.

I do not answer these questions on either side. However I propose to make an argument that mere political representation may not serve the ultimate goal of women's empowerment, if that is the goal of the system. The line of argument adopted here is to highlight the limitations and drawback of the state intervention to affect social change and ensure that women's participation in socio-economic and politico-legal life of the country is ensured. Thereafter I move on to lay bare the strategies for future to ensure that women get their ultimate due. This goes without saying that the purpose of reservation for women is not to increase employment opportunities for women, nor even to improve their economic condition, but the basic purpose of reservation is to give them a chance to participate in the affairs of the community and in decision making process and thereby enhance the sense of participation so that others may emulate them and move ahead in the ladder of socio-political power game. Apart from this it also entwines a notion of historical restitution or reparation to offset the systemic and cumulative deprivations suffered in the past.[9]

It may not be out of place in this context to mention that right since the beginning of 19th century when we launched our struggle for national rejuvenation, the issue of social reform in general and emancipation of women in particular has been the prominent issue in every agenda that we have formulated for guiding our struggle. An important and noteworthy point in this context is that the fight for social reform and emancipation of women was fought at two levels, i.e. social and political. On the social front the struggle was against social evils such as sati, polygamy and emphasis on widow remarriages and women's education.[10] These efforts for removal of social evils were re-inforced by

[9] Jayanti Alam, *Ideology of Oppression under secular Constitution,* Mainstream, Vol-XXXVI, No 40, New Delhi, 1998.
[10] Prem Arora, *Comparative Politics and Indian Political System,* Cosmos Bookhive Pub, New Delhi, 1998.

the instrumentalities of law such as Sati Prohibition Act, Widow Remarriages Act etc. The stalwarts of early reform movements emphasized on social reform as a pre-condition for political reforms.[11] The later reformers, however, relied more on affecting social reforms by using the instrumentality of the State rather than work upward from the grassroot level transforming the social scenario as a ground for initiating reform at the political level.

This tradition of using the instrumentality of the state for social reform continued in the post-indpendence period and a host of social reform laws, like Sati Abolition, Child Marriage Prohibition Act etc. joined the statute books. Now once again we are attempting to uplift women through a new legislation. What has been forgotten in the process is that legal remedies for social ills can work upto a point. Beyond that it depends on the extent of acceptability of value system in the society at large. Human history is witness to a process of social development preceding the development of political institutions and the development of rules of governance. Unless the acceptability of the political institutions and rules of governance is "deep and comprehensive" no force can really implement it.

In fact this concept is also the basis of modern democratic governance. Mahatma Gandhi conclusively proved that the ruled can not be governed without its consent. This is not an argument for status quo or an apology against social transformation. The point is that for affecting social change one has to see first that favorable conditions are created and institutions developed for the purpose. Political institutions are essentially the tools of governance.[12] What we have been trying is to use political institutions and instrumentalities of the state for social transformation and the history of last few years is proof enough that we have miserably failed in that. My submission is that the causes for the present ills of political governance are the in-appropriate usage of the institutions, i.e. using certain institutions for purposes for which they are

; Ibid

" Swaminathan S Ankaleshwar Ayer, *Institutional Barriers of Reforms,* Times of India. New Delhi, September 20, 1998.

not meant. This in a word is a systemic aberration. Unless we correct it there is no hope of overcoming the present ills of our polity.

What is even more disconcerting is the fact that the institutions we have emulated are essentially western in origin whose acceptability in our system is neither "deep and comprehensive" nor is it spread evenly in all the sections of our population. It may be noted in this respect that the socio-political institutions do not develop in vacuum. They have strong cultural resonances. Their structural combinations are highly complex and determined by history, culture and tradition. Their roots lie deep in the ethos and social behavior of a particular system.[13] If one wants to emulate the institutions of the system alien to one's ethos and culture, tradition and convention there has got to be a long indigenization process and some kind of an acceptability developing on a large scale. This is not the case with India.

On the contrary, here people have developed abhorrence or a grudge against the state and its institutional structure as a result of long drawn struggle for political independence. And by emulating the institutions of the same system we have brought in an inherent contradiction in the sense that now we are called upon to respect and abide the dictates of the same system against which we were called upon to wage a struggle earlier. This led to the development of a paradigm wherein the individuals' relation with the state is of an adversarial character and not that of willing cooperator.

The new welfare state, dispenser of goods and services and provider of employment etc. has used the master-key of political/state intervention for all socio-economic issues though the particular problem may not concern the political domain. Burdening the state system with the things it cannot solve, to my opinion, leads to some sort of dysfunctionalism of various structures of the state system on the one hand and on the other various kinds of frustrations develop. In contrast to this we have had various social institutions which did not allow politics to dabble in its affairs and concentrated on issues of social development and social evils. Such institutions did not only flourish quickly but also developed a strong grip over public mind. Brahmo Samaj, Prarthan Samaj and Arya Samaj etc can be cited as some of the examples. Within the life time of an individual these institutions developed a strong grip over public mind and contributed towards social development and eradication of social evils.

[13]Ibid, n. 12.

The state system no doubt brought in many a social reform, but they are at the most facial and superficial and their acceptance level in the social arena is neither deep and comprehensive nor distributed evenly in all the sections of society. On the other hand, political reforms whenever brought about at the instance of social reform movement or social institutions, have been both deep and comprehensive.

3. WOMEN'S RESERVATION

Women's reservation is a way of seeking women's emancipation by way of state intervention i.e. affecting social reform by the instrumentality of the political system. On the basis of the above analysis it may be argued that this measure for women's upliftment is neither sufficient nor purposive but is merely a political face-wash. There is nothing to suggest that bringing 180 women in the parliament might benefit the women in general. Studies have compelling evidence to suggest that ascendancy of women to political eminence does not necessarily lead to the beneficial deal in favor of women. Rajasthan and U.P. where women chief ministers have ruled for a substantial period of time have not changed power equations in favor of women. Mrs. Indira Gandhi was at the apex of Indian political scene for almost two decades. Smt Bhandarnaike and then her daughter Mrs Chandrika Kumartunge had dominated the political scene of Sri Lanka and the political scene of both Pakistan and Bangladesh has been dominated by women politicians like Benazir Bhutto, Begum Zia and Shiekh Hasina Wajed. One may meaningfully raise a question whether this has brought in any significant change in the lot of South Asian women. The answer is evidently and categorically a big NO.

Added to it is the fact that women political leaders even when they are at the apex of political/state organization do not necessarily favor women centric policies for the dynamic of power structures is different. The reason for the low influence of women-centric policies in the formal political structures and decision making levels, seems to lie in the compulsions of competitive elections and the quest for power by the political parties in a multiparty democracy. Increasingly the compulsions of the political parties due to narrow majorities, precarious coalitions and hung parliaments have made the question of power rather than that of representation the determining factor. Women's issues and women's participation and representation are encouraged only within the parameters of power and are constrained by the basic objectives and interest of the parties either to capture power or survival, if in power.

Further it must be understood very clearly that even if women's reservation may bring about a swift quantitative jump in legislatures, it is unlikely to improve the overall quality of the governance in the country and benefit the women in any significant manner. The argument that the participation of a few in the decision making process might give a sense of participation to a large section of women presumes that public institutions are resources at the disposal of their members for altering the distribution of power in the directions that they consider desirable.[14] While this does not serve the purpose of empowerment to any significant extent, this leads to the displacement of objectives of the institutions and wastage of public resources. This also entails the question of efficiency of the system as a whole.

These points have never been discussed in the debate over reservations in general and women's quota in particular. When we talk of one third of the public offices to be filled on the basis of reservations, this point needs a thorough debate. Article 335 of Indian Constitution speaks of maintaining consistent efficiency of administration while fulfilling the demands of underprivileged sections of society, but in the debate over reservations this article never figures in the agenda anywhere. The reason appears to be simple. Here we take care only of a particular community and its share in the cake of national resources, not as individuals and members of a whole political system whose efficiency is our concern.

4. AFFIRMATIVE ACTION PROGRAMME OF US

This may be contrasted with a similar system prevalent in USA, by the name of "Affirmative Action Programme, title VII, which provides the package of principles for affirmative action is nothing like quota system in India. It specifically makes it clear that affirmative action will not in any case mean the lowering of qualifications and undermining the merit.[15] Interestingly there has all along been unanimity on the point through the entire spectrum of political class of USA. Here in India for

[14] Andre Betielle, *Power and Authority,* Times of India, New Delhi, April 19th 1994.
[15] Deepankar Gupta, *Question of Quotas,* Times of India, New Delhi, September 26' 1998

filling up of reserved quotas we continuously bring down the merit and even minimum qualifications too can be dispensed with as has been held by the Supreme Court in the Case of State of Kerala v. N.M.Thomas[16].

5. PANCHAYATI RAJ EXPERIMENT & RESERVATIONS

A lot has been written about 73rd and 74* amendments and it has been claimed that the experience gained by the Indian Republic in the process justifies reservation at the higher reaches of India's political system i.e» the state legislative assemblies and the Parliament. One might re-call in the late 50s when Panchayati Raj System was launched in Rajasthan at the recommendations of Shri Balwant Rai Mehta Committee, it appeared that Rajasthan would emerge as the pioneer of a big revolution. But the scheme was stillborn for 18 years when the elections for Panchayati Raj institutions were first held in Rajasthan.[17] It has not been more than one and half a decade since elections were held on the basis of 73rd and 74th amendments. It would be pre-mature to term it as a successful experiment. It would take decades before one can make a definite and meaningful statement about the usefulness and longevity of systems initiated by 73rd and 74th amendment.

It may be noted that women's reservation shall have its own logic of operation. So far no scheme has been devised and proposed to operate it. According to the information provided by the National Commission for Women the new scheme shall be modeled on the scheme already operative at Zila Parishad and Panchayat levels. Reserved constituencies of women shall be selected through a draw of lots which means that they shall keep on changing with every election.[18] Thus no one including women who get elected once from a particular area will have any incentive to nurse their constituency because there shall be no knowing which constituencies shall be earmarked for the women next. At a time when political accountability is already at a discount this measure shall lead to further deterioration of the situation and there shall be no incentive to be accountable to the constituency concerned.

[16] AIR 1976 SC 490
[17] Mangal Bihari *Women's Reservations: An analysis,* Rajasthan Patrika, Bikaner, May 27th 1997
[18] Madhu Kishwar, *Women's Reservations,* Hindustan Times, New Delhi, Jul 19th 1998

It may also be noted that once the special constituencies for women are earmarked it shall be highly unlikely that any political party shall field additional women candidates. Women shall forever be pitched against women and they will view each other as rivals rather than as potential allies to work with on issues of common concern.[19] This in a way would ghettoize the women. We shall have no scene like we witnessed sometime back in Parliament wherein women, irrespective of party allegiance gathered and raised their concerns unitedly.

There already exist multiple levels of reservations in jobs and legislatures like SCs, STs, OBCs, BCs, AJGAR, KHAM and so on. By opting for women's reservations we are going to create further divisions in the society. Women's reservation bill has been aborted thrice and has been hanging fire for more than a decade in the Parliament precisely for this reason, i.e. whether reservations for women should be provided on the basis of their caste and communal identity?

It may be noted that during the debate on women's reservations Mr. G.S. Banatwala, had demanded that there should be comprehensive reservation both for men and women to give proportional representation to OBCs, Dalits and minorities.[20] In fact this was the precise language used by Mr. Mohammad AH Jinnah during the round table conference while demanding a fair representation for Muslims. One might venture to guess in which direction we are moving. One might fruitfully remind oneself that the special subcommittee of Sardar Patel, Dr. Ambedkar, Pandit Nehru, Dr. Rajendra Prasad and Sh. K.M. Munshi formed on minority problems had rejected both separate electorate and reservation, saying these might disrupt the whole conception of democracy.[21] Patel wrote "Although the abolition of separate electorate had removed much of the poison from the body politic, the reservation seats for religious communities it is felt, leads to a certain degree of separatism and was to that extent contrary and an exception to a secular and democratic state." Pandit Jawahar Lai Nehru, while responding to a speech by Begum Rasool, against reservation in the Constituent Assembly had observed "I think that doing away with this reservation business is not only a good thing in itself, good for all concerned more specifically for the

[20] Zafar Agha, *Pulled and Pushed,* Hindustan Times, New Delhi, Jul 19th 1998.

B. Shiva Rao, *The Framing of India's Constitution: Select Documents* (Govt of India Press 1968)

[2] B. Shiva Rao, *The Framing of India's constitution: Select Document* (Govt of India Press 1967)

minorities, but psychologically too, it is a very good move for the nation and the world. It shows that we are really sincere about this business of having secular democracy."[23] Contrary to the sentiments of founding fathers of Indian Constitution we have kept the juggernaut of reservation moving and enlarged it with the passage of years.

6. STRATEGIES FOR FUTURE

What is the way out then? No body disputes that if the country is to march confidently into the new era of equality and prosperity and take long strides in the matter of development, the lot of women has got to be improved. There is certainly a need for women's more effective role in decision-making processes for the democratic and constitutional assurances of equal citizenship and rights in the Indian Constitution to become a reality at the operational level. After all citizenship is linked to political participation and representation. How the goal of emancipation of women is to be achieved is a matter on which there has to be a thorough debate. It must be recognized that boosting women's political participation needs to go beyond raw numbers to encompass the complex relationship between power, poverty and participation. Women want to and should be able to participate in the decisions that affect them, their families and their communities.

First of all it must be accepted that the issue of women's development is basically a social issue and for finding out the solution and changing the social standards in favor of women the fight has to be at the social level. State intervention, because of its adversarial character with the social system, entails some kind of a backlash and forecloses the chances of social transformation. It is comparatively easier for the people at the apex of the political system to pass this or that legislation rather than waging an intensive struggle for changing social norms in favor of women. They naturally choose the easier path. But in this process they give rise to so many contradictions which are not only difficult to manage but stop the growth of social organism.

Ibidn.21

It is not that the state at no place can prove to be useful. But the initiative has got to be at the social level. It has got to be accepted that the state is not equipped to effect social transformation overnight by passing this or that legislation for that merely changes the formal rules of the game whereas the informal rules, traditions, conventions and ethos of the people are equally important for bringing about change in the thought process of the people.

Education naturally has to play a big role. We will have to remind ourselves that the state of Kerala which has achieved the best results in matters of status of women and population control, is the first fully literate state of the Indian Union. Evidently success has been achieved by the instrumentality of the education.

Secondly, we have to realize that during the last 50 years of our independence, we have not tried to cultivate the spirit of enterprise and individual initiative. American democracy from the very beginning is individualistic and enterprising in character. The Horatio Alger story of rising from rags to riches, the tales of how the west was won by sheer individual persistence and determination and accounts of early settlers who refused to allow status considerations of the old world to nestle in the colonies are all part of the popular lore that most Americans hold very dear.

It is not that we do not have our Horatio Algers. We have them in millions. Millions of refugees who crossed over from what is now the territory of Pakistan, without any aid from the state rose to prominence and within a few decades, they were the star performers of Indian Economy. It shall be very difficult to find such rags to riches stories anywhere else in the world. A thousand case studies of such miracles could show the way for our millions. But we do not celebrate excellence. What we do is that we put a premium on inefficiency and teach our people to look towards the state succor in times of crisis. The state system provides the crutches to the socially handicapped and the result is for all to see. This part of our population with crutches has got atrophied forever and anon refuses to grow. In the 7th decade of our independence and standing at the gate of a new era of economic prosperity, we shall have to change our perspective of

[24] Andre Betielle, *Power and Authority,* Times of India, New Delhi, April 19th 1994

development and growth or else we may atrophy another body part of our social organism.

ISSUES ON PATENT SECURITIZATION

DR. MEI-HSIN WANG

ABSTRACT

Current worldwide economic recession aroused more doubts on patent securitization. However, securitization is the most advanced financial technique developed in the last 20 years, started with pass-through then mortgage-backed bonds to collateralized mortgage obligations. Asset-backed securities expands from mortgage loans to car loans, credit cards etc., providing a wide variety of financial instruments. Intellectual property is a kind of intangible asset, IP backed asset securitization gives opportunities for the inventors, start-up companies and capital demanding industry to raise funds with flexible resources and at a much bigger scale. Patent backed asset securitization has attracted the attentions from the international companies to apply to their intellectual property strategies. Although issuance volume for intellectual property securitization, has been relatively low, intellectual property remains an asset class with a potentially robust outlook. This article discusses issues related to intellectual property securitizations. Guarantees from government, exclusion of the collaterals from the balance sheets of originators, complete and detailed statistics on mortgage loans, ability to develop pre-payment models and attractions from investor by developing new financial instruments are important success factors.

INTRODUCTION

Patents can be used for various purposes, transformation into a product and launching it to the market are not be the only options. Patent-backed securitization gives the opportunities for the inventors, start-up companies and capital demanding industry to raise funds with flexible resources and at a much bigger scale.

Generally speaking, the raised fund is not a revenue, therefore, it is not subject to income tax. In addition, it is not a mortgage-backed loan, hence there will be no interest upon this capital. Moreover, the scale of this capital is based on future business success and royalty, therefore, the size of the capital is likely be bigger than traditional mortgage. The loans

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are often 20-30 % percentage deduction based on the original value of those assets.

As a new type of financial instruments, there are various financial managements for the companies to convert the biomedical patents to cash, such as sales, out license, joint venture, strategic alliance, spin out, donation for tax write-off and securitization. Some of the patents turn out to be very profitable, for example, the average revenue per active patent in pharmaceutical industry was from US$ 6.5 million for Eli Lilly to US$ 25 million for Merck[1]. As the biomedical patent normally requires a long period of development and compliance with complicated FDA regulations, therefore, the return on each survived patent often generates much higher profit than any other industries.

Coming to semiconductor industry, manufacture and research development consumes an enormously amount of budget, but still semiconductor companies have to struggle in competition for filing a huge numbers of patents, therefore the return on each patent becomes much lower, from US$ 1.2 million to US$ 8.4 million, with less security.

However, the avent of patent securitization can also attract competition.[2] Securitization is also one of the most significant innovations in financial management, a technique which revolutionized the bank intermediate and funding mechanisms. While intellectual property royalties may never trade as broadly as mortgage-backed Securities, biomedical patents present intangible assets with large financial potentials.

BENEFITS OF SECURITIZATION:

Technology advances and innovations bring benefits to the human beings and the intellectual backed asset securitization is no exception. Intellectual-backed asset securitization is a newer type of asset-backed securitization, providing the borrowers with cheaper sources of funds. Furthermore, the borrowers, originators (such as banks, thrifts, finance companies, or other intermediaries making loans to ultimate borrowers) and investors all may reap the advantages from this innovation. Intellectual-backed asset securitization is likely to lead to more efficient

[1] Berman, B., *From Ideas to Assets,* 314 (Chichester: John Wiley & Sons Ltd., 2002). [:] Fabozzi, F. J., *Handbook of Structured Financial Products,* 58, (Chichester: John Wiley & Sons Ltd, 1998).
['] Bruchey, S, *The Financial Sector of the American Economy,* 61, (Columbia: Garland Publishing, 2000)

financial markets to reduce costs of intermediation for both loan originators and borrows.

Intellectual-backed asset securitization allows parties to free funds tied to outstanding loans and meet the demand for new loans. Furthermore, proceeds from intellectual-backed asset securitization are not subject to regulatory taxes such as reserve requirements and insurance costs, thus making intellectual-backed asset securitization a more attractive source of funding/liquidity compared to traditional deposits.

In most cases, intellectual-backed asset securitizations require a higher credit rating than the debt obligations of the originator. This can be generally achieved by use of the bankruptcy-remote vehicle such as a trust that acts as a repository for the assets and issuer, or obligor, of the securities funding those assets. This improvement (triple A in most cases) affords the originator savings on funding costs and substantially broadens the investor base available to the originator.

One key element for the success of securitization is the ability to arbitrage credit ratings of assets. The credit rating of the asset-backed security is generally greater than that which would be assigned to securities directly issued by the bank and collateralized by those same assets. While there are costs associated with the mechanical processes of obtaining higher rating, in most cases these costs are less than those associated with direct funding, thereby making securitization a more effective means of funding.

STATUTORY AND LEGAL MECHANISMS **FOR** PATENT SECURITIZATION

Normally, an intellectual property securitization involves the royalty stream transferred to a special purpose vehicle, a so called bankruptcy-remote vehicle. There are two types of transactions which already have historical precedent in the United States. One is the loans collateralized by title to patent, the lender loans at a value ratio of between 25-30% of the appraised value of the asset, depending on the quality,[4] credit worthiness of the asset holder and other risk factors. In this case, patent is an instrument with a payout structure similar to a call option with academic and industry support. Merton suggested that Black-Sholes equation can be applied to non-traded asset classes including patents,

[4] "Review: *Hidden Value: profiting from the Intellectual Property Economy"* , New York Law Journal, 29th Sept., 2000,
[5] Robert Merton, *"Application of Options Pricing Theory: Twenty Five Years Later"*, The

and Sherer and Harhoff s discussion for the distribution technology values as log normal rather than bell curve by Gaussian.[6] The risk is much higher to the borrower and insurer, however, less for the lender in the transaction with an impetus to the market. The over collateralization provided by the small loan to value ratio can enhance the credit of the offering; the other advantage is the securitizations of cash flows emanating from patent based licensing agreements. This debt capital is based on the value of the assets without relying on the company's credit. It is a better option for the technology rich but cash deficient company or inventor for developing and commercializing to achieve success, then to seek for venture capital without giving up equity.

The second type of transaction is patent-backed securitization, the cash flows turned into marketable securities. In this case, patent is underlying asset to generate cash flows (royalty and share from the marketed sales) as defined by licensing agreements. The future cash flows securitization is claimed to be risky as the historical sales data and royalty forecasts are variable. The structured deal is a special purpose vehicle to serve as a legal, bankruptcy remote entity, aiming for collecting and administering the cash flowers to the debt and equity holders. The capital structure is often combination of debts and equity. The equity holders can receive residual cash flows after the bondholders are paid off. The internal credit enhancement is formed by the structure of senior debt, sub-debt and equity along with over collateralization, while the external credit enhancement comes from financial guarantees and reinsurance.

In the United States, patent securitization is governed by intellectual property law, bankruptcy law, uniform commercial code, tax law and securities law. However, conflicts do exist between the intellectual property laws, Copyright act of 1976, the Lanham Act of 1946, Patent act, 35 U.S.C. etc. Bankruptcy Code which involves in an isolation of the assets from the credit risk, will be effective for securitization and holders to be covered under an automatic stay on the creditors actions, a prohibition on preference among creditors,[8] avoiding certain transactions for the trustee in bankruptcy,[9] the power of court to subordinate creditors claims to those of others,[10] the right of the debtor and some of his

American Economic Review, June 1998

[6] Sherer, F. M. & Harhoff, D., *Technology Policy for a World of Skew-Distributed outcomes,* (New York: Elesevier Science, 2000).

[7] Bankruptcy Code § 362 (a), 11 U.S.C. § 362 (a)

* Bankruptcy Code § 547

[9] Bankruptcy Code § 544, 545,547, 548,553

"Bankruptcy Code §510

creditors to set off their mutual claims[11]. Seller's bankruptcy estate will be included if (1) the transfer is. a secure loan and not a true sale, (2) in the interests of equity there is a substantive consolidation and (3) if there was a fraudulent conveyance.[12] Special purpose vehicle (SPV) can be transfered either by a sale of the assets or a secured loan backed by the transferred assets. Only when the transfer is considered a loan, then the assets are considered to be the bankruptcy estate.

The Uniform Commercial Code is also related to the patent securitization and works with the bankruptcy law. Article 9 of U. C. C. applies to any transaction which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts and also to any sale of accounts or chattel paper.[13] The other parts related to U. C. C. are regarding the security interest, such as filing of a financing statement,[14] taking possession,[15] or automatic perfection.[16] A security interest attaches when (1) the collateral is in the possession of the secured party or the debtor has signed a security agreement describing the collateral, (2) value has been given; and (3) the debtor has rights in the collateral.[17] Rating agencies and underwriters are required to creare perfect securitization to give a secured creditor protection against third parties.[18]

Loan is the cash up front, free of income tax.[19] The tax law applied on securitization is the special purpose vehicle concerned "pay-through notes". In order to avoid taxation of special purpose vehicle, the special purpose vehicle shall be structured as a single-purpose subsidiary or a partnership. For the investor, interest paid on securities will be treated as an ordinary income; however, payment of principle is generally nontaxable. There are three statutory provisions applied to asset-backed securitization. Under the section 5 of the Securities Act of 1933, registration is required, unless a registration statement is in effect as to a security,[21]. Private placement, not involving any public offering,[2] can

[1] Bankruptcy Code § 553
[12] Bankruptcy Code § 361, 362, 363, 364, and 541
[13] U.C.C. § 9-102(1)
[14] U.C.C. §9-402(1)
[15] U.C.C. § 9-305
[16] U.C.C. § 9-303
[17] U.C.C. § 9-203
[18] U.C.C. § 9-302
[19]I. R.C. §108(1988)
[20] I. R. C. § 61
[21] Securities Act of 1933 § 5, 15 U. S. C. § 781 (1997)
[22] Securities Act of 1933 §4

be exempted from registration for transactions by an issuer according to section 4(2). Rule 144A exempts certain secondary market transactions in privately -placed securities[23].

Although current official regulations for securitization do not include the intellectual property, the regulations for the securitizations of estate and banking can be applied as references for patent-backed securitization. In Japan, there is asset securitization law to govern the business. In China, there are few patent-backed securitization cases launched in the market. Similar situations exist in like Taiwan and Japan. The statutory and legal mechanism for patent securitization has not been perfected yet.

SUCCESSFUL PATENT SECURITIZATION CASES

There are already quite a few successful patent securitization cases. The first biomedical patent royalties turned to a securitization in the market, was done in August 2000. Zerit was developed by Yale University to treat AIDS/HIV. It was licensed to Bristol-Myers Squibb Co. The securitization was handled by BioPharma Royalty Trust. The fund raised totaled US$ 115 million, including US$ 57.15 million in senior debt, US$ 22 million in mezzanine debt and US $ 22.16 million in equity. Standard & Poor's rated the senior debt as single A in October 2000. This case was completed and the transaction could become a precedent for future patent royalty securitizations. Estimate of royalties was based on the past track records from 1992 to 2000 of the Bristol-Myers Squibb Co. and an estimated a 24% compounded annual growth rate.

The rating on Biopharma Royalty Trust's senior notes due quarterly beginning 6th September 2000 through 6 June 2006, was based on several foundations, such as strong legal structure that segregates the revenue stream, credit support provided by subordinate debt and equity investors, strength of the historical and projected performance of Zerit patent royalty revenues, and the AAA credit rating of Bristol-Mayers Squibb Co., a leading international pharmaceutical company. The underwriter/ issuer of Biopharm Royalty Trust was Royal Pharma AG and the senior holder was Westdeutsche Landesbank Girozentrale in London.

Even under stress assumptions, the rating benefits from the cash flows were sufficient to make the timely payments of interest and principal on the senior notes. The rating agent, Standard & Poor's applied structured finance future flow criteria and the cash flow of this transaction is to be

-• 17C. F. R. §230, 144A

generated by Bristol-Mayers Squibb Co. from the worldwide HIV/AIDS market of Zerit.

However, the risk to bet on a single technology is high. Therefore, the next biomedical securitization case was based on a pool of patents. Royalty Phamra Finance Trust closed a securitization of US$ 225 million of variable funding notes, structured by Credit Swiss First Boston in 2003 with AAA rating by Moody's and Standard & Poor's, based on the insurance by MBIA Insurance Group and trustee by Deutsche Bank Trust Co. Americas. This transaction is a three years revolving borrowing period with a seven years expected maturity, combined with quarterly amortization. This vehicle issued securities including 13 drugs innovated from various companies (Genetech's and Biogen Idec's Rituxan®, Celegen's Thalomid®, Eli Lilly's /Johnson & Johnson's, and Centocor's PrePro®, Centocor's Retavase®, Chiron's TOBI®, Norvatis' Simulect®, Roche's Zenapax®, Ligand's Targretin® Capsules, Memorial Sloan Kettering's Neupogen/Neulasta®, Organon's Variza®, Glaxo Smith Kline's and Adolor's Entereg®, Pfizer's Lasofoxifene® and Wyeth's Bazedoxifene®),[24] all the listed companies are either prestigious biotechnology innovation companies or leading international pharmaceutical companies. In January 2004, a portion of Memorial Sloan Kettering Cancer Center's royalty interest in Neupogen/Neulasta® added US$ 263 million into the bankruptcy-remote vehicle and made US$ 7 million dollar investment into Royal Pharma. Before this transaction, the royalty assets were owned by offshore Royalty Pharma AG, however, at closing, the assets were sold to an Irish Trust, a new formed bankruptcy-remote Delaware business trust established for the purposes of securitization.

Nine of drugs were launched in the market place in 5 years, patents expire between 2005to 2015, and this portfolio generated US $ 4.4 billion in sales and about US$ 49 million in royalty and contingent payment rights for Royalty Pharma AG in a calendar year. The licensees of the contingent payment rights are a diverse group of investment-grade companies.

" Hillery, J. S., *Securitization of Intellectual Property: Recent Trends from the United States*, 31-33, (Washington: CORE, 2004).

Common Concerns And Worries Upon Patent Securitization

There are many concerns for the securitization of intellectual properties. The statutory and legal mechanisms are not in place in developing countries. However, the model of asset-backed securitization of real estate and banking which exists in most countries can be adopted for patent securitization. Doubts do exist worldwide usually for the valuation and credit rating, in spite of academic supported valuation methods such as market approach, cost approach, income approach.

Quality of Patents

Challenges on the quality of patents, trustable evaluation of patents and rating institute will certainly create the hesitation for government to launch the patent securitization. In many cases, quality of technologies is doubtful and resources for adequate drafting of technologies in patent applications are not present. Common problems in drafting are obscure claim language, badly drafted claims, poorly designed embodiments, presenting non-supportive specification etc. Any defects in patent writing can be used to against the inventors and assignees which could adversely impact business enormously in the future. Even carefully designed patents could be requested for re-examination by third party, obviously from competitors. For example, US patent no.5352605,[25] of the leading transgenic seeds company, Monsanto, on Chimeric Genes for Transforming Plant Cells Using Viral Promoters, applied on 28 October 1993 and approved on 4 October 1994. However, a re-examination was requested in 2006. Though all the claims survived the challenge, it must have been problematic to face an ex-party re-examination 12 years after the approval. Obviously, this is one of the extreme cases involving vigorous business competition.

Some of common mistakes discovered during venture capital due diligence are :

I. Late filing of national and international patent applications
II. Very narrow legal scope of claiming patentable inventions
III. Filing a patent in haste, without proper patent mapping planning
IV. Inadvertently tainting intellectually property rights with third party co-ownership rights.
V. Underestimating the importance of trade secrets and confidentiality

" US patent no.5352605, *Chimeric Genes for Transforming Plant Cells Using Viral Promoters,* www. Uspto.gov.

VI. Overlooking legitimate opportunity to set up offshore licensing tax shelters
VII. Over/under spending on legal fees to prosecute patent applications

However, if adequately addressed, the quality issues became relatively less damaging as compared to tricky business strategy and tactics covered by complicated scientific details. Quality issue is also a common concern in other types of securitization.

Credit rating

The validation or identification of the patent valuation and the credit rating institute are often conducted by prestigious consulting companies, for example in the previously mentioned case:

Zerit was developed by Yale university to treat AIDS (a market believed to be expanding) and was licensed to Bristol-Myers Squibb Co. Although the estimated compounded annual growth rate of 24% was obviously over optimistic one in this specific case, Standard & Poor's rated this securitization grade A based on quite a few solid foundations mentioned previously.

The second case, a pool of 13 technologies, all developed by either leading pharmaceutical companies or biotech companies, was given AAA rating by both Moody and Standard & Poor's, based on additional security. This securitization was insured by MBIA Insurance Group and trustee by Deutsche Bank Trust Co. America. Moody and Standard & Poor's are experienced credit rating firms, however, the credit rating companies in developing countries are always not that qualified and experienced, which can cause worries to investors and hesitation for the statutory progress.

However, compared to real estate or banking, patent backed securitization provides additional guarantee from technologies, rather than market mechanism itself on real estate or banking type of securitization. In addition, the credit support provided by subordinate debt and equity further enhanced the interests on patent backed securitization.

Insufficient cashflow

Other causes for insufficient cash flow to serve debt could be due to the competing and new products, reduced or decline of sales, product obsolescence, regulatory intervention such as withdrawal of FDA approval, changes to healthcare reimbursement policies, liability for possible customers complaints etc. Unexpected circumstances may crop in any time for any case.

The first US FDA approved true food, Calgene FlavrSavr® Tomato, is a transgenic tomato with a gene from a pig, which extended the shelf life, therefore, the tomato will have less chance to rot during the transition. However, in the 1990s, consumers did not accept this concept of "tomato with the pig gene". Economic disaster attacked this technology when this pig gene news was revealed. This type of response could not be foreseen, and the consumers' acceptance on technologies vary from time to time.

Tobacco resistant to a plant virus was however a cash success in China. Another success was cheese-making enzyme, a bioengineered version of chymosin . It was a success in US, as this bioengineered version is used to make cheese but will not appeared in the final product. In addition, this bioengineered chymosin version is less expansive than the nature chymosin and does not tend to be erratic.

Above cases proved that the success on patented technologies required full range planning, marketing, selling, administration, cost control etc., just like any product on the market.

Litigation plague on patents

It seems that one of the major challenges is the litigation plague on patents. Whosoever desires to get involved in profitable patented products, try every possible measure to attack competitor or target the technology owner.

In human growth hormone case, Genetech sued Novo Nordisk twice by US patent 4610980 ('980 patent) for the first time[26,] and by US patent 5424199 for the second time.[27] Genetech's '980 patent was also

[26] *Genentech, Inc.* v. *Novo Nordisk MS,* 935 F. Supp. 260 (S.D.N.Y. 1996); *Novo Nordisk of North Am., Inc.* v. *Genentech, Inc.,* 77 F.3d 1364, 37 USPQ2d 1773 (Fed.Cir.1996)
[27] *Genentech, Inc.* v. *Novo Nordisk* 108 F.3d 136142 U.S.P.Q.2d 1001 , 1997

challenged by Bio-Technology General which Genentech overcame after explaining the US PTO that the '980 patent yielded only the variant methionine-human growth hormone of 192 amino acids ("met-hGH"), and not the natural hGH of 191 amino acids made by the human body. In the anti-coagulant and antithrombotic case, Genetech sued Welcome,[28] and Aventis sued Amphastar & Teva pharmaceuticals.[29]

Monsanto challenged Bayer[30] for the validity and enforceability of four Bayer patents, U.S. Patent Nos. 5,545,565, 5,767,372, 6,107,546, and 5,254,799, in order to assert no infringement of Monsanto's transgenic corn products. For biogenetic product user, Monsanto sued Loren David for hiding seeds for next harvest season[31].

In U.S.A., the legal fees are very high, running into millions of dollars, and most often the damages awarded by the courts do not compensate for the legal expenses. Therefore, the unexpected high risk and legal expenses do stand out as unique factors and slow down the legislation for patent securitization.

However, most of these risks are common for the other type of securitization also, such as in real estate or banking securitization cases. Investors or buyers carry the risks based on their choices and decisions.

CONCLUSION

Patent-backed securitization is a kind of newer funding source with stronger foundations as compared to other types of securitization. The major advantage of patent-based securitization is technology, which builds up higher competitive barriers in terms of gestation period and demand on capital for R&D and manufacture. In addition, the products transformed from patents are often addressed at large market with strong market share competition.

[28] *Genentech lnc* v. *The Wellcome Foundation Ltd,* 29 F.3d 1555, 31 U.S.P.Q.2d 1161 [2] *aventis pharma s.a. And aventis pharmaceuticals, inc.,* v. *Amphastar pharmaceuticals, inc., and teva pharmaceuticals usa, inc.,* 2007-1280, decided on 14 May, 2008, www.uscourt.cafc.gov

[30] *Monsanto Company,* v. *Bayer bioscience* w.v., 2007-1109, decided on 25 Jan., 2008, www.uscourt.cafc.gov

[31] *Monsanto Company,& Monsanto Technology lie, v. Loren david,* 2007-1104, decided on 5 Feb., 200&, www.uscourt.cafc.gov

As a finance opportunity for the owner or inventor, intellectual property backed securitization offers accountable benefits, such as a greater amount of revenue than from a loan, an immediate capital rather than waiting for the over years royalties, avoiding taxes issue, a non-recourse to the originator and the irrevocability of the bond sale, a de-facto insurance policy for the value of future royalties. Owner still retains ownership of intellectual property while the buyer is on the debt side. Credit rating can be higher than the originator's rating because of the quality of the assets, credit enhancement and the isolation of the assets in a bankruptcy-remote entity[32].

Securitization of intellectual property is different from traditional securitization types , such as mortgages or credit cards, the general principle for most asset-backed securitization are based on loan, which pay a fixed amount. In this case, the intellectual property backed securitization pay out royalties upon the fluctuation in sales. However, the intellectual backed securitization is not likely to rival the mortgage backed market, biomedical patent securitization certainly reveals the opportunities for the biomedical company and investors are able to extract more value from the intellectual property assets.

The quality validation of high technology patents are more secure than other type of patents due to highly scientific foundations (time consuming for conducting tests/experiments, complicated facilities and capital requirements for manufacture /laboratory) and additional regulatory control (such as FDA and semiconductor related laws). Statutory mechanism and legal control for all the participants (such as originator-company, patent holder, inventor, investor, special purpose vehicle, issuer, buyer, bond holder) will add to the perfection of patent backed securitization for biomedical innovations.

Under the present circumstances, the limited available resources are not able to support most of the potential technologies. Patent-backed securitization offers an opportunity for the patent holders to obtain funds with limited credit exposure and at a lower cost. It yields an improved capital structured, better ratings, and a possible greater leverage of intellectual property as an acquisition tool[33]also. Patent-backed securitization offers an individual inventor-patent holder, a large

[32] Kane, Sean F., *Securitization may work beyond Music Royalty Income Stream,* Entertainment Law & Finance, 7th Aug., 2003
[33] Edward, D., *Patent Backed Securitization: Blueprint for a New Asset Class* , Gerling NCM, 2002 Insurance

technology company or a start up company a chance to develop and emerge into the market place, although it may represent a tiny segment of the overall market pie.[34] Patent backed securitization is likely to work well as there is always a shortage of funds for innovative idea and capital/time demanding technologies due to the apathy of traditional lenders towards such ventures. These new ideas and technologies are often deficiencies in credit quality and do not often match desire for yield from investors. Promoting patent securitization and framing related statutory/legal mechanism to allow risk pooling and the creation of liquid instruments is not only attractive in developing countries for the critical need to create liquidity in the banking system but also meet the policy and economic goal of the new economic development.

[34] Fabozzi, F. J., *Accessing Capital Market through Securitization,* (Chichester: John Wiley & Sons Ltd., 2002).

MEDICAL NEGLIGENCE & CONSUMER PROTECTION - PHANTASY OR FACT*

DR. MADHU SOODAN RAJPUROHIT"

ABSTRACT

The litigation under law of torts is not much in India; negligence suits are rare and medical negligence suits are rarest of the rare. However, public awareness of medical negligence in India is growing. After introduction of the Consumer Protection Act, 1986, many patients have filed legal cases against doctors, have established that the doctors were negligent in their medical service, and have claimed and received compensation. Hospital managements are increasingly facing complaints regarding the facilities, standards of professional competence, and the appropriateness of their therapeutic and diagnostic methods. This article throws light on the issues of medical negligence and consumer law and tries to find out, whether it is phantasy or fact.

INTRODUCTION

Why the law is required? The question usually creeps in every mind. The answer in simple words can be - No human society can run without wrongs; and law comes where the wrong exists. The law is needed for the weak, as it protect them from the exploitation of the strong. The old practice was *"Ubi Remedium Ibi Jus"* - which meant that where there was a remedy there was a right; but after the passage of time it turned it into a practice of *"Ubi Jus Ibi Remedium"* - which means that where there is a right there is a remedy. For better understanding of subject of medical negligence and consumer protection, it will be better if we

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understand the basic concept of the subject, covered under Law of Torts, from where emanates the concept of 'Negligence'.

The 'wrong' can be split into two major parts i.e. the 'Civil Wrong', and the 'Crime'. The law of torts is a civil wrong. Under the Hindu Law and Muslim Law tort had a much narrower conception than the tort of the English Law.[1] The punishment of crime in these systems occupied a more prominent place than compensation for wrongs.[2]

The Law of Torts as administered in India in modern times is the English law as found suitable to Indian conditions and modified by the Acts of Indian Legislature.[3] The Indian Law of Torts based on English law is continued by Article 372 of the constitution which has been interpreted also through the Common Law Principles applied in India.[4]

Sir Frederick Pollock prepared a draft code of Torts for India but it was never enacted in to a law.[5] The Letters of Patent of Sept 24, 1726 (the 13* year of the Reign of George I) established the Mayor's Court (The first British Courts established in India) in three Presidency towns of Calcutta, Madras and Bombay. This Charter required them "to give judgment and sentence according to justice and right". The Englishmen administering these courts normally drew upon the common law and statute law of England as found suitable to Indian conditions while deciding cases 'according to justice and right'. This led to introduction in these Court's jurisdiction of English Common and statute law in force at the time so far as it was applicable to Indian circumstances.[6] The Law of Torts or Civil wrongs in India is thus almost wholly the English law which is administered as rules of justice, equity and good conscience. Justice Krishna Iyer has opined that the Indian courts, "....however, before applying any rule of English Law can see whether it is suited to

[1] Priyanath Sen, *Hindu Jurisprudence*, p. 336; Kashi Prasad Saxena, Hindu Law and Jurisprudence, pp. 170, 171; Abdul Rahmaan, Muhamadan Jurisprudence p. 360; Ramaswamy Iyer's Law of Torts (7th Edition 1975) Appendix pp. 591, 592.
[2] Ibid.
[3] Setalvad, The Common Law in India, p. 110.
[4] Ibid p. 225-226.
Building Supply Corporation v. Union of India, AIR 1965 SC 1061 (1068)
Union Carbide Corporation v. *Union of India,* 1988MPLJ 840 (The whole of this para with only a little variation has been adopted by Seth, J.)
[5] See 5 LQR 362, *Vidya Devi* v. *M.P. State Road Transport Corporation,* AIR 1975 MP 89.
[6] Ibid, n.3, p. 12-13; *Advocate General of Bengal* v. *Ranee Surnomoye Dossee,* (1863) 9 MIA 387 (426, 427).
[7] *Union Carbide Corporation v. Union of India,* 1988 MPLJ 840.

Indian society and circumstances."[8] It is to be kept in mind that in applying the English law on a particular point, the Indian courts are not restricted to common law alone.

MEANING & HISTORY OF WORD 'TORT'

The term "Tort" is the French equivalent of the English word "wrong" and of the Roman law term "delict". It was introduced in to English law by Norman jurists. The word 'Tort' is derived from the **Latin** term ***'tortum'*** to twist, and implies conduct which is twisted or tortious. The first reported use of the word *'Tort'* is found in the year 1597 in ***Boulton*** *v. Hardy?*

DEFINITION

There is no consensus on a satisfactory definition. However, Winfield defines 'Tort' as:- "Tortious liability arising from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages."[10] Salmond, & Heuston define 'Tort' as:- "a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or a trust or other merely equitable obligation."[11] Ratanlal & Dhirajlal put it in a different way:*- ""-Tort, may be defined as a civil wrong independent of contract for.which the appropriate remedy is an action for unliquidated damages."[12] Tort law is a mosaic in which the principles of corrective justice (the principle that wrong should be righted) and distributive justice (the principle that there should be a fair allocation of assets and losses) are interwoven.[13]

[8] Krishna Aiyer, J. : "We cannot incorporate English torts without any adaptation into Indian Law." - in *Rohtas Industries Ltd.* v. *Rohtas Industries Staff Union,* (1976) 2 SCC 82 (93).

[9] (1597) Cro. Eliz. 547, 548, referred in Salmond and Heuston, Law of Torts; (20th Edition) 1992, f.n. 54. See also *Union of India* v. *Satpal Dharam Vir,* AIR 1969 J&K 128(129).

[10] Winfield & Jolowicz on Tort, [Seventh (South Asian) Edition,2007], p.5.

[1] Salmond & Heuston, Law of Torts 20th Edition 1992, pp. 14-15.

[12] Ratanlal & Dhirajlal, The Law of Torts, 23rd Edition, 1997, p.4.

[13] *McFarlane* v. *Tayside Health Board* [2002] 2 A.C. 59 at 83 per *Lord Steyn.*

For the sake of understanding 'Tort' is a civil wrong, which is different from the 'breach of contract' and the 'breach of trust'.

NEGLIGENCE s

The wrong of 'negligence requires three essentials:, (i) Defendant owed Duty of Care to Plaintiff; (ii) Breach of that Duty; and (iii) Plaintiff suffered Damages. The development of the law of negligence for the medical profession has been turbulent since the early part of this century. Old rules did not satisfy social necessities and social opinion. In a series of decisions in England from 1932 onward, the courts evolved the tort of negligence as an independent and vigorous wrong and extended the liability for negligence to professional men and to public authorities.

MEDICAL NEGLIGENCE

A medical professional/practitioner, when consulted by a patient, owes him the following duties: (i) A duty of care in deciding whether to undertake the case; (ii) A duty of care in deciding what treatment to give; and (iii) A duty of care in administration of the treatment.[14] A person engaged in some particular profession is supposed to have the requisite knowledge and skill needed for the purpose. He has a duty to exercise reasonable degree of care in the conduct of his duties. The standard of care needed in a particular case depends on the professional skill expected from persons belonging to a particular class. A surgeon or anaesthetist will be judged by the standard of an average practitioner of class to which he belongs or holds himself out to belong. In case of specialist, a higher degree of skill is needed.[15]

DEGREE OF CARE IN MEDICAL NEGLIGENCE [BOLAM'S TEST]:

The landmark case, on the degree of care, decided was *Bolam* v. *Friem Hospital Management Committee,*[16] which laid down the test, popularly known as the *'Bolam's test',* to judge the degree of care expected from a medical practitioner. The Court held in this case that a doctor shall not be held guilty of negligence if he has acted in accordance with a practice

[14] *Dr. Lakshman Balkrishana Joshi* v. *Dr. Trimbak Bapu Godbole,* AIR 1969 SC 128 (131-132).
[15] *Dr. P. Narsimha Rao* v. *G. Jayaprakasu,* AIR 1989 AP 207 (215).
[16] (1957)1 WLR582.

accepted as proper by a responsible body of medical men skilled in that particular art.

The facts of Bolam's case were that the plaintiff was given electro convulsive therapy. The result of this treatment was that the plaintiff sustained fractures. His contention was that the doctor was negligent in not giving him relaxant drugs that admittedly would have excluded the risk of fracture, and that if drugs were not used, the doctor failed to restrain him manually. It was further contended that the doctor was also negligent in not warning him of the risk involved in the treatment.

There were divergent opinions in medical field whether the plaintiff should have been given relaxant drugs and whether he should have been so warned. The medical practitioner was found not negligent as he had acted in accordance with the accepted practice of his peers.

The *Bolam's test* was appreciated and followed in various foreign and Indian cases by the Courts.[17] In case of *Sidaway* v. *Board of Governors of the Bethlem Royal Hospital and Mauds ley Hospital,*[1]^ the plaintiff had a complaint of recurring pain in her neck, shoulder and arms. She underwent a *laminectomy* of the fourth cervical vertebra in 1974, unaware of the inherent material risk of damage both to the spinal column, which would severally disable her, and the nerve roots. As a result she became severally disabled. Her claim in damage was not based on the operation been performed negligently. It was based on the failure by surgeon to warn her of the risk of damage to the spinal cord. In the trial it was agreed that the damage to the spinal cord was less than 1%. Her claim was dismissed observing that since there was a responsible body of medical opinion who would have warned the plaintiff in substantially similar terms to those used by the defendants. *Lord Diplock* observed, "To decide what risk the existence of which a patient should be voluntarily warned and the terms in which such warning, if any,

[17] Foreign cases : viz., *White House* v. *Jordan,* (1981) 1 267; *Maynard* v. *West Midlands Regional Health Authority,* (1985) 1 All ER 635; *Sidaway v. Bethlem Royal Hospital,* (1985) 1 All ER 643; *Chin Keo* v. *Government of Malaysia,* (1967) 1 WLR 813 ;
Indian cases : - *viz. Indian Medical Association v. V.P Santha,* AIR 1996 SC 550; *Poonam Verma v. Ashwin Patel (Dr.),* AIR 1996 SC 211; *N.T.Subramaniyam (Dr.) v. B. Krishna Rao (Dr.),* 1996 (2) CPR 247; *Prasanth S. Dhananka* v. *Nizam's Institute of Medical Sciences and others,* 1999 (1) CPR 42.

[18] (1985)1 All ER 643.

should be given... is as much an exercise of professional skill and judgment as any other part of the doctor's comprehensive duty of care ... The Bolam Test should be applied." Supreme Court in its latest judgment held, "It must be remembered that sometimes despite their best efforts the treatment of a doctor fails. For instance, sometimes despite the best effort of a surgeon, the patient dies. That does not mean that the doctor or the surgeon must be held to be guilty of medical negligence, unless there is some strong evidence to suggest that he is." [19]

MISFORTUNES EVEN AFTER DUE CARE

Even after adopting all medical procedures as prescribed, a qualified doctor may commit an error. "In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control."[20] The National Consumer Disputes Redressal Commission and the Supreme Court have held, in several decisions, that a doctor is not liable for negligence or medical deficiency if some wrong is caused in her/his treatment or in her/his diagnosis if she/he has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals skilled in that particular art, though the result may be wrong. In various kinds of medical and surgical treatment, the likelihood of an accident leading to death cannot be ruled out. It is implied that a patient willingly takes such a risk as part of the doctor-patient relationship and the attendant mutual trust.

MEDICAL NEGLIGENCE AND CRIMINAL LIABILITY

In *Mohanan vs Prabha G Nair and another,*[21] it ruled that a doctor's negligence could be ascertained only by scanning the material and expert evidence that might be presented during a trial. In *Suresh Gupta's*[2] case in August 2004 the standard of negligence that had to be proved to fix a doctor's or surgeon's criminal liability was set at "gross negligence" or "recklessness." In Suresh Gupta's case the Supreme Court distinguished between an error of judgement and culpable negligence. It held that criminal prosecution of doctors without adequate medical opinion pointing to their guilt would do great disservice to the community. A

[19] *Martin F. D'Souza vs. Mohd. Ishfaq,* MANU/SC/0225/2009
[20] *Indian Medical Association* vs. *V.P. Shantha & Others,* AIR 1996 SC 550.
[21] *Mohanan vs Prabha G Nair andanother,* (2004) CPJ 21(SC), of 2004 Feb 4
[22] *Dr. Suresh Gupta v. Government of N.C.T. of Delhi and Anr.,* AIR2004SC4091: MANU/SC/0579/2004,

doctor cannot be tried for culpable or criminal negligence in all cases of medical mishaps or misfortunes. A doctor may be liable in a civil case for negligence but mere carelessness or want of due attention and skill cannot be described as so reckless or grossly negligent as to make her/ him criminally liable. A doctor cannot be held criminally responsible for a patient's death unless it is shown that she/he was negligent or incompetent, with such disregard for the life and safety of his patient that it amounted to a crime against the State.[23]

The courts held that this distinction was necessary so that the hazards of medical professionals being exposed to civil liability may not unreasonably extend to criminal liability and expose them to the risk of imprisonment for alleged criminal negligence. Hence the complaint against the doctor must show negligence or rashness of such a degree as to indicate a mental state that can be described as totally apathetic towards the patient. Such gross negligence alone is punishable. On September 9, 2004, Justices Arijit Pasayat and CK Thakker referred the question of medical negligence to a larger Bench of the Supreme Court. They observed that words such as "gross", "reckless", "competence", and "indifference" did not occur anywhere in the definition of "negligence" under Section 3 04A of the Indian Penal Code and hence they could not agree with the judgement delivered in the case of *Dr. Suresh Gupta.* The court directed the central government to frame guidelines to save doctors from unnecessary harassment and undue pressure in performing their duties. It ruled that until the government framed such guidelines, the following guidelines would prevail:

"A private complaint of rashness or negligence against a doctor may not be entertained without prima facie evidence in the form of a credible opinion of another competent doctor supporting the charge. In addition, the investigating officer should give an independent opinion, preferably of a government doctor. Finally, a doctor may be arrested only if the investigating officer believes that she/he would not be available for prosecution unless arrested.

[23] *R vs Adomako,* (1994) 3 All ER 79.
[24] *Jacob Mathew vs State of Punjab,* AIR 2005 SC 3180.

In the case of the *State of Haryana vs Smt Santra,* the Supreme Court held that every doctor "has a duty to act with a reasonable degree of care and skill."[26] Doctors in India may be held liable for their services individually or vicariously unless they come within the exceptions specified in the case *of Indian Medical Association vs V P Santha.*[21]

VICARIOUS LIABILITY AND MEDICAL NEGLIGENCE

Generally, a person is liable for his own wrongful acts and one does not incur any liability for the acts done by others. If A is held liable against C for the wrong committed by B against C, then it is called that A is vicariously liable for the wrong committed by B against C. The vicarious liability of A for the act done by B can arise ,only when there is a certain kind of relationship between A and B, and the wrongful act should be, in a certain way, connected with that relationship. These relationships can be: (i) Master & Servant, (ii) Principal & Agent, (iii) Partners, and (iv) Husband & Wife.

The doctrine of vicarious liability of the master for the act of his servant is based upon the maxim *"respondeat superior",* which means *'let the principal be liable'* and it puts the master in the same position as if he had done the act himself. It also derives validity from the maxim *'qui facit per alium facit per se',* which means 'he who does an act through another is deemed in law to do it himself. So, if servant does a wrongful act in the course of his employment, the master is liable for it. The servant, of course, is also liable. Their liability is joint and several as they are considered to be joint tort-feasors.

WHO IS SERVANT?

A servant is a person employed by another to do work under the direction and control of his master. He is an agent and subject to control and supervision of his employer regarding the manner in which the work is to be done. As a general rule, a master is liable for the tort committed by his servant; but he is not liable for the tort of an *independent contractor,* because the independent contractor undertakes to do certain work and the manner is to be decided by the contractor and not by the person assigning the work. The interdependent contractor is his own master and exercises his own discretion and does not function under the

(2000) 5 SCC 182:: AIR 2000 SC 3335.
State of Haryana vs. Smt. Santra (2000) 5 SCC 182:: AIR 2000 SC 3335.
AIR 1996 SC 550.

order or control of the person for whom he does it. It can be better understood by the following example: My car driver is my servant. If he negligently knocks down X, I will be liable for that. But if I hire a taxi for going to railway station and taxi driver hits X, I will not be liable towards X because the taxi driver is not my servant but only an independent contractor. The taxi driver alone will be liable for that.

VICARIOUS LIABILITY AND MEDICAL NEGLIGENCE:

In *Hillyer* v. *Bartholomew's Hospital*[28], the hospital authorities were *held not to be vicarious liable* for the negligence of the professional staff involving professional care and skill, because they lacked the power of control over them. But the previously stated position no more holds good and now the hospital authorities are liable for the professional negligence of their staff including radiographers,[29] resident house surgeons,[30] assistant medical officers and nurses[31] and part time anaesthetists.[32] In *Cassidy* v. *Ministry of Health,*[33] the hospital authorities were held liable when, due to the negligence of the house surgeon and other staff, during post operation treatment, the plaintiffs hand was rendered useless. Referring to the liability of the hospital authorities, Denning L.J. observed, "...it is no answer for them (hospital authorities) to say that staff are professional men and women who do not tolerate any interference by their lay masters in the way they do their work. The doctor who treats a patient in the Walton Hospital can say equally with the ship's captain who sails his ship from Liverpool, and with the crane driver who works his crane in the docks, "I take no orders from anybody." That 'sturdy answer' as *Lord Simonds* described it, only means in each case that he is a skilled man who knows his work and will carry it out in his own way, but it does not mean that the authorities who employ him are not liable for his negligence."

[28] 1909)2 KB 820
[29] *Coldv. Essex County Council* (1942)2 All E.R. 633
[30] *Collins* v. *Hertfordshire County Council* (1947) 1 KB 598. [Instead of harmless "procaine", a house surgeon negligently ordered "Cocaine" as a local anaesthetic which proved fatal.
5| Cassidy v. Ministry of Health (1951) 1 All E.R. 574.
52 *Roe* v. *Ministry of Health* (1951) 1 All E.R.' 131.
"(1951)1 All.E.R. 574

It may be noted that in England, the hospital authority has a duty, under the National Health Service Act, 1946, to provide proper treatment to the patient. If there is a lapse on the part of a surgeon etc., it is now possible that hospital authority may be made primarily liable for the same and the question of vicarious liability may not arise.

MEDICAL NEGLIGENCE & CONSUMER LAW

Public awareness of medical negligence in India is growing. After the Consumer Protection Act, 1986, has come into force many patients have filed legal cases against doctors, have established that the doctors were negligent in their medical service, and have claimed and received compensation. Hospital managements are increasingly facing complaints regarding the facilities, standards of professional competence, and the appropriateness of their therapeutic and diagnostic methods. As a result, a number of legal decisions have been made on what constitutes negligence and what is required to prove it.

WHETHER SERVICES BY DOCTOR CAN COME UNDER CONSUMER LAW?

Whether the services given by the doctors can be treated under Consumer Protection Act, 1986 (herein after said as the Act)? The answer can only be obtained after going through the definition of consumer under the Act. Section 2(1)(o) defines the term service as follows: "Service means, service of any description which is made available to the potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, (housing construction), entertainment, amusement or the purveying of news or other information, but does not include rendering of any service free of charge or under a contract of personal service."

In the light of the above definition of the term 'service' given under the Act the Supreme Court held that a medical practitioner can be regarded as rendering 'service' under Section 2(1)(o) of the Consumer Protection Act, 1986.[34] Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in Section 2(1)(o) of the Act and the

Indian Medical Association v. *V.P Santha,* AIR 1996 SC 550.

patient would be the consumer within the meaning of Consumer Protection Act. The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils constituted under the provisions of the Indian Medical Council Act, would not exclude the services rendered by them from the ambit of the Act. Supreme Court included the medical service in the ambit of Consumer Protection Act by observing, "It would thus appear that medical practitioners, though belonging to the medical profession, are not immune from a claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical Council Act and are subject to the disciplinary control of Medical Council of India and/or State Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected."[35]

Commenting on the issue of medical care being a contract of personal nature the Supreme court observed, "It is no doubt be true that the relationship between a medical practitioner and a patient carries within it, certain degree of mutual confidence and trust and therefore, the services rendered by the medical practitioner can be regarded as services of personal nature, but, since there is no relationship of master and servant between the doctor and the patient the contract between the medical practitioner and his patient cannot be treated as a contract of personal service but is a contract for services and the service rendered by the medical practitioner to his patient under such a contract is not covered by the exclusionary part of the definition of 'service' contained in Section 2(l)(o)oftheAct."

Addressing the issue of free medical care Supreme Court made following observations: "The question for our consideration is whether the service rendered to patients free of charge by the doctors and hospitals in category (iii) is excluded by virtue of the exclusionary clause in Section 2(1)(o) of the Act. In our opinion the question has to be answered in the negative. In this context it is necessary to bear in mind that the Act has been enacted "to provide for the protection of the interests of "consumers" in the background of the guidelines contained in the Consumer Protection Resolution passed by the U.N. General Assembly on April 9, 1985."

[35] Ibid.

"To hold otherwise would mean that the protection of the Act would be available to only those who can afford to pay and such protection would be denied to those who cannot so afford, though they are the people who need the protection more. It is difficult to conceive that the legislature intended to achieve such a result."

"We are of the view that in such a situation the persons belonging to "poor class" who are provided services free of charge are the beneficiaries of the service which is hired or availed of by the "paying class". We are, therefore, of the opinion that service rendered by the doctors and hospitals falling in category (iii) irrespective of the fact that part of the service is rendered free of charge, would nevertheless fall within the ambit of the expression "service" as defined in Section 2(1)(o) of the Act. We are further of the view that persons who are rendered free service are the "beneficiaries" and as such come within the definition of "consumer" under Section 2(1)(d) of the Act."

"Unless it is found that the services are rendered free of charge to all the patients availing services at the nursing home, it cannot be held that the said services do not constitute 'service' as defined in Section 2(1)(o) of the Act. A contention has also been raised that even in the Government hospitals/health centers/dispensaries where services are rendered free of charge to all the patients the provisions of the Act shall apply because the expenses of running the said hospitals are met by appropriation from the Consolidated Fund which is raised from the taxes paid by the tax payers. We do not agree."

The Supreme Court affirming A.P. High court's view in *Dr. A.S. Chandra* v. *Union of India*[*6] and overruling *Dr. C.S. Subramanian v. Kumarasamy and Anr*[37] held that service rendered for consideration by private medical practitioners, private hospitals and nursing homes must be construed as 'service' for the purpose of Section 2(1)(o) of the Act and the persons availing such services are 'consumers' within the meaning of Section 2(1)(d) of the Act. Supreme Court also placed great reliance on *Laxman Balakrishna Joshi* v. *Trimbak Bapu Godbole and Anr.*[38] Supreme Court has held, "The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill

MANU/AP/0378/1992
(1994)1 MLJ438
MANU/SC/0362/1968

and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law require."

NEGLIGENCE VIS-A-VIS OVER - ACTIVENESS/NON-NEEDED ACT

Suit for damages on account of death of plaintiff s wife; 'Angiography' test not conducted which was the surest method to diagnose the disease of the deceased. Reason for not conducting this test was, non availability of radiologist. On the other hand a test which was not needed conducted thrice. Non conducting of angiography test will have to be seen fatal omission on the part of the appellants. The deceased was suffering from SAH (subarachnoid haemorrhage) as there was blood clot in her brain but she was put on paracetamol tablets. The Court[39] held it that case of medical negligence has been made out, and awarded the damages.

BURDON ON WHOM?

The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor. The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor. Doctors must exercise an ordinary degree of skill. However, they cannot give a warranty of the perfection of their skill or a guarantee of cure.[40] If the doctor has adopted the right course of treatment, if she/he is skilled and has worked with a method and

Dr. Narayan K Swamy v. *A.Nazir Ahamed Khan & Ors.,* 2008 (3) Civil Court Cases 087 (Karnataka). [40] *SmtJSPaul vs Dr (Mrs) A Barkataki* (2004) 10 CLD 1 (SCDRC - MEGHALAYA).

manner best suited to the patient, she/he cannot be blamed for negligence if the patient is not totally cured.[41]

RES IPSA LOQUITUR:

"In the ordinary case, the law will not assist an innocent plaintiff at the expense of an innocent defendant."[42] However, if the circumstances are such that it clearly indicates the negligence, in this circumstance the maxim *'res ipsa loquitof* applies, which means the incidents speaks for itself. The concept is that a man can tell a lie, but the circumstances cannot. This principle was applied and recognized by the Courts including Supreme Court of India.[43]

CONSENT AND MEDICAL NEGLIGENCE

Appellant went to a doctor for diagnostic and operative laproscopy. Appellant put under general anesthesia and she went unconscious. With the consent of the mother of the appellant doctor performed an additional operation and removed her uterus, ovaries and fallopian tubes. It was held by the Supreme Court[44] that a doctor cannot perform unauthorized additional operation without the consent of the patient unless the same is necessary in order to save the life or preserve the health of the patient and it would be unavoidable to delay the further procedure until the patient regains consciousness where the consent by patient is for a particular operational surgery, it cannot be treated as consent for an unauthorized additional operation involving removal of an organ only on the ground that such removal is beneficial to the patient or is likely to prevent some danger developing in future, where there is no imminent danger to life or health of patient.

It has been held that when a patient is a competent adult, there is no question of someone else giving consent on her/his behalf.[45] Supreme Court held, that appellant was neither a minor nor mentally challenged

[41] *Dr Prem Luthra vs Iftekhar* (2004) 11 CLD 37 (SCDRC - UTTARANCHAL); *Mrs Savitri Devi vs Union of India IV* (2003) CPJ 164; *Dr Devendra Madan vs Shakuntala Devi* 7(2003) CPJ 57 (NC).

[42] *Pashman J.* in *Anderson vs. Somberg*

[43] See - *Achutrao Haribhau Khodwa v. State of Maharastra and others,* AIR 1996 SC2377; *DrJanak Kantimathi Nathan vs Murlidhar Eknath Masane,* 2002 (2) CPR 138.

[44] *Samira Kohli v. Dr. Prabha Manchanda & Another,* 2008(3) Apex Court Judgments 253 (S.C.).

45 ,u;A

nor incapacitated.[46] In absence of an emergency, the question of taking her mother's consent for radical surgery did not arise. The appellant was temporarily unconscious, undergoing only a diagnostic procedure by way of laproscopy. The respondent ought to have waited till the appellant regained consciousness, discussed the result of the laproscopic examination and then taken her consent for the removal of her uterus and ovaries. In the absence of an emergency and as the matter was still at the stage of diagnosis, the question of taking her mother's consent for radical surgery did not arise. Therefore, such consent by mother cannot be treated as valid or real consent. It was also held by the Supreme Court that since no consent of the patient was taken by the doctor for additional surgery the same was an unauthorized invasion with appellant's body which amounts to tortuous act of assault and therefore a deficiency in service and is liable to pay compensation.[47]

FREE TREATMENT AND CONSUMER PROTECTION

Doctors are not liable for their services individually or vicariously if they do not charge fees. Thus free treatment at a non-government hospital, governmental hospital, health centre, dispensary or nursing home would not be considered a "'service" as defined in Section 2(1)(0) of the Consumer Protection Act, 1986.[48] The treatment done in the Government Hospital will not be covered by the Consumer Protection Act, 1986; because the service given by the Government Hospital cannot be considered as the services hired for the consideration by the patient and therefore does not come with-in the ambit of the definition of the 'consumer' as given under the consumer Protection Act, 1986.

Consumer Unity and Trust Society, Jaipur went to the consumer forum for a lady patient, who underwent an abdominal tubectomy operation at the Government Hospital, Kota as part of family planning programme. She developed some serious complications after surgical operation on her, which reduced her to a condition of physically invalid person. It also caused her continuous physical pain and great mental agony. The Consumer Unity and Trust Society made allegation in the complaint that what was a simple surgery had resulted in serious complications on

Ibid. Ibid. *Indian Medical Association vs V P Santha,* AIR 1996 SC 550.

account of the negligence on the part of the Civil Surgeon who performed the operation, and also due to lack of post-operative care and attention. The National Commission[49] observed that the persons who avail themselves of the facility of medical treatment in a Government Hospital are not 'consumer' and the said facility offered in the Government Hospitals cannot be regarded as service 'hired for considerations'. Therefore, no complaint under the Act can be preferred either by such person or by a Consumer Association on his behalf.

However, after this judgment, a different view was taken by Orissa Sate Commission in the case of*Sukanti Behera (Smt.)* v. *Shashi Bhushan Rath (Dr.)* that the State Government has paid the doctor to render service to the people of Orissa who attended the hospital and, therefore, the persons who are attending the hospital for treatment and advice are beneficiaries of the services rendered by the doctor. But this controversy was settled by the Apex Court in - *Indian Medical Association vs V P Santha*[51] by affirming the view taken by the National Commission in Consumer Unity and Trust Society, Jaipur v. State of Rajasthan[52].

POSITION IN CASE OF ESI HOSPITALS

The complainant was working in an industry and was a member of Employees State Insurance Corporation. He and her wife were fully covered under the State Employees Insurance Scheme regarding medical aid as per the law. The complaint was filed for the compensation for being aggrieved poor medical attention given to her late wife. The Haryana State Commission[53] observed, relying on *Consumer Unity and Trust Society, Jaipur* v. *State of Rajasthan*[5*], that complainant did not come under the ambit of the definition of the expression 'consumer' as given in the Act because of the gratuitous nature of the medical services provided to him.

THE HIGHEST COMPENSATION

Consumer Unity and Trust Society, Jaipur v. *State of Rajasthan,* I (1992) CPJ 259 = 1991 (1)CPR241-N

[50] III (1993) CPJ 633 - Orissa State Commission.

[51] AIR 1996 SC 550

[52]1 (1992) CPJ 259

[53] *Birbal Singh v. Employees State Insurance Corporation,* //(1993)CPJ 1028-Haryana State Commission. [54]1 (1992) CPJ 259

In *Nizam Institute of Medical Sciences v. Prasanth S. Dhananka & Ors.*[5]\ the Supreme Court in its latest judgment awarded a gigantic compensation of Rs. *One Crore* to a software engineer who suffered permanent disability due to medical negligence at a government-owned hospital in Andhra Pradesh.

A bench of Justices B N Agrawal, G S Singhwi and H S Bedi enhanced the compensation to Rs one crore from Rs 15 lakh which was awarded by the Andhra Pradesh High Court to Prashant S Bhanaka, the software engineer.

The victim suffered permanent disability in the form of paralysis and other complications, rendering him incapable of all normal chores after undergoing a surgery in Nizams Institute of Medical Sciences.[56]

FRESH GUIDELINES SET BY THE APEX COURT

In a landmark judgment of *Martin F. D'Souza vs. Mohd. Ishfaq*[51], the Supreme Court stepped in to check the harassment of doctors in medical negligence cases. Apex court felt that the Cases, both civil and criminal as well as in Consumer Fora, are often filed against medical practitioners and hospitals, complaining of medical negligence against doctors/hospitals/nursing homes and hence the latter naturally would like to know about their liability.

The general principles on this subject have been lucidly and elaborately explained in the three Judge Bench decision of this Court in *Jacob Mathew* v. *State of Punjab and Anr.*[ss] However, difficulties arise in the application of those general principles to specific cases. The Apex court felt, "The Court and Consumer fora are not experts in medical science and must not hold their own views over those of specialists. It's true that the medical profession has to an extent become commercialised and there are many doctors who depart from their Hippocratic Oath for the selfish

[55] Civil Appeal No.4119 Of 1999, decided on 14/05/2009 (Thursday) by Supreme Court of India. See http://iudis.nic.in/supremecourt/helddis3.aspx .
[56] *Nizam Institute of Medical Sciences* v. *Prasanth S. Dhananka & Ors.,* (Civil Appeal No.4119 Of 1999, decided on 14/05/2009 (Thursday) by Supreme Court of India). See http://iudis.nic.in/supremecourt/helddis3.aspx.
[57] MANU/SC/0225/2009. judgment delivered on 17-02-2009 (Tuesday).
[58]AIR2005SC3180

ends of making money. However, the entire medical fraternity cannot be blamed or branded as lacking in integrity or competence just because of some bad apples."

A division bench of Justice Markandey Katju and Justice G S Singhvi set the fresh guidelines, to avoid harassment to doctors who may not be ultimately found to be negligent, the Apex court stipulate the guidelines as follows: Whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made; the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent.

The police officials are not to arrest or harass doctors unless the facts clearly come within the parameters laid down in *Jacob Mathew's*[59] case, otherwise the policemen will themselves have to face legal action. The Apex Court also warned police officials against arresting or harassing doctors, and to follow existing guidelines that require the police to seek a medical opinion before registering an FIR in case of a complaint against a doctor.

[59] AIR 2005 SC 3180.
"In para 52 of ***Jacob Mathew's*** *case* the Supreme Court realizing that doctors have to be protected from frivolous complaints of medical negligence, has laid down certain rules in this connection:
(i) A private complaint should not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.
(ii) The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion, preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial opinion applying the Bolam test.
(iii) A doctor accused of negligence should not be arrested in a routine manner simply because a charge has been leveled against him. Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest should be withheld."

CONCLUSION & SUGGESTIONS

If we see the medical negligence in the light of the Consumer Protection Act, 1986, and the decisions of Supreme Court, it is crystal clear, from above discussion, that Medical negligence is not aloof from effect of law and hence it is not a phantasy but a fierce fact and that it protected the patients and consumers from the merciless behavior, attention-less attitude, uncouth negligence and fearless dishonest functions of medical practitioners. The Apex Court, by awarding massive compensation upto Rs. 1 Crore due to medical negligence, contributed its wisdom in establishing this to be true.

The Apex Court has provided protective shield to doctors and medical practitioner by issuing new guidelines through its landmark judgment of ***Martin F. D'Souza vs. Mohd. Ishfaq***[60]**.** However, a mention of general defences available to the medical practiceners may not be out of place here. These defences are the Complaint filed after period of limitation, dispute not heard by Civil Court/Consumer Forum, complainant has filed suit in civil court as well as in consumer forum, defect of parties, misjoinder of causes of action, want of pecuniary jurisdiction, complaint filed in wrong District Forum, *res judicata* (A thing already decided), waiver, service given free of charge, service under contract of personal service, medical practitioner not negligent, contributory negligence, patient consented to harm (Volenti non fit injuria), immunity defenses, remoteness of damage can be good defences in such medical negligence cases.

MANU/SC/0225/2009. judgment delivered on 17-02-2009 (Tuesday).

FLUID CONTOURS OF 'ABETMENT' AS AN OFFENCE

MOHD. A. ASHARAF*

Law cannot punish the thought of a man, however, when this thought is transmitted to an agent for commission of a crime, the rubicon of thought is passed and then the law would take note of such a thought. There are myriad hues and fascinating twists wrapping around the offence of abetment in criminal jurisprudence. This paper seeks to highlight the fact that unless the essence of offence is brought out, the very act of incitement would not constitute the offence of abetment.

It is normally said that 'mere intention is not triable- even if it is to contemplate most heinous of the wrongs'.[1] The same has been put forth by C.J. Brian[2] that the thought of a man is not triable, for the 'devil himself knoweth not the thought of man.' However, law is really concerned when such nefarious thoughts start getting transcended into the realm of action. It is so because, law's main concern is as to how men should live together; hence, one has to be made responsible for his/her action - by word, act or even gesture. Conversely, thoughts are mere ideas and, at times, even intrude involuntarily into the cognitive zone, and are often transient in nature; like cinematic films, one idea rolls over the other.

And if we talk about 'act', it is a product of 'will';[3] hence, it squarely falls into the domain of answerability. This in fact is the main plank of the present paper- since one's thoughts cannot be fathomed, is perhaps,

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[1] R.C.Nigam, I *Law of Crimes in India* 41(1965).

[2] In Y.B. 17 Ed. IV f.o.2.Ref in id. At 41-42.

[3] To elaborate the idea further, one needs to distinguish the 'subjective reason'(what Kant calls the 'pure reason') from two things- first, the perception, experience or knowledge of an individual and second, the common/shared reason or logic. For a beautiful and elaborate analysis, see; metaphysical conception of justice in Julius Stone, *Province and Function of Law* 143-145 (2000).

not the actual ground for exonerating one from any responsibility; it is so because law must, as an instrument of collective/institutional regulation, leave that much of space to a person to entertain thoughts, whatever he wishes to, and catch hold of him once it crystallizes into the cognitive domain. The intricacies and complexities of, what we call as the inchoate offences, like abetment, conspiracy, and attempt - lie seemingly in the above problematic. The offence of 'abetment' is the topic of present paper and is worthy of some deeper analysis.

^INCHOATENESS' OF THE TERM ABETMENT.

Besides the *mens rea,* an 'act' too, resulting into a perceptible/physical consequences, which the law prohibits categorically, is required for an offence to be completed. This brings us to the issue of incomplete or the inchoate offence. This legal conception is indicative of the situation where a person is checked before he can carry out his criminal intention, which by that time, itself constitutes an offence; such transient kind of illegal act is, suitably, termed as an inchoate offence

It is often a matter of protracted debate as to whether there is anything inchoate in an offence of conspiracy, attempt or abetment. It may be pointed out that these offences, essentially, are not inchoate in nature because, they invariably include both the elements of crime, viz, *actus reus* and *mens rea.* In case of conspiracy, the design or agreement is the requisite *actus reus,* while in case of abetment the instigating words or a helping hand constitute the same. In fact, what is inchoate is the ulterior offence, which may yet remain to be completed. Therefore the liability in an inchoate offence is imputed only at a stage when the offender has done some act which not only manifests his *mens rea* but it also goes some way forward towards carrying it out. For example, if 'X' steals a revolver to kill 'Y', but gives up the idea after stealing, he is still liable for theft though no completion of the intended offence is there, and he may have no inertest in keeping the revolver as it was never his purpose. His liability for theft is because it is *per se* an offence as defined in the penal laws, if one fulfils its ingredients. Similarly, the act of abetment of an offence is itself an offence because of the threat or danger created by such an act; the same, in the collective wisdom reflected in the penal codes, is perceived to be threat enough to be nipped in the bud, and hence is defined as an offence.

DEFINITION OF ABETMENT

In various decided cases the gist of the offence of abetment has been brought out by the hon'ble Supreme Court. It has been laid down that 'to abet is to give aid, to assist, to command, to procure, to counsel, to encourage, to induce, or to set another to commit.[4] In another case, it has been observed that ' in case of abetting by instigation or conspiracy, it is immaterial whether the person instigated committed an offence or not....'[5] In fact, the words abet, aid, counsel or procure must be construed according to their ordinary meaning.[6] The apex court has further clarified the position of an abettor and the perpetrator (principal) and said that 'the role of the perpetrator and the abettor of a crime are distinct, standing apart from each other.[7]

ANALYTICAL DISCOURSE

Under section 107 of the IPC, abetment can be committed by instigation, or by engaging into conspiracy, or by abiding someone in the commission of an offence. Instigation, also called incitement, is an instant offence and it is not necessary to prove even the actual words of incitement. In abetment... the agent (is) urged forward by a person who will not himself act, but who procures or instigates another to put into execution his criminal intention.[8] The Supreme Court has held that the word instigate denotes incitement or urging to do some drastic or inadvisable action to stimulate, incite, goad, urge forward or to provoke to do an act.'[9]

A pertinent question that arises is as to what amounts to an abetment? Here it may be kept in mind that an abettor becomes an accomplice if the crime is actually committed. 'The accomplice's liability rests on the premise that someone whom the law interchangeably calls an accomplice, accessory, aider (sic) and abettor, secondary party, or helper in the crime or crimes of his perpetrator does or is derivatively liable for whatever crime or crimes the principal commits.[10] This brings us to the

[4] *Kartar Singh* v. *State of Punjab,* (1994) 3 SCC 569
[5] *Faguna Kanta Ram* v. *State of Assam* AIR 1959 SC 673.
[6] Ibid 5(1), Also see Halsbury's Laws of India **191** (2007).
[7] *Joseph Kurien* v. *State of Kerala,* AIR 1995 SC 4.
[8] See Rattanlal and Dhirajlal, *Law of Crimes* 25th Ed. 404 (2002).
[9] Ramesh Kumar v. State of Chhatisgarh, AIR 2001 SC 3837.
[10] 1 Encyclopedia of Crime and Justice 2nd Ed. 8 (2002).

most crucial aspect of the offence of abetment i.e. as to what distinguishes an abettor from the perpetrator.

In abetment, one exerts some sort of influence upon other individual, which may range from 'no' to 'some' to 'too much' constraint on the principal's autonomy. Hereinabove, only the 'some' influence qualified as abetment because, then, there is enough freedom to the principal to choose or reject the aid or advice. However, if the influence is too much, the abettor would become a principal and the agent an innocent tool. If X asks the safecracker to break open a safe, it is still left to his autonomy to do or refuse. However, if X threats, or coerces, or fraudulently manages to get the safe opened by him, then it will not be an abetment but an act of perpetration in itself. That's why '....perpetrating harm through another is a narrower category of action than is causing another to do something harmful... causing can be mechanical whereas 'using' cannot." As an example, if a ringleader uses insane breakers - without knowing so- he causes the theft but does not commit the theft through an insane thief because there cannot be inadvertent 'using'.

In any case, aiding or abetting is not the same as 'committing' an offence, like 'helping burglary is not committing burglary', anymore than 'argue' is equivalent to try convince 'or warn is equivalent to try to alarm.[12] However, to be liable as a helper or aider the helper must (in addition) know what is being helped and must intend (or at least know) that the acts of encouragement or aid facilitate the principal's criminal venture.[13] It is, however, clear that when it is said and not encouragement, that the helper aids, it must be 'actual' aid that 'mattered' or 'made a difference' to the principal's action.[14] To round off, 'the real issue here is not so much whether the helper has caused or even made a difference, but rather, whether he has put himself to helping or has tried to help,[15] which soothed the perpetrators during their act. As held by Justice Learned Hand, the 'aid' or 'helper' must 'have sufficiently, 'purposive attitude' towards the venture so as to be

1 Supra note 10 at 9.
12 Ibid.
13 Ibid at 11.
14 Id at 10
15 Ibid.

associated with it in a way that demonstrates that he wishes to bring about 'certain outcome'.[16]

WHAT CRIMES CAN BE HELPED?

It is an interesting facet of abetment by help or aiding as to whether one can help or abet the co-actor for the wrongful act or crime which can only be done by two or more. For example, when two persons rob, one usually commits the assault of threat and the other actually snatches. In this situation, is one helping another? As another example, can selling of liquor, if it is a crime, be abetted by buying the same? The courts in UK take the stand in affirmative calling such buying or aiding the crime. While, in the US, courts do not say so because, 'one cannot help another for an offence which cannot be analytically defined, unless both the acts are done in tandem. On the similar lines, an unmarried cannot help bigamy by marrying a married person. The reason that '... if the crime analytically, elementally or definitionally requires two or more parties then the required parties cannot merely by participating , possibly 'help' an activity to which they are by definition essential.'[17]

WHAT IF THERE IS A DEPARTURE?

There may be cases where the act incited and the incitement does not converge squarely or substantively. Such situations may elicit a sense of defeat in the abettor. He may lay claim to have committed no offence pointing out the failure. However, the law is 'understandably unsympathetic to the claims of too-finicky helper who complaints at trial that the principal deviated, however slightly from the common scheme.[18] The law is very much clear that'... so long as there is attunement as to the essential matters and so long as the crime in question is of the same 'type' or within the contemplation of the range of crimes anticipated by the helper, the principal departure will not save the helper from liability' as was held in Northern Ireland v. Maxwell.[19] For example, if 'X' asks 'Y' to snatch watch off Z's wrist, but 'Y' does it by threatening to expose Z's criminal record, X's liability as an abettor is there because the criminal objective of stealing the watch remains at the core of it.

[16] Id. at 11.
[17] Ibid note 10 at 14.
[18] Id. at 12.
[19] (1978) 3 All. ER 1140, cited as above.

INCITEMENT - SOME OTHER FACETS.

Incitement being an instant offence, there must be an element of particularity in the crime that is counseled....'[20] Therefore, if X advises Y that burglary gives good chances or opening, X should be responsible for only burglary and not to further crimes. There should be an intention or at least knowledge of crime to be followed, so much so that even recklessness in encouraging is not enough.

Further, 'the mere fact that a person is pursuing is pursuing his lawful occasion, not designing to bring about a crime... does not make him a party... even though he knows that what he is doing will be made the occasion of crime...'[21] Where a crime is facilitated without communication with the suspect and with intent to obtain evidence against him, is not an abetment.[22] For example, when a trap is laid by X to catch a thief, the fact that Y steals in the trap, does not mean that X had helped. In *Fritzmaurice case,*[23] the defendant approached X and informed him of the proposed robbery, inviting his cooperation, impliedly promising a reward, was held as incitement because of the element of persuasion, which is more than mere suggestion - a 'cool' suggestion. However, if the suggestion is tendered to those prone of being plucked , as Shakespeare puts it, '(who) take suggestions as a cat laps milk' and if he knows such a propensity, then mere suggestion may amount to incitement.

At this juncture, it may be just right to deliberate upon in some context, by slipping into two problems, theoretically.

PROBLEM I.

Can one incite an offence which is impossible, though the person believes it to be so? G.Williams opines in negative and says, 'At common law one would not attempt or conspire to do the impossible, unless the impossibility related solely to means....however the rule has been changed by the statute or conspiracy and attempt. But nothing has

G. Williams, *Text Book of Criminal Law* 335(2003).
Beatty v. *Gillbanks* (1882)9 QBD 308. Supra Note
20 at 341. (1983)2 WLR 227.

been enacted for incitement. Hence, as held in *Fitzmaurice case*, the impossibility rule still governs the crime with the caveat that nothing but the most complete impossibility would at the time (of incitement), might become possible before it was expected to be committed, the incitement would be an offence.[25]

However, it is significant to point out that, as far as incitement is concerned, the role of 'means' is not fundamental to the offence because the gist of it is to counsel/ encourage to commit an act - by exhorting or impressing upon - and hence the only protection to the abettor is the impossiblility, as above, and not to the means. If the offence is capable of being committed per se, the incapability of the means has no guard to offer. The basic rule, therefore, emerges out that the offence of incitement should be towards substantive offence, which is otherwise possible. Hence, if X incites Y to burgle X's home, it would not be an offence of incitement because, even if Y thinks it to be X's house, it is the principle of negativity of crime since X knew that no substantive crime is going to be committed. However, in the above example, if Y is asked to burgle Z's house, but Y is incapable of doing so because of, say physical incapacity, X will be liable for incitement because the crimes is possible though by means it is not. One reason for this is, in the first example, that Y, even if he does anything, cannot get the crimes committed by anyone. However in the second case, though himself incapable, he may command or goad someone else to commit the same. Hence the impossibility of means is no defence for the inciter.

PROBLEM II

Here an example of goading an innocent agent further brings out the intricacies of the crimes of abetment. 'There can certainly be liability for attempting conspiring or inciting a person to commit a crime through an innocent agent because perpetrating a crime through an innocent agent is regarded like any other perpetration of crime.'[26] If X incites Y to commit a crime through Z, a child, the X is surely an inciter, and if Z performs an act as instructed, Y is liable as perpetrator and X is an accessory.[27]

[24] Supra Note 20 at 440.
[25] Id. at 441.
[26] Id. at 444.
[27] Cases of Principal liability on the part of a would-be helper arise when the would be helper acts in a way that allows us to say that it is as though the helper commits the crime

It must be borne in mind that Y's words of goading to Z, in the above example, are not incitement because, 'incitement presupposes a guilty inciteee',[28] which is not possible in case of an innocent agent. Rather, the inciter is regarded as the perpetrator, because the incitee is not capable of committing the crime on his own. He is merely a means of communication, e.g., if X asks Y , a watier to give a glass of water having poison, which he does not know, then Y is merely a means for X for committing the crime. If he fails to deliver the water, X commits an attempt, or else, he becomes a perpetrator. Thus, mere 'asking' would not qualify as an incitement, 'if the act of incitement of an innocent party were held to amount to an attempt and on principle it always should be.[29] Further if many cases of inciting innocent agents can be charged as attempts, there is no reason why the crimes of attempt and incitement should not overlap in this respect.

From the discussion above, we can gauge the myriad hues and fascinating twists wrapping around the offence of abetment that may be thrown up in a real life scenario. Unless the essence of the offence is not brought out - an effort to outline the same has been made in the preceding pages, with all its faults - there is every chance to get entangled in this booby trap of criminal jurisprudence.

himself. Certainly, one can perform an action by getting others to do as we say 'Louis VI built Versailles' even though the actual construction was not done by him'. See 1- *Encyclopedia of Crime & Justice,* Supra Note 10.

[28] Supra Note 20 at 444.

[29] Id. at 445.

GENDER DISCRIMINATION AND STUDY OF LAW

DR. RASHMI MATHUR

ABSTRACT

Law and legal knowledge are conventionally regarded as predominantly male bastion and it is only in the last 50 years that women have become active participants in the legal process. For today's youngsters law is emergingas a very popular and profitable career option. Women are trying to gain a foothold in the profession but besides problems like lack of a historical female perspective and ignorance of gender issues, the chief obstacle encountered is an overwhelming discrimination against women which sometimes appears subtly and at others quite bluntly. This paper aims to study the concept of legal feminism, its origin and the chief forms of discrimination legal feminists encounter. It also focuses on appropriate education as a means.'to eliminate this discrimination. The paper further investigates with the help of an empirical survey about the various disadvantageous facets of the profession for its women students and finally ends with recommendations by the survey respondents on how gender bias can be nipped in the bud by Law schools amending their curriculums and making them more gender compliant.

LEGAL FEMINISM

Law is an important institution of contemporary society. The entry of women in this hallowed territory can be traced very late in all Oriental and Occidental societies. It is only in the past one century that, coupling the demand of adult suffrage and equal legal rights, women entered the legal arena worldwide and then slowly gathered a foothold. In the Indian context, women entered public life (for the first time since their cloistering after the arrival of Islam in India more than 10 centuries ago) during the freedom movement as active proponents and practitioners of Gandhian ideals. Post-Independence, in the midst of the rise of Indian feminism there arose a sub-class of Legal feminists conscientious about

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furthering the legal rights of women. The progress of Legal Feminists can be demarcated, analogous to the development of Modern Feminism, into 3 well marked stages.

The Norton Anthology of Theory and Criticism has divided the growth of Feminism into 3 periods.

1. First wave Feminism : Equality
   This phase of feminism stressed on equality, rights, liberty and emancipation.
2. Second Wave Feminism : Difference
   This phase emphasized on the essential difference between masculine and feminine traits and asserts that this difference demands specialized treatment.
3. Third Wave Feminism : Deconstruction

This phase illustrates with the help of everyday examples how the difference between men and women is constructed and performed. This phase of the movement emphasizes upon separate sexual identifications and performances which constitute identity.

Now illustrating and applying these 3 phases in the context of growth of Indian Legal Feminism in Independent India, the initial demand for Legal equality was accepted by the framers of the Constitution of independent India and unlike their Western counterparts, Indian women got adult suffrage without any struggle. This stage can be identified as the first stage.

Legal feminists soon realized that in gaining constitutional equality their goal was not realized since women were physiologically and emotionally different so they required a different set of laws to help them progress and the demands of legal feminists turned towards recognition of essential differences between male and female identity. This is easily demarcated as the second stage i.e. difference.

Now, in its present third stage of Deconstruction, Legal Feminists scrutinize social constructs of law and the link between law and masculine power. A pertinent example of Deconstructive feminism's problems can be the obstacles in the path of dispensation of gender-neutral decisions by the overwhelmingly male psyche of the justice dispenser who does not consider wife-battering as a very serious crime because of the domineering masculinity of his personality. The legal profession is male dominated to such an extent that *he* includes *she* in legal discourses so the task of wrestling fair judicial decisions from a gender- discriminatory system becomes doubly arduous.

Contemporary Legal feminists are committed to performing the Herculean task of eliminating gender constructs from the legal system of the country which besides including conventionally tasks like eliminating domestic violence and working towards economic empowerment also includes off beat tasks like reconstitution of the law of taxation keeping in mind important questions with regard to household income, what constitutes that income and are the unpaid wages of the house wife to be regarded as family income? There are other pertinent questions like- Are women working at home legitimate wage earners? Whether housework can be monetized for tax purposes and income from other earnings clubbed with it to form taxable income? Are the laws enshrined in constitution able to gain their objective of gender equality? Are various laws enforcing gender stereotypes by encouraging double standards in societal attitudes? Are laws promoting a stereo-typical image of women as chaste, loyal, ideal and pliant and if laws continue to sustain the sub-ordination of women, how can this subordination be challenged? Are laws giving an equal opportunity, equal share and equal benefit of doubt to women when confronted in trials? Legal feminists also detect and criticize the subtle bias behind most legislations and legal documents which demand the marital status or parentage of the applicant to be declared in order to subtly undermine the independent identity of a woman.

Gender discrimination and gender fairness are concerns across the spectrum of civil, criminal, family and juvenile law. Gender discrimination permeates the legal profession and statistics show women disproportionately represented in law firm partnerships, judgeships or important law faculty positions. Witnesses and litigants frequently encounter bias that affects the outcome of cases. The manifestation of unconscious or subtle gender discrimination compromises judicial integrity and undermines public confidence in the judicial system. Bias in the legal profession prevents many competent attorneys from achieving their professional goals within conventional practice. As a result, a significant portion of available female legal talent remains under-utilized.

LEGAL EDUCATION

In spite of a number of legal reforms post- independence (the most recent being the acknowledgement of women as equal coparceners in ancestral property and Prevention of Domestic Violence Act, 2005) and many still in the pipeline, a majority of women in India continue to be severely oppressed. This has prompted feminists to change strategy from emphasis on law reform to emphasis on women empowerment schemes like better education, more career opportunities, better health facilities etc. In this scenario with a paradigm shift from law reform to social and educational reform, which necessitates sound knowledge of legal nuances, there arises the necessity of well-qualified female legal professionals. "Legal academics have to engage in analysis in order to address the criticisms of feminists but more importantly to equip the coming generation of lawyers- law students, practitioners, judges, policy makers, researchers and academics - to explore the role of law in maintaining oppressive status quo or in achieving social justice for all sections of society. This task of Indian legal feminists is made difficult by a narrow conception of legal education."[1]

As a profession, Law is a relative newcomer as a suitable career choice, for female professionals. Women getting educated and gaining expertise in the finesse of the legal sphere are also a very recent phenomenon globally. The first recorded case of gender discrimination in legal practice was registered as far back as 1869 in U.S when Myra Bradwell was denied admission to the Illinois bar. The US Supreme Court affirmed the decision in 1873 stating that "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother."[2]

A wonderful Indian specimen of women putting up a spirited defense against unequal gender laws comes across as early as the 1887 "restitution of conjugal rights" suit of Dadaji Bikaji vs. Rukhmabai discussed at length by Sudhir Chandra in his monograph "Enslaved Daughters". Rukhmabai, was dragged to court by her husband for refusing to consummate and cohabit in a child marriage after achieving adulthood. An unprecedented suit which enraged a mighty debate between liberals, conservative thinkers, newspaper editors, the legal fraternity, self proclaimed religious leaders and pro feminist intelligentsia of England for a number of years had Rukhmabai defiantly asserting that she preferred to court arrest and allow her property to be attached by the Govt, than lead her life with a man abhorrent to her. To quote Chandra, "Extraordinary by any reckoning, Rukhmabai's defense

[1] Archana Parashar, "Feminism in Indian Legal Education" in Engendering Law, Essays in honor of Lotika Sarkar, Eastern Book Company, Lucknow, 1999, p. 90.
[2] Bradwell vs. Illinois, 83 US 130 at 141 (1873)

is even more impressive because it was made before passive resistance had captured either political theory or popular imagination. It further stands out for being made by a woman when - let alone India where physically as well as mentally 'respectable' women were confined to the zenana - even in the West women's groups were in the early stages of developing a gendered critique of life, and still uncertain about ways of seeking change."[3] A suit which generated immense debate and was on the point of being referred to Privy Council for necessary amendment in the law, finally ended with a compromise whereby Rukhmabai purchased her independence from an unacceptable marriage by merely paying the cost of litigation to her husband which amounted to Rs. 2000 only. Rukhmabai later went on to train and serve as a doctor hence serving as a precedent for all women who sought release from stifling matrimony.

Coming back to the legal stature of women in our country, post-independence we started democratically enough with no delegation of women to a subsidiary status in any sphere of socio-legal-political life, yet even today the number of eminent female jurists in India are a meager handful. Names like Cornelia Sorabji, Indira Jai Singh and Justice Leila Seth are merely a few iconic figures in a largely barren landscape.

Looking at the historical perspective, Ancient India boasts of many female academicians but there are very few examples of women getting involved either in the law making or law deliverance process. Laws, legal system and justice delivery have always remained an overwhelmingly male bastion and it is an irony of sorts that though Justice is a woman, she is quite blatantly blind to the subtle but deeply entrenched prejudices that are found in the legal system.

In order to merge women into the Indian mainstream and to insure gender discrimination is nipped in the root, Legal feminism should form an integral part of legal education and not just an idiosyncratic extra. Gender issues should gain center stage in all legal analysis.

The exact nature of legal education is a debatable matter. Law is controversially considered by some to be a specialized training or an educational undertaking or a technical expertise and the study of law (usually based on the Case study method) is usually divorced from the ground realities of societal issues. Until the study of law is

[3] Sudhir Chandra, "Enslaved Daughters - Colonialism, Law and Women's Rights" OUP, 2008, p. 103.

reconceptualized and made interdisciplinary, gender issues can never be successfully addressed by legal personnel. "Legal education in India and in much of the industrialized world is premised upon the idea that law is an autonomous institution and law students need only concern themselves with the study of law as if it did not have any connection with other institutions and disciplines."[4]

EMPIRICAL ANGLE

This debate on the nature of legal education leads us from the purely theoretical aspect of this research paper towards its empirical perspective. There exists little empirical work to assess the influence of gender bias on legal education. In the hope of remedying this deficiency, a survey of 50 female students from the premier law schools of the country was conducted. It can be treated as a representative sample for this explorative study. The tables are attached as appendix to the paper and the results throw up some interesting facts.

All the respondents, being young career conscious women thought of law as a suitable career option for women. (Table 1) This answer indicates the tendency of modern women to leave behind more conventional careers and don more challenging personas in their professional lives. A majority of them responded by whole heartedly agreeing to law being a pre-dominantly male territory where women were now attempting to achieve a foothold.(Table 1) The budding lawyers who responded to the survey also felt that while trying to accomplish personal career related ambitions, they now also had the power to further the cause of female emancipation.(Table 1). This interesting response shows the larger social concerns of female lawyers. One very noticeable finding in this survey is that these young women could hardly pinpoint any instance of bias in their academic life but once they moved to the professional sphere for their internships they found an all pervasive presence of gender bias and they were anticipating discrimination in their future professional careers also. (Table 1)

A very sad consequence of women being historically alienated from law is lack of proper role models, mentors and support network of more experienceo! women lawyers in the lawyering community and the barest minimum respondents could recall role-models in the legal sphere.(Table 2) Thus most of the respondents had no role models to look up to in their professional sphere. An important premise which had been presented

[4] Ibid, n. 1, p. 96.

earlier(that law reform should now be replaced by social reform) in the paper is emphatically reasserted by this survey where 3/4* of the respondents feel that 33% reservation for women will not improve their legal stature.(Table 3). Empowerment would come not from more legislation favoring women but from better education and better facilities. The respondents did not find much discrimination in Law school which might disadvantage them academically but startlingly all of them are prepared to face bias once they leave law school. The respondents also felt that there were some spheres of legal activity where women could not intervene for example criminal law as it was too dangerous and litigation which was too arduous hence women move into the profession with a pre-conceived mental block (Table 2).

One huge advantage of women taking up challenging careers in law is that female appellants now can more comfortably address and repose faith in female attorneys.(Table 2) All female law students overwhelmingly assented to their being better equipped to tackle women clients in comparison to their male colleagues. Another important role which female advocates could play would be to provide a deeper insight into conflict resolution from a human perspective, thus making the noble tribe of lawyers more humane and people oriented. One major grouse which these students bear against gender bias is their being hindered from gaining equal monetary satisfaction and equal promotion viz a viz their male colleagues.(Table 2) The presence of the invisible "glass ceiling' was found to be a major hurdle to professional and personal growth. This barrier also didn't let them get involved in landmark cases and work for significant clients. The responses to a question on the methods to nip out gender bias on the academic level were largely focused on changing teaching methodology and making the environment of law schools more safe and friendly for women.(Table 3) A major obstacle to this change in strategy appears to be a complacent attitude which turns a blind eye towards discrimination and refuses to put any problem solving mechanism into motion for a problem which to them seems non-existent.

The premier Law schools of the country are considered as strongholds for acquiring and grasping all the intricacies of law. The traditional image of Laws and law making as gender- neutral has led to the growth of a deep-infested wound of gender bias in our legal system. It can only be eliminated at the root level and in its very infancy by the involvement of law schools on an institutional level in promoting women's legal rights, shaping gender-neutral legal thinking, affecting and training future lawyers and policy makers, and by creating authoritative structures for legitimizing legal strategies to combat discrimination against women. In order to eliminate gender discrimination in the laws and legal institutions, there is a need to incorporate women's human rights and gender issues into the law school curriculum. It should be made mandatory to give instructions in legal education regarding professional conduct towards female witnesses, litigants and attorneys. Law schools should co-operate to identify and recommend teaching materials that adequately cover areas of concern for women.

Besides amending and updating curriculums, Law schools can also bring in policy based changes and adopt a written policy against gender bias and sexual harassment, including the means to enforce the policy. All freshers should be familiarized with these policies at the very commencement of their academic careers and gender discrimination should also be eliminated from the recruitment process. The administration should specify what kind of interview questions are permissible and the penalties resulting from violation there of.

In order to further the goal of gender-neutrality in law, morals and ethics should also be an integral part of legal education. According to Deborah Rhode, "Most recent psychological research indicates that well-designed curricula can significantly improve capacities for moral reasoning and that moral judgment bears some modest relationship to moral behavior."[5] Legal education should not merely emphasize on rote learning of cases and statutes but should promote self-reflective and critical capacities with an aim to interweave law, society and state together for conducting legal analyses.

Awareness on gender issues can also be further spread by experienced and discerning faculty capable of addressing gender issues. "Inducting notions of gender into legal education does not require a restructured syllabi but only a gender sensitive teacher."[6]

Legal education plays a vital role in shaping the culture and biases of the entire legal profession but we tend to easily forget the fact that an overwhelming majority of Indian citizens have no legal education or information regarding their legal rights. The woman in the Indian family is the fountainhead of all progress and empowerment so educating the woman is the first step towards the achievement of the ideal of legal

[5] Deborah Rhode, "Missing Questions : Feminist Perspective on Legal Education" Standford Law Review, 1993 p. 1562.
[6] Ibid, n. I,p.l04.

equality and gender fairness. The cardinal goals of democracy "of the people, by the people and for the people" remain unaccomplished if the female population remains unempowered.

This statement made at the Asian Women Lawyers Conference aptly sums up the necessity of merging women in the legal mainstream. "The legal community, comprising of both the Bench and the Bar, is regarded as the upholder of justice and rule of law. However, unless a country's constitutional, legal and judicial systems strive to put in place a gender responsive framework, it will never have a full and fair chance at progressive development. Equal involvement of women in all walks of life, particularly the legal profession, is therefore essential to promote the wider interests and possibilities of law."[7]

Table 1

	Yes	No
Percentage of students thinking of law as suitable career	100%	0%
Percentage of students thinking of law as male bastion	57.1%	42.9%
Percentage of students feeling they will further women's empowerment	69.6%	30.4%
Percentage of students who have encountered bias in legal education	22.7%	77.3%

Table 2

	Yes	No
Percentage of students who can recall female role models in law	4.3%	95.7%
Percentage of students who feel women lawyers better able to represent female clients	72.2%	27.8%
Percentage of students who find themselves at	65.5%	34.5%

[7] http://supremecourtofindia.nic.in/new_links/Final_22_Sept_Bangalore_Women_Conference.pdf

a disadvantage in comparison to male peers		
Percentage of women who feel that gender determines monetary compensation	81.3%	18.7%

Table 3

	Yes	No
Percentage of women who feel reservation of seats will improve their legal stature	24%	76%
Percentage of women wanting improvements in law school mechanism to rale out gender bias	78.2%	21.8%

THE INDIAN AND AMERICAN LAW ON PROVOCATION

SOUVIK CHATTERJI*

ABSTRACT

American law on provocation, after being enacted long time back was executed with sound principles over the last 100 years. The procedure for evaluating grave and adequate provocation had been refined considering the fact situation in the respective cases. The element of deliberation has been given adequate importance to determine the guilt of the accused and the quantum of punishment. In India, the law of provocation developed during colonial period and sympathy was shown by Courts of law to husbands in cases relating to adultery where the act of culpable homicide occurred due to such provocation. The paper compares the law of provocation of the two jurisdictions and it is suggested that the better provisions of the American law can be incorporated in the Indian law and such cases should be adjudicated with scientific, logical, justified rationale.

This article is related to the law of provocation under Indian and American law.[1] It is primarily related to cases involving crimes of passion in relation to adultery. Adultery is an offense of having sexual intercourse with a person other than the lawful husband during the subsistence of marriage.[2]

Under American criminal law, provocation is a factor or element which mitigates the offense of murder into that of manslaughter. The element of deliberation is tested in cases of provocation, which is scientific and well justified.[3] It is not present in the Indian law. Indian law should take ^-^inspiration from American law in bringing about the test of deliberation under-section 300 of the Indian Penal Code (1860), in the definition of grave and sudden provocation.[4]

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[1] American law refers to the law of United States of America.

[2] Black's law dictionary, 8th ed, 2004.

[3] CJS Homicide, section 83, source, west law.

[4] The Indian Penal Code by Dhirajlal K.T. and M. Ratanlal Vakil, 23rd edition, 1962, published by the Bombay Law Reporter Office, page 235.

Adequate provocation means something that would cause a reasonable person to act without self-control and lose any premeditated state of mind.[5] The usual form of adequate provocation is the heat of passion. Under American criminal law, provocation can reduce a criminal charge from murder to voluntary manslaughter.

Under common law, mere language, however aggravating, abusive, or indecent, is not regarded as sufficient provocation to arouse ungovernable passion which will reduce a homicide from murder to manslaughter. It has to be associated with actual or threatened assault, or to any indecent or provoking actions or gestures.[6]

Under American law, a lot of emphasis is given on the timing in relation to the act. In other words, the time that elapsed between provocation and the commission of the act determine the fact whether the killing has been done with intention or sudden heat of passion. If there is time for deliberation then the plea of provocation fails. It is because the provocation has to be adequate to cause the reasonable person to lose self-control. If there was sufficient time for cooling off, then even if there was provocation, the person could have regained his senses and not committed the act in heat of passion.

In *Jackson* v. *State,* [7] it has been stated that where a husband finds his wife at night in company with a man, and the man then and there discloses to the husband that she is guilty of acts of infidelity, and that the man in whose company she is her paramour, and that she intends to continue her acts of infidelity and lascivious intercourse with the man in whose company she is found, and the husband, in the heat of passion, excited by the words and conduct of his wife, shoots and kills her, on the trial of the husband under indictment charging him with the offence of murder, the jury, if they believe that the circumstances were such as to justify the excitement of passion, and the defendant was not actuated by malice or a spirit of revenge, would be authorized to find the defendant guilty of voluntary manslaughter.

Under the Indian criminal law the concept of provocation is dealt with under exception to section 300 of the Indian Penal Code, 1860. It says that culpable homicide is not murder if the offender whilst deprived of

[5] *State* v *Lesbini*, [1914] 3K.B. 1116.
[6] A.M. Jur. Homicide section 56, source: west law.
[7] 135 Ga 684, 70 S.E.245 GA. (1911).

the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.[8]

The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. In *K. M. Nanavati* v. *State*,[9] the judge said that the fatal blow should be clearly traced to the influence of passion arising from that provocation and after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation. It was also said by the judge that the mode of resentment should bear some proper relationship to the sort of provocation that has been given.

Under the Indian law there is no clear standard of deliberation which separates a cold-blooded murder from a murder committed in heat of passion. Provocation is just an exception which reduced the crime of the accused from culpable homicide amounting to murder to culpable homicide not amounting to murder.

The test of grave and sudden provocation is whether a reasonable man, belonging to the class of society as the accused, placed in the situation in which the accused is placed would be so provoked as to lose his self control. Words and gestures, may also, under certain circumstances, cause grave and sudden provocation to an accused as to bring his act within the act of culpable homicide not amounting to murder. Besides the physical and temperamental peculiarities of the accused is not taken into consideration under the Indian law.

That is the reason why the test of deliberation should be introduced in the Indian criminal law (Indian Penal Code, 1860), under the definition of grave and sudden provocation.[10] Besides the Indian law had traditionally been kind to the husband who discovers his wife committing adultery ^md kills either her or the person she is engaged with or even both. This early lenient attitude to the husband in such situations had been designed by the idea that adultery constituted an infringement of the husband's property interest in his wife. And the leniency of the law is confined to

[8] The Indian Penal Code by Dhirajlal K.T. and M. Ratanlal Vakil, 23rd edition, 1962, published by the Bombay Law Reporter Office, page 235.
' 1962,64 Bom L.R.488.
[10] Section 300 of the Indian Penal Code, 1860.

situations where a legal marital tie between the offender and the woman he killed.

Although the aspect of provocation in relation to adultery is a subject primarily related to criminal law, but it has relationship with personal law. Therefore there is no requirement under Indian law to strengthen the self defense relating to heat of passion unnecessarily. In India personal laws are divided into Hindu law, Muslim law, Christian law and Parsi law.

The Hindu Marriage Act, 1955, came eight years after the independence of the country. Section 13 of the Hindu Marriage Act, 1955, deals with the grounds on which the parties can seek a decree of divorce from a competent court having jurisdiction to entertain such petition. Adultery includes the offence of incontinence by married persons. One general intercourse after the solemnization of the marriage is sufficient to make a case. It is very difficult to produce direct evidence to prove an act of adultery. Adultery is a matrimonial as well as criminal offence.

In all the personal laws in the country, adultery is considered a valid ground under which divorce can be obtained by either of the spouses. The only requirement is that the party (husband or wife) who is asserting the ground of adultery has to prove the offence of adultery in a court of law.

So in case the husband discovers that there is relationship of his wife with another person, and he loses self-control due to the discovery he can use the rage in the legal process towards separation after having dialogue with his wife, rather than using the same loss of self-control in committing homicide to the wife or the person with whom she is engaged.

Besides adultery is itself an offence, punishable under the Indian Penal Code, 1860. So in case the husband is aggrieved by the act of the third person who has infringed into his marital home, he has the option of taking the legal recourse, that is filing a criminal case against the said person and thereby punishing the accused of the offence that he has committed.

Actually the Indian law requires a stronger approach in respect of the use of the defense of provocation. The Indian Penal Code was enacted around 150 years back and there was a concept existing at that point of time that the wife was the property of the husband. But in recent times the concept has changed. A person cannot be given an opportunity to kill an adulterer on the reasoning that he had invaded into the marital relationship. Nor is the test enough whether there was sufficient provocation or not.

The Courts in India also should take the beneficial aspect of the law into consideration. The defense of provocation in cases relating to adultery should be granted only in cases where there was no deliberation involved and the provocation was sudden. The Indian law and the Indian courts should not encourage human beings from taking law into their own hands in cases relating to adultery and adjudicate cases relating to provocation in a scientific manner.

BOOK REVIEW

Durga Das Basu's 'Human Rights in Constitutional Law' third edition 2008, revised by Prof. S.R. Bhansali, pp clxiii + 1198 published by Lexis Nexis, Butterworths Wadhwa, C-33 Inner Circle Connaught Place, New Delhi, Price Rs. 1295/-.

'Human rights' had its origin in International Law and its genesis is not older than the Second World War, though the concept of human rights against the sovereign State has its origin in the doctrine of natural law and natural rights. When human rights are guaranteed by a written constitution, they are called 'fundamental rights' or 'individual rights' in the form of Bill of Rights. Prof. S.R. Bhansali, former Professor of Law, Dean and Head, Jai Narain Vyas University, Jodhpur has discussed this constitutional aspect of human rights in national constitutions, and the principles evolved by the courts in the leading countries. The international standards of human rights embodied in the Universal Declaration of Human Rights, 1948 and various covenants on Human Rights, regional conventions on Human Rights and the national standards adopted in the constitutions of different countries form the basis of this book.

This book has been divided in two parts. Part I deals with main contents divided in eight chapters i.e. (i) Introductory, (ii) Origin And Development Of Human Rights, (iii) Fundamental Rights, (iv) Enumeration And Classification Of Human Rights And Fundamental Rights, (v) Fundamental Rights As A Limitation, (vi) Restrictions Upon And Limitations Of Human Rights And Fundamental Rights, (vii) Due Process, Natural Justice And Fundamental Rights, and (viii) Impact Of Emergency On Human Rights. Part II contains 27 Appendices i.e. 22 Statutes relating to human rights passed by the Parliament of India, International instruments and regional instruments. In this way this has become an encyclopedia of human rights in constitutional law. In Part I, the author has dealt with human rights in the Constitutions of India, USA, UK, Canada, Australia, New Zealand, Japan, Guyana, Dominica, Jamaica, Trinidad & Tobago, Ireland, Germany, Nigeria, Malta, Malaysia, Antigua, Mauritius, Nigeria, Austria, Norway, Kenya, Gambia, Cyprus, France etc.

The Constitution of USA has served as a model for the adoption of human rights in almost all the new Constitutions promulgated after the Second World War. The Constitution of India was being drafted at the time when the UDHR was adopted; therefore, it was also influenced by the concept of human rights embodied in the UDHR. In the substantive provisions of the Constitution of India, the human rights were divided into two parts, in much the same way as the International Covenants on Civil and Political Rights, and the Economic, Social and Cultural Rights did later in 1966. The author has rightly said that the justiciable human rights, broadly speaking, were included in Part III of the Constitution of India, while the non-justiciable social and economic rights were set forth in Part IV relating to the Directive Principles of State Policy. It is thus evident that during the period between 1946 and 1949, India has formulated the concept of human rights. The importance of these rights was explained by Bhagwati J. in *Maneka Gandhi case}* as follows:

> "These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to represent the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a 'pattern of guarantee' on the basic structure of human rights, and impose negative obligations on the State not to encroach on individual liberty in its various dimensions-"

India enacted the "Protection of Human Rights Act, 1993" and established the National Human Rights Commission. The powers of the Supreme Court to protect the human rights cannot be curtailed by section 36(2) of the said Act of 1993.[2] The author has rightly pointed out that even though the States have ratified the International covenant and thereby become party to that, it has no direct binding effect on the municipal law of the State unless and except to the extent it has been implemented by the legislature of that State or incorporated into its national constitution. But in the US Constitution, Art. VI (2) has given the place of'supreme law of the land' to the treaties. However, the USA has not so far ratified the International Covenants of 1966, so that no

[1] ***Maneka Gandhi* v. *Union of India,* AIR 1979 SC 597 (619)**
[2] ***Paramjit Kaur* v. *State of Punjab,* AIR 1999 SC 340**

question of invalidity of an American law on the ground of inconsistency with these covenants can possibly arise. India has ratified these covenants in 1979, therefore Prof. Bhansali has rightly said that India has an international obligation to implement them by -

> "appropriate legislation. The Courts in India can offer relief to the victim by so construing the Constitution or the relevant statute, if possible, as to be in tune with the provisions of the Covenant. In many cases the Supreme Court of India implemented the norms adopted by the covenants on Human Rights."[3]

Prof. Bhansali has pointed out that the rule of *locus standi* has been liberalized in U.K.,[4] USA,[5] New Zealand,[6] Canada,[7] and India,[8] where an association or an individual has been allowed to fight through PIL for the persons who are directly affected and are not likely to come to Court to assert their fundamental rights. It is interesting to note that in its zeal to enforce human rights, says Prof. Bhansali, the Supreme Court of India has enforced the non-justiciable rights enumerated in the 'Directive Principles of State Policy' by issuing directions under Art. 32, under the guise of 'social justice'[9] or social rights,[10] and economic rights.[11] While proceeding for the enforcement of fundamental rights, the compensation cannot be claimed under Art. 32 or 226 of the Constitution, where alternative remedy of civil suit is available. But the Supreme Court gave compensation where right to life in any of its form was violated and other effective or adequate remedy was not available. For example in the cases of birth after vasectomy,[12] loss of vision in eye camps,[13] injury to

[3] *Sheela Barse* v. *Secretary Children Aid Society,* AIR 1987 SC 656, *Jolly George Varghese* v. *Bank of Cochin,* AIR 1980 SC 470 ; *People's Union for Civil Liberties* v. *Union of India,* AIR 1977 SC 568

[4] *R.* v. *H.M Treasury,* (1985) 1 All ER 589

[5] *Secy of State* v. *Munson* (1984) 467 US 947

* *Finnigan* v. *N.S.R.F. U.* (1986) LRC (Const.) 877 (884)

[7] *Min. of Justice, Borowski,* (1981) 2 SCR 575 (Can.)

[8] *S.P. Gupta* v. *Union of India,* AIR 1982 SC 149

[9] *State of Kerala* v. *Roshana,* (1979) 1 SCC 572

[10] *S.P. Gupta* v. *Union of India,* AIR 1982 SC 149

[1] *Bhagwan* v. *State ofHaryana,* AIR 1987 SC 2049

[12] *Shakuntala Sharma* v. *State of UP.,* AIR 2000 All 219

[13] *M.P. Human Rights Commission* v. *State ofM.P.* AIR 2003 MP17

newly born infant,[14] death in open manholes,[15] death due to electrocution,[16] anti Sikh riots,[17] protection of fundamental and human rights,[18] death in police custody,[1] death after gang rape[20] etc. the High Court or Supreme Court awarded compensation.

Natural rights are superior to and inviolable by human authority and when they are guaranteed by a Constitution, they are called fundamental rights, because they are guaranteed by the fundamental law. Fundamental rights, like natural rights, are the limitations on all governmental power and State action but in China there are no rights or fundamental rights cannot be enforced against the State. If a right can be over ridden by the legislature, it is not fundamental. Under the Indian and American constitution and European convention, the right to life is available to aliens also. Rights under Article 17, 18, 21, 23 or 24 are also available against private persons.

Prof. Bhansali has pointed out that the doctrine of State action, which originated in USA, is based on the principle that 'when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State'.[21] Whereas the Supreme Court of India has held that, under Art. 12 of the Constitution, every type of public authority which is exercising statutory powers is an agency of the State, whether such powers are governmental and whether such authority is under the control of the Government or not.[22] Therefore, when a statute is violated, a writ petition would be maintainable.[23]

The fundamental rights constitute limitations against the cantonal legislature in Switzerland, but not against the Federal Legislature. There is no separate bill of rights appended to the Swiss Constitution. The protection against arbitrary federal laws, thus is not before the courts but in the hands of the people themselves, through the referendum without which no major law can be enacted. Whereas in India and USA the Supreme Court can determine the validity of an impugned law, because

[14] *Jasbir Kaur* v. *State of Punjab,* AIR 1995 P&H 278
[15] *Punjab Civil and Consumer Welfare Front v.U.T. Chandigarh,* AIR 1999 P&H 32
[16] *Sarla Sah* v. *State ofOrissa,* AIR 2001 Ori. 106
[17] *S.S Ahluwalia* v. *Union of India,* AIR 2001 SC 1309
[18] *Smt. Charanjit Kaur* v. *Union of India,* AIR 1994 SC 1491
[19] *State ofM.P.* v. *Shyamsunder Trivedi,* 1995 AIR SCW 2793 (2801)
[20] *Chairman Rly. Board* v. *Chandrima Das,* AIR 2000 SC 988
[21] *Evans* v. *Newton* (1966) 382 US 296
[22] *Ramamurthy* v. *Chief Commissioner,* AIR 1963 SC 1465
[23] *Gayatri De* v. *IAAI,* AIR 1979 SC 1628

the constitution is the fundamental law. The Court would not exercise the power of judicial review, unless the controversy is real. In other words, the limitations on the freedoms should be limited only to the extent necessary to protect society of which a citizen is only a part.[24] Prof. Bhansali has rightly said that the words 'interest of the general public' in Art. 19 (5) and (6) have been rightly used as grounds of permissible limitation to the freedoms of movement, residence and profession.[25] The European Convention has accepted a limitation that a person cannot exercise his right to life so as to affect the right to life or health of another.[26]

As regards due process clause, a seven Judge bench of the Supreme Court in *Maneka's case*, made a revolutionary pronouncement, which made this judgment a turning point in the history of due process and judicial review in the context of Art. 21 of the Constitution. For the first time, *BhagwatiJ.* observed on behalf of the court as under:

> "There can be no doubt that in view of the decision....in *Cooper* v. *Union of India*, the minority view in *Gopalan's case* must be regarded as correct and the majority view must be held to have been overruled."

The Supreme Court said in the above case that a just and fair trial is guaranteed by Art. 21 as by the American Due Process Clause. The US Supreme Court held that the guarantee of due process requires that the trial of the accused should be as speedy as the circumstances permit, otherwise the trial cannot be said to be 'fair'.[27] Prof. Bhansali has therefore, said that the same view was taken by the Supreme Court of India when it said that the right to a speedy trial is a fundamental right in Art. 21, because no procedure can be fair unless it ensures speedy determination of the guilt of the accused.[28]

The Supreme Court of India has also expanded its jurisdiction under Art. 32 when it said that relief be granted whenever it is necessary for (a)

[24] *Om Kumar* v. *Union of India*, AIR 2000 SC 3689
[25] *Municipal Cropn* v. *Jan Mohd.,* AIR 1986 SC 1305
[26] *X\. U.K.* (1978) DR 19(244)
[27] *Klopfer* v. *N. Carolina*, (1967) 386 US 213
[28] *Hussainara* v. *Home Secy. (I)* AIR 1979 SC 1360

enforcing 'fair play',[29] (b) upholding human dignity,[30] and (c) for preventing suffering and degradation.[31]

As regards the last chapter on 'impact of emergency on human rights' the problem has been solved in different ways in different countries. In India, Art. 359 (1)(1-A) has prevented the President from suspending rights given under Articles 20 and 21 during emergency, the US Constitution does not contain explicit or elaborate provisions to deal with emergencies, and extra ordinary powers have been inferred from the judicial interpretation, whereas in UK emergency powers are conferred by statute, apart from common law. Prof. Bhansali has rightly said that even during the emergency minimum liberties or 'human rights' should be ensured. In case of emergency, the Government should be armed with additional powers, but vital issues relating to human rights should be saved from total or permanent annihilation.

In the end, it may be stated that the book throws light on the subject from different angles and tries to provide enough material for the Bar and the Bench. It is a scholarly exposition of a difficult subject and may be confidently expected to provide a reliable guidance to all those engaged in the research of law relating to Human Rights in Constitutional Law.

Dr. MADHU SOODAN RAJPUROHIT*

Javed v. *State of Maharashtra,* AIR 1985 SC 231

[30] *Sher Singh* v. *State of Punjab,* AIR 1984 SC 469]'

Radal v. *State of Bihar,* AIR 1983 SC 231

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"Legal Technique", by Christopher Enright, Australian Catholic University, North Sydney, First Indian Reprint 2009, Universal Law Publishing Company Pvt. Ltd. C-FF-1A, Dilsukh Industrial Estate, GT Karnal Road, Delhi-110033. Pp. xxxvii + 565. Price Rs.550/-.

Knowing Law and using Law are two different things. The way Law is taught in Indian Universities and Law Schools merely makes the student learn the theoretical frame of law. How do they use it is left to be learnt in professional practices by trial and error methods. Obviously the outcome is not a very healthy understanding of legal processes resulting in inefficient professionals working with law in a shoddy manner. Many a professionals undergo painful process of learning proper use of law in performance of variety of tasks in an extremely competitive environment.

The book under review "Legal Technique", written by Christopher Enright, generally describes the research and use techniques in Australian legal jurisdiction. However given the similarity of paradigm in common law jurisdictions in major countries of the world the research and use techniques can perfectly be utilized in Indian legal world as well. The book explains the task of legal research in a systematic way. It does not deal with the details of specific research materials. Obviously it provides some details, but its main task appears to be to describe material in a generic way, which makes the work useful across all common law jurisdictions, including India. For example instead of describing the specific contents of published statutory annotations, it explains the concept of statutory annotations. It explains as to what an annotation is, what an annotation needs to have to function effectively and how annotations can satisfy one or more of the aims of legal research. This generic understanding of each type of research material is used in the book to build up a general and comprehensive technique for researching law. In this way it assists the readers and professionals in understanding the nature of legal research and gives them an insight which enables them to master any research material they encounter including new materials and new versions of already existing legal materials in terms of new interpretations. Thus the major aim is to make the professional information smart and prepare them for the task of gathering and processing legal information at a time when the volume of this information is increasing at a tremendous rate and tools to locate relevant material are still inadequate.

The book basically aims at beginners in the field of law i.e. students in their first semesters in law schools, but the same can be used in later semesters as well, as the students in the process of learning basic theoretical frame also need to understand the techniques of using the knowledge base. It should enable law teachers to teach techniques for working with law simply and effectively. The way Moot Court competitions are used nowadays to enhance the practical skills of students in applying law, this book could be extremely useful in making them learn basic techniques of reading, interpreting, using, and applying legal principles in variety of situations in legal processes. It should also make working with law more effective and more efficient. In particular it should ensure that judgment, cases, and statutes are clearly written and should substantially improve the quality of teaching in law schools, in turn making lawyers much more competent and justice dispensation mechanism quick and effective. The books as the author himself puts it, is meant "for all those who work with law, regardless of their label as solicitor, barrister, attorney, judge, corporate lawyer, government lawyer, teacher or writer or law student". They are all referred to in the book as people, who work with law as lawyers, and differentiates amongst various categories of lawyers only when it is necessary to do so.

The book is divided into four parts and 45chapters, methodically making subdivisions of topics under a given part. Part-I describes, legal techniques, symbols and concepts and the philosophical underpinnings of those concepts for the purpose of elucidating the things lawyers use and processes and matters that lawyers perform. The law is worked with by the lawyer in two situations, litigious and non-litigious situation. In a litigious situation, the facts are past events and a lawyer has to present evidence in a court of law to prove those facts. The lawyer on the other side too would have to present his version of facts and it is for the courts to decide. This way in a litigious situation a lawyer does not control a case and do not make the things happen. They only try to do so. So persuasive argumentation helps them in a big way in litigious situations. In non-litigious situation the lawyer makes the client perform a series of procedures which satisfy the requirements laid down by law. This way they generate the consequences designated by law. How the lawyer in two different situations has to organize the inventory of his tools and arguments is exhaustively covered in part-I of the book.

Generally making laws and interpreting laws are considered to be two acts falling in two different domains, i.e. legislative and judicial. However at a more generic level there is apparently a continuum in making and interpreting laws. In fact when a court interprets a statute or evolves a common law principle it determines the meaning of law and this way it makes law because it adds to or completes the law. Part-II, extending from chapter 9 to 26 discusses and analyses the process of making and interpreting laws, another way of working with laws. The major concern of a practicing lawyer or any other professional is as to how a particular rule of law would get crystallized. How a court will decide a question of interpretation when it comes before it? When a court interprets common law it decides which meaning of an ambiguous provision is legally correct meaning. This is the meaning which the court takes when it applies the law to the facts to decide the case. Ultimately it is for the legislature to decide which reasons would prevail, either by approving the law implicitly, by not touching it or overturning it by way of a legislative proposal. How and with what techniques a lawyer has to operate in predicting law to his client or ensure justice in a more abstract sense is what is elaborately dealt with under part-II of this book.

Law is made for the purpose of applying it to a fact situation to bring legal consequences to the parties involved when a person consults a lawyer, the matter may involve litigation or transaction or it may involve mere advice or doing a matter that involves litigation or a transaction a lawyer tries to do something about his clients' legal position. Acting or advising client, instituting proceedings in a court of law, initiating a process of law non-litigious situations, organizing law to respond to a particular litigious or non-litigious process, attending to the needs of the client during the legal process, all involves a range of options for a lawyer. How does he responds and articulates his position in a given situation depends upon the explicit and assimilated knowledge which he acquires by way of practicing the skills over a long period of time. If this training is provided to him from the very beginning of his legal career i.e. from the beginning of his legal education itself, he may turn out to be an efficient and effective professional . There are essentially three processes of using law, organizing law, establishing facts and applying law to facts to ascertain the legal consequences of those legal facts. How does a professional makes choices amongst available options and what legal tools he uses for arriving at decisions is what forms part of the discussions in part-Ill of the book.

Reading and writing a legal text has always been considered a fairly technical task, involving special skills. Needless to say that for a legal professional reading and writing legal text is first and one of the most important skills that one has to cultivate consistently. Because of the complexity of the legal paradigm, reading and writing of legal text involves specialized vocabulary used in specially structured sentences. Even otherwise, unfortunately though, the legal writers are distinguished by their frequent use of unnecessarily complicated sentences. Therefore, one of the major areas of concern for plain English advocates has been convoluted sentence structures which put the reader to enormous efforts to understand it. Part-IV of the book discusses the techniques of reading and writing law in terms of statutes, judgments, textbooks, briefs of statutes and cases, summaries, legal documents and opinions in simple and comprehensive manner.

On the whole the book written in a lucid and exceptionally simple language, describes clear and simple techniques of working with law, explaining and elucidating why each technique is needed and what it achieves and then provides a model for employing it. Each model is a step by step guide for performing the relevant task in lawyering process. This shall undoubtedly be an exceptional addition to the armoury of lawyers, working with law.

Dr. A.P. SINGH*

A. N. SAHA - Criminal Reference, 6th Edition, by M. R. Mallick, Assisted by R. K. Beg, Publisher - Eastern Law House Pvt. Ltd., 54 Ganesh Chander Avenue, Kolkata, 2009 p. 2006, Price 1290.

The book is a treatise on criminal law and the approach of the author is to synthesize varied criminal laws with relevant case laws and comments at one place. The book is a good work and is ready reference for most of the criminal laws for lawyers, academicians, judges and students of advance learning.

The work is thorough and comprehensive regarding Indian criminal statutes and is adorned with latest case laws. The hallmark of the book is that it has not focused only on the three Major Criminal Acts, namely, Criminal Procedure, Indian Penal Code and Evidence Law but has gone beyond and strived for unchartered territories like Army Act, Arms Act, Dowry Prohibition, Immoral Traffic (Prevention) Act, Electricity Act and the likes. The knapsack contains varied statutes and also covers the theories of interpretation of penal statutes and relevant constitutional law provisions too.

The book is divided in 41 chapters dealing with varied issues of criminal jurisprudence in India. The first three chapters are general chapters containing the basic issues of criminal liability, the interpretation part and constitutional aspect of criminal liability whereas the remaining 38 chapters discuss the specific statues of criminal law.

First chapter of the book covers the Interpretation of Statutes relating to criminal law and is nicely weaved into the book. The chapter fulfils the duty of an opening batsman nicely, settling the foundation for the middle order to come and exploit the conditions. The base is set in a nice manner and complex doctrines of interpretation of (positive) criminal law is explained in the most lucid manner. Though the author missed the bus while dealing the retrospectivity of criminal statute, firstly, in not demarcating the difference between retroactive penal statute and retrospective penal statute and secondly, missing the all important case of *Kedar Nath Bajoria* v. *State of West Bengal*, (AIR 1953 SC 404) on the point. Second chapter of the book satisfactorily covers the relevant constitutional provisions but again missed out on the relevant concepts of Narco-Analysis and right of self-incrimination. The present controversy about the constitutionality of narco-analysis test, is a big time debate in the criminal law circles. Also if the illegal evidence is obtained through narco-analysis how much of it is to be used and how much not, these controversies are amiss from the book. Also from the second chapter the recent debate about constitutionality of S.377 of IPC is also amiss. The case of *Naz Foundation,* though yet to be decided, could have been incorporated under the heading of Art. 14. Third chapter on general principles of criminal law is not satisfactory and needs a lot of tinkering. It deals with handcuffing of under-trials, lawyers, judges etc., which to my understanding affects the consistency of the chapter. The proper place to discuss these points was the rights of arrested person and accused in Chapter second, where the author discussed the case of *Joginder Kumar and D. K. Basu.* In this chapter the recent Supreme Court stand on Ragging and issuance of Anti-Ragging guidelines have not been touched, which would have been more appropriate in the current scheme of the book. While the author has skipped this very important issue of anti-ragging guidelines, the guidelines on harassment of women in public etc., is also omitted. Furthermore, the basic concept of stages of offences which even an elementary book on criminal principles would cover is missing.

From fourth chapter onwards, the book takes a different path and treads over specifics. It adequately covers the case law and concepts on Arms Act (Chapter 4), Army Act, (Chapter 5), and Code of Criminal Procedure (Chapter 6). Though it seems that the author has not revised in this edition anything that was existing in the previous edition i.e. 5th Edition, which came in 1991. A bare perusal of Chapter 6 makes it very conspicuous that the recent celebrated amendments in Cr.P.C. are not touched upon at all by the author. Though this is true that there are no leading cases on the issues covered by these amendments but this book - as it is a treatise on criminal reference - must cover the recent amendments, especially the amendment of Plea Bargaining, the bail provisions, the Directorate of Prosecution etc. need to be mentioned.

Chapter 7 covers offences pertaining to Company Law and it covers the same rather satisfactorily. Though my suggestion to the author would be to either add in this part or to make a new chapter on Corporate Criminal Responsibility and cover the various corporate governance scams and their legal implications. This part is obviously missing in the present format of the book. Chapter 8, (COFEPOS Act), Chapter 9 (Contempt of Court), Chapter 10 (Copyright), Chapter 11 (Customs Act), Chapter 12

(Dowry Prohibition), Chapter 13 (Drugs and Cosmetic), Chapter 14 (Electricity Act), Chapter 15 (Essential Commodities) adequately cover the specific areas of the stated criminal statute elucidating the relevant and contemporary legal position.

Chapter 16 (Indian Evidence Act) nicely covers the relevant issues under the Law of Evidence. But the author skipped the illegally obtained evidence part. At page no. 1022 of the book the author mentions about, "Evidence procured by irregular means", but this heading does not cover the leading case on the issue namely *R. M. Malkani v. State of Maharashtra,* (MANU/SC/0204/1972) and *Pushpa Devi M. Jatia* v. *M. L. Wadhawan,* (1987 SCC (Crl.) 526) Also the issues relating to brain-mapping test, polygraph test etc. which are very debatable especially after the Telgi case and the Mumbai High Court judgement in *Ramchandra Reddy* v. *State of Maharashtra,* (2004 All MR (Cri) 1704) case, are not covered at all. Also important cases like *Smt. Selvi and Ors. vs State by Koramangala Police Station* (2004(7) (Ker LJ501), *Rojo George vs Deputy Superintendent of Police,* (2006(2)KLT197) et al. on the issue are not covered.

Chapter 17 (Explosive Act), Chapter 18 (Explosive Substance Act), Chapter 19 (Factories Act), Chapter 20 (Foreigners Act), Chapter 21 (Indian Forest Act), Chapter 22 (Identification of Prisoner Act), Chapter 23 (Immoral Traffic Act), covers the area satisfactorily and is informative and educative.

Chapter 24 covers the statute which is the backbone of Indian Criminal Jurisprudence. The statute Indian Penal Code and the commentary thereon is comprehensive and well compiled. Though *few faux pas* were committed by the author here too. The gaffe include not covering the leading Supreme Court judgement on Corporate Criminal Liability and the definition of person, namely *Standard Chartered Bank v. Directorate of Enforcement,* ((2005) 4 SCC 530), concept of Harbour was not at all touched upon, and the biggest of them all is not covering the leading case of *Jacob Mathew v. State of Kerala* ((2005) 6 SCC 1), on the medical negligence of the doctors. The author only contained itself with the case of Suresh Gupta, and much water has flown after that judgement. The author completely bungled in not even letting the discerned readers know that no case against the doctor be booked unless a prior certificate of negligence is obtained by another doctor, as per the latest Supreme Court judgement, namely *Martin F. D'Souza* v. *Mohd. Ishfaq* (decided on 17th Feb 2009). Though these guidelines are mere reproduction of the earlier judgement of Supreme Court, namely, *Jacob Mathews case.*

Chapter 25 (Juvenile Justice), Chapter 26 (Motor Vehicles), Chapter 27 (Muslim Women right) properly covers the relevant provision of laws and are accompanied by relevant case laws.

Chapter 28 covers the Narcotic Drugs and Psychotropic Substances Act, 1985 and here again few important things skipped the attention of the author. Firstly, in my opinion, the definition sections should have been more elaborate in this treatise and the areas like bhang, smack, *charas* et al. should be focused. Also the very famous case of *NoorAga,(* 2008 SC) is missed by the author which is the watershed on the presumptions part ofNDPS.

Chapter 29 (Negotiable Instrument), Chapter 30 (Prevention of Corruption Act) cover the area pretty well and are pretty well knitted with relevant case laws. Chapter 31 properly covers Prevention of Food Adulteration Act, but here the author has bungled big time by not taking into consideration the Food Safety and Standards Act, 2006 which has repealed this act. Nowhere in the commentary this aspect is touched upon.

Chapter 32 to Chapter 41 are decently written though again in Chapter 41 the UAPA and POTA provisions could have been tackled.

Thus the book is a well written commentary but requires loads of changes for it to be called an authority on criminal statutes.

General Observations: The book is a good commentary on varied criminal statutes and covers almost all the relevant central legislations on criminal law adequately. Though the author has committed few lapses, still the approach is very unique and original. Also the book knits and weaves the relevant criminal statutes with constitutional provisions relating to criminal law and general principles which make it very useful for the practicing lawyers of criminal law and academicians. Though the book does not cover Information Technology Law and cyber crimes, where I feel the book has missed out in a big way. Further, the book would have been benefited with a chapter on DNA and Forensic issues. Also the book does not contain a list of cases which could have been handy for a piece of such a nature.

Thus this treatise is nicely compiled and craftily written but committed faux pas at times. The author also lacks initiatives when bringing new edition of a well settled master piece, therefore it is advised that in the next edition the author will plug these gaps and make it a comprehensive master piece.

Dr. MUKUL SHASTRY*

R.K.Bag, *Service Law of Government Employees* (Eastern Law House, Kolkata, 2009). Pp.7-25 + 593. Price Rs.625.

Service law in India largely relates to public services. In public employment the relationship between the employer and employee, terms & conditions governing such relationship are generally governed by statutory provisions which are mostly statutory rules. The dominance of such statutory provisions or rules is because of the vast number of persons involved and the requirement of known, fixed and uniform, to the extent reasonably practicable, norms by which the terms and conditions of their services are to be governed. Once appointed, a public servant acquires a status, his rights and obligations being thereafter determined mainly by statutory rules. The Supreme Court of India has authoritatively laid down the proposition that although the origin of Government services is contractual-there being an offer and acceptance in every case-yet, once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties but by statute or statutory rules which might be altered unilaterally by the Government.[1] The phenomenal expansion of State activities not only through the Governments but also the giant statutory authorities & Government Companies involving countless citizens bring to the foreground the need for a close study of the laws & rules regulating the *inter se* relationship between the employer and the employee engaged in public services.

Prof. M.P.Jain has rightly remarked:"The service jurisprudence in India is rather complex, intertwined as it is with legislation, rules, directions, practices, judicial decisions & with principles of Administrative Law, Constitutional Law, Fundamental Rights & Natural Justice."

To take care of justice to public servants, their reasonable autonomy and legitimate expectations, we have many laws, constitutional provisions and accumulation of case-law too bewildering to understand. The complexity is not inherent in the subject. Once a pattern is prescribed & the core issues identified & defined, then service law can be presented in an attractive manner and as a more comprehensible subject.

[1] *Roshan Lai* v. *Union of India* AIR 1967 SC 1889

The author asserts and rightly so, that it is extremely difficult to present a self-contained & comprehensive work covering conditions of service from recruitment to retirement, because the bulk of statutory rules governing condition of service vary from organization to organization.

The book under review quenches the thirst of inquiry about the core issues in service law. It has presented the subject in a lucid style. The author brings to the readers the entire gamut of the subject, stating principles in a codified form for proper comprehension. The basic principles culled out & enunciated in a codified form. With the perspective in mind that there is inadequacy of standard books on service law, the author has written this book by searching principles from important judicial pronouncements, perplexing statutory rules & overwhelming administrative instructions in the form of government orders & circulars. The complexity of the subject due to the emergence of principles from intermingling of statutes, statutory rules, administrative instructions & judicial decisions of the Administrative Tribunal, High Court & Supreme Court of India has been comprehended by the author with precision & clarity. However, the author, with a view to understand in proper perspective, the procedural aspects relating to judicial redress available to the public servants, has raised the issue of vindictive attitude of the higher authority which is responsible for situations in which the aggrieved public servant is compelled to seek redress for his/her grievances before the judicial forum.

The whole gamut of a public servant's career, the vicissitudes of the life while in service has been meticulously explored by the author. The major areas of disputes such as recruitment, reservation, appointment, regularization, transfer, seniority, promotion, deputation, leave, disciplinary proceedings, termination and suspension, compulsory retirement & voluntary retirement, fixation of pay & pension etc., has been discussed by the author in a simple yet coherent way. Law is allergic to simplicity and reveals in proximity and to weave a lucid statement of the complex calculus of principles, precedents and practices is an admirable goal. The author has meticulously explored every branch of service law in a comprehensive manner.

Author of the book under review, has divided the various areas of service jurisprudence into twenty-five chapters. In the first chapter the author goes on with a general discussion about the ambit of rules and Administrative Instructions. By issuing executive instructions the Government cannot supplant or amend or modify the statutory rules framed under Article 309 of the Constitution of India, but the executive instructions can supplement the statutory rules on matters on which the rules are silent.[2] Second chapter of the book deals with the jurisdiction of Administrative Tribunal over various services, exercise of power of by Tribunal and limitation of such power, limitation of adjudication and execution of order and finally the chapter ends with a discussion on the jurisdiction of High Court vis-a-vis Administrative Tribunal. The Administrative Tribunal is competent to exercise all powers that belong to civil courts and High Courts under Article 226 and 227 of the Constitution, subject to the limitations provided in the Article itself.[3]

The third, fourth, fifth, sixth chapter goes on to discuss the process of creation of relationship between the employer and the employee. The author correctly makes a distinction between recruitment and appointment as they are separate concepts and states that appointment is the end result of recruitment. Recruitment is just an initial process that may lead to eventual appointment in the service. But, that cannot tantamount to an appointment.[4] The author has vividly discussed the issue of reservation in services. Article 16(4) of the Constitution is an enabling provision conferring discretion on the State to provide for reservation, and as such no duty is imposed upon the State to make reservation and consequently no right is vested on a citizen to demand for reservation.[5]

From chapter seven to chapter fifteen the author has discussed the incidents of relationship between the employer and the employee. The author has opened the discussion with leave and absence. The chapter on correction of age and medical fitness is of importance. The power has been conferred on the appointing authority to relax the age of initial recruitment in service with a view to attract the persons of higher efficiency. In the event of suspicion, the date of birth can be challenged and determined by an enquiry.[6] The subsequent chapters discuss lien and transfer, deputation and its various aspects, annual confidential report, pay and increment, discrimination in pay benefit and remedy, promotion and its various aspects and lastly the author, close the discussion on this area with seniority and its various aspects.

[2] *State ofHaryana* v. *Samsher Jang* AIR 1972 SC 1564
[3] *SP Sampath Kumar* v. *Union of India* AIR 1987 SC 386
[4] *Prafulla Kumar Swain* v. *Prakash C.Misra,* 1993 (1) SLR 565 (SC)
[5] *SBISCST Employees' Welfare Association v.* 55/AIR 1996 SC 1838
[6] *State ofOrissa* v. *Binapani Dei* AIR 1967 SC 1269

Disciplinary control and end of relationship with the employer are the subject matters of discussion from chapter sixteen to the last chapter i.e., chapter twenty-five.

In the introductory chapters, a very brief outline of various types of employees in public employment, Constitutional provisions dealing with services under the Union and the State and historical background, since the historical background of the civil services in India can occasionally assume relevance in appreciating some of the substantive principles of the law relating to public services is missing, which would have been of some interest for the readers. The discussion on public service commission is very brief. Public service commission is a constitutional body. Its constitution and functions are also laid down in the Constitution. A chapter on public service commission dealing with its constitution, functions and powers would have been beneficial. Towards the end of the book from chapter sixteen onwards, it would have been proper if the chapters "would have been divided under broad heads. For example, there ought to be a chapter on disciplinary control under which topics like ambit of disciplinary action, disciplinary enquiry, suspension and its various aspects, penalty, dismissal and removal, conduct and misconduct, should have been discussed. The chapters like pension and retrial benefits, termination of service, compulsory retirement and voluntary retirement should have been clubbed under one chapter, because these topics indicate the end of relationship with the employer. Systematic chronological order of chapters from recruitment to termination would have been a matter of appreciation, if the lay-out would have been simple. Broad heads in matters of public employment if covered in the form of chapters with various topics and sub-topics, instead of twenty-five chapters, it would have facilitated ready reference while searching for cases or topics in a particular area under service laws.

Overall, the book under review makes a good reading on various facets of service law in India. The exposition is clear. The language and style are lucid and simple. The contents are educative and informative. Author's profound insight coupled with his clear and concise style of explaining various complicated issues make this book helpful not only for the students of law but also administrators, civil servants, Government companies, local bodies, statutory authorities and legal practitioners.

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Pranay Chaturvedi and Ankur Dalai, *Law of Special Economic Zone, National and International Perspective,* (Eastern Law House, 1st Edition, Kolkata, New Delhi, 2009). Price Rs 975.

Law of Special Economic Zone is taught in the under-graduate and post-graduate levels in different universities across the world. The area is also taught under the broad subject titled Law of Infrastructure Development in certain universities. Generally the law and the policy should be studied and the efficacy of the law can be compared after examining similar laws in other jurisdictions.

In this book, the authors have efficiently discussed the setting up of SEZs in India and the incentives given by the Central Government for establishment of SEZs. The incentives generally include income tax benefits and indirect tax exemptions. But the discussion about the Land Acquisition Act, 1894, in relation to acquisition of lands for setting up SEZs had not been adequate. The author had discussed cases like Devinder Singh v. State of Punjab[1] and *Manubhai Jethalal Patel* v. *State of Gujarat,*[2] etc. But the Land Acquisition Amendment Bill, 2007, and the Rehabilitation and Resettlement Bill, 2007, had not been examined in that context.

In the past it had been seen that most controversies in India took place in respect of acquisition of private land by the Government for public purpose including setting up of SEZs. Whenever agricultural lands were acquired controversy arose. Whenever compensation granted was inadequate, controversy arose. The Land Acquisition (Amendment) Bill, 2007 had come up with a proposal for social impact assessment study in relation to displacement of people whenever private lands are acquired by the appropriate government for public purpose.[3] The author could have addressed the issue as lack of social impact assessment study had led to controversies relating to displacement of people in related cases in the past. Also the manner of evaluation of market value of land had been

'2007 (12) Scale 496.
[2] AIR 1984 SC 120.
[3] Section 3A of the Land Acquisition (Amendment) Bill, 2007.

adequately addressed under the Land Acquisition (Amendment) Bill, 2007, which required discussion.[4]

The Rehabilitation and Resettlement Bill, 2007, had gone one step further and discussed the procedure for carrying out the social impact assessment study in the context of setting up of any infrastructure project including SEZs.[5] The author discussed it in Part Three of the Book, but only the provisions of the Bill had been mentioned, neither the provisions have been analyzed, nor examined. The UN Guiding Principles on Internal Displacement are discussed, but those principles are recommendatory in nature. If the local governments are not bothered to follow the principles there is no express law which can compel them to follow the principles. So, elaborate analysis was required on the implementation of the UN Guidelines.

Reference of SEZs in China had been adequate. The Labour Laws in the country had been explained and the strategic areas where the SEZs were created were also put forward. But the discussion relating to implementation of such kind of a strategy in the Indian context was lacking. India has a different socio-economic framework. Broad discussion was required in respect of implementation of the SEZ law and policy in China within the Indian jurisdiction.

RBI notifications involving ECBs by Units in SEZs, certification of SOFTEX Forms, one Offshore Banking Unit in One SEZ, etc., were not discussed at length in the manner it is discussed in Taxmann's Law and Practice relating to SEZs.[6] These are important areas and require serious discussion.

SEZ law and policy in states like Andhra Pradesh, Maharashtra, West Bengal, Karnataka, Kerala, Rajasthan, and other states could have been discussed in details like the way it is discussed in Taxmann's Law and Practice relating to SEZs.[7] Recently the TATA- NANO case and other instances had shown that the different Indian states had treated SEZs and Land Acquisition issues differently and for those reasons the individual policies of the respective states should have been dealt with in an elaborate manner.

[4] Section 1 IB of the Land Acquisition (Amendment) Bill, 2007.
[5] Section 4 of the Rehabilitation and Resettlement Bill, 2007.
[6] Hitendra Mehta, *Taxmann 's Law & Practice Relating to Special Economic Zones,* Published by Taxmann Allied Services (P) Ltd., New Delhi, India, 2007 pp 10.9-10.30.
[7] Hitendra Mehta, *Taxmann's Law & Practice Relating to Special Economic Zones,* Published by Taxmann Allied Services (P) Ltd., New Delhi, India, 2007 pp 12.3-12.230.

In conclusion it can be said that the Book is well researched work, but the suggestions that are mentioned should be incorporated to make the subject updated and knowledgeable to the readers. As the discipline is ever changing and challenging the Authors of books relating to SEZs should be prepared for incorporating the changes both national and international in nature which are relevant to SEZs.

SOUVIK CHATTERJI*

P.C. Mogha's 'Indian Conveyancer', Fourteenth Edition 2009, revised and updated by M.C. Agarwal and G.C.Mogha, published by Eastern Law House Private Ltd., 54 Ganesh Chunder Avenue, Kolkata (Calcutta), 700 013 [36 Netaji Subhash Marg, Daryaganj, New Delhi], Hardcover, Price Rs. 675/-.

Drafting and Conveyancing are presently a fast moving and fast changing area of law and practice. In the current paradigm of globalizing world, when every business tycoon or tiny, wants to establish its office in India; market forces and recent legislative enactments put a greater burden on the shoulders of the lawyers/solicitors/conveyancing practitioners, which made the task more challenging by keeping themselves update and well-versed with the demand of the day.

"The document is weighed by its content, not the title".[1] The language and the words used are more important in any construction of Deeds, as the construction of a document of title or of a document which is the foundation of the rights of the parties necessarily raises a question of law.[2] The Apex Court has rightly observed that unless the language of two documents is identical, an interpretation placed by courts on one document is no authority for the preposition that a document differently drafted, though using partially similar language, should be similarly interpreted.[3] Judicial interpretations of similar documents in the past can[4] and ought[5] to be relied on, but as the effect of the words used must inevitably depend on the context and would be conditioned by the tenor of each document such decisions are not very useful unless the words used are identical.[6]

[1] *Syam Sunder* v. *Delta International Ltd.,* AIR 1998 Cal 233 (DB); Following, *Inderjeet Singh* v. *Karam Chand Thapar,* (1995) 6 SCC 166 (para 13).
[2] *Sir Chunnila Mehta* v. *Century Spinning Manufacturing Co. Ltd.,* AIR 1962 SC 1314; *I.C.I. India Pvt. Ltd. V. C.I.T.,* AIR 1972 SC 1524; See also *Kameshwaramma* v. *S.Subba Rao,* AIR 1972 SC 1524; *J.G.Chakravarty* v. *Bhowmik,* AIR 1978 SC 139; *Tenkasi Senkunda* v. *N. Kuttralinga Muddliar,* 1998 AIHC 2226 (Mad).
[3] *Abdulla Ahmed* v. *Animendra K.Mitter,* AIR 1950 SC 15.
[4] *Ram Gopal* v. *Nandlal,* AIR 1951 SC 139 (para23).
[5] *State ofOrissa* v. *Titaghur Paper Mills,* AIR 1985 SC 1293.
[6] *Shapoor F.Mazda* v. *Durga Prasad,* AIR 1961 SC 1236.

Conveyancing is an important constituent in the legal career. Objective of the parties may be failed if the deeds are not warded with appropriate words. Alas! Legislature in India did nothing regarding the standard forms of various Conveyancing deeds, as it did in case of pleadings by providing the standard forms of pleadings in Code of Civil Procedure, 1908 (herein after mentioned as CPC). Thus, in India there is a pressing need of an Act of legislature laying down what a conveyance should, and what it need not contain, and providing a set of authoritative forms, as is provided in English Acts, *viz.* - the Conveyancing Act, 1881 (herein after mentioned as the Act, 1881); and the Law of Property Act, 1925 (herein after mentioned as LPA). The LPA contains among other thing standard forms in the same manner as our CPC contains standard forms of pleadings etc. Furthermore, section 46 of LPA authorizes the Lord Chancellor to prescribe other forms of agreements as well.

However, in India, the Transfer of Property Act, 1882 (herein after mentioned as the TP Act), the Trust Act, 1882 (herein after mentioned as the Trust Act), the Indian Contract Act, 1872 (herein after mentioned as the Contract Act), the Registration Act, 1908 (herein after mentioned as the Registration Act), etc. covered the English law provisions of LPA; but none contains any standard forms of conveyance deeds. As a result, the English forms are being used with necessary alterations. Hence, it's want has been long felt by the legal profession in the Country, as rightly said by the original author Mr. P.C. Mogha in its first edition long back in January 1, 1938.[7] The original author Mr. P.C. Mogha tried to fill this gap successfully and set a milestone in Indian Conveyancing by his this classical work, and provided the apposite model deeds, which proved very helpful for the assistance of young practitioners as well as the senior lawyers and solicitors.

Mr. M.C. Agarwal, Former Judge, High Court at Allahabad and Mr. G.C. Mogha, former District and Sessions Judge have revised and updated the *Locus Classicus*, which is perhaps the oldest and the most renowned book on the subject of Conveyancing in India, authored by late Mr. P.C. Mogha (originally written by him in January, 1938), in this fourteenth edition.

This book has been divided in 38 Chapters *viz.* (i) Introduction, (ii) General Forms, (iii) Acknowledgment, (iv) Adoption, (v) Agreements, (vi) Apprenticeship, (vii) Arbitration, (viii) Assignment of Actionable Claims and Decrees etc, (ix) Attorney, Power of, (x) Bond, (xi)

[7] Preface To The First Editon.

Compromise, Composition and Family Settlement, (xii)Declaration, (xiii) Easements, (xiv) Exchange, (xv) Foreign Collaboration, (xvi) Franchise, (xvii) Gift, (xviii) Guarantee, (xix) Hire and Purchase, (xx) Indemnity, (xxi) Lease, (xxii) Licence, (xxiii) Mortgage, Charge, Hypothecation and Pledge, (xxiv) Negotiable Instruments, (xxv) Notice, (xxvi) Partition, (xxvii) Partnership, (xxviii) Patent, (xxix) Receipts, (xxx) Ratification and Modification of Deeds, (xxxi) Release, Relinquishment, Disclaimer, (xxxii) Rescission of Contract, (xxxiii) Sale, (xxxiv) Sales of Goods, (xxxv) Separation Deed, (xxxvi) Service Contract, (xxxvii) Trusts including Settlements, Endowments and Wakfs, and (xxxviii) Wills; which can be classified in basic two categories i.e Firstly the Introduction and the concept , and Secondly the Formats. In this way this has become an encyclopedia on Conveyancing writing.

First chapter has been divided in four Parts *i.e.* Part - I : Preliminary, Part - II : General requirements of Deed of Transfer, Part - III : Precautions, and Part - IV : Rules of construction of Deeds. This chapter deals with the fundamental necessities, cautions and the rules of the construction of Deeds. The second chapter observes the forms of formal parts of deeds. The rest of the chapters deal with the legal concepts enriched with illustrative drafts and formats of different conveyance deeds. These remaining chapters are divided in two major sub - parts *i.e* Firstly - *Preliminary Note* - which speaks about the basic concept and legal requirement of the specific Conveyance deed, and Secondly -*Precedents* - in which various specific conveyance deeds are drafted in illustrative manner for various situations and the different factual matrixes .

This Fourteenth edition is revised and updated by the authors by adding and deleting some new drafts according to the demand of the time. There is addition of two drafts *viz.* i) Memorandum of understanding for bidding for Spa and Health Club, and ii) Live in Agreement in fifth chapter on Agreements; one draft *viz.* Appointment of Arbitrators in other cases in seventh chapter on Arbitration; one draft *viz.* Agreement for consultancy services in fourteenth chapter on Foreign Collaboration; two drafts *viz.* i) Lease of dwelling house, ii) Lease - cum - management agreement for hotel in twentieth chapter on Lease; one draft *viz.* Notice of dishonor of cheque under Sec. 138 of Negotiable Instrument Act in part H - Miscellaneous Notices of twenty fourth chapter on Notice; and one draft on Exclusive patent licence agreement in twenty seventh chapter on Patents. There is deletion of one draft *viz.* Trust deed establishing a scholarship, when no trustees are appointed but money is given to the University in thirty-sixth chapter on Trusts including Settlements, Endowments and Waqfs.

A notable miss is the list of cases. It would have been more useful if the list of cited cases could have been given in the beginning as it has not been given anywhere in the book.

In conclusion, it is fair to say that this Fourteenth Edition of Mogha's Indian Conveyancer revised and updated by Mr. M.C.Agarwal and Mr. G.C. Mogha will go a long way in fulfilling the dire need of a comprehensive work on such an important subject as that of the Conveyancing in India. This *Classical* work is an essential reading for students, practitioners and judicial authorities and would prove very useful for all others who are interested to learn and know the art of Conveyancing.

Dr. MADHU SOODAN RAJPUROHIT*

Law and Social Norms, Eric Posner, Universal Law Publishing Co., Ltd., New Delhi, First edition, pp. 260 Rs. 325/

Do the normative legal theories consider government 'as a determinate instrument' of 'problem solver temperament' in the context of citizens and their inter-relationships? Is law always 'imposed' or to be 'enforced'? Whether the relationship with non legal co-operation is always undermining in its nature, for the later is mixed in terms of its closeness to the legal solutions? These questions as to the basis on which a legal rule depends are interesting authorial posers to a reader, for, they make one to examine and choose in between the choices of 'action problem and legal instruments' on one side and the 'manner of functioning' of the non legal systems on the other.

The author also raises a question to be answered by the reader alone at one's own level i.e., whether the institution of State was overemphasized or whether the relationship of citizens and government is being simplified in the analysis of the problems wherein the simple one's are being chosen at the cost of important one's.

Focusing on the importance of methodological inputs relating to non legal cooperation the author's efforts evolve a mode at the examination of the behavioral regularities so as to bring out the feasibility of being desirable partners in the cooperative endeavors, wherein, the model looks at how the social norms may enhance or diminish the social welfare.

Thus, the author analytically explains various aspects of concern that otherwise are less attended in a given context of and explanation of 'law'. The model; its application; and, therefore, its impact are nascent for the author's work primarily addresses to (i) how people cooperate in view of the enabling incentives towards group endeavors; and , (ii) why the innately 'norm driven quality' of behavior, which in the standard economic premises must reflect the varying preferences.

In the midst of varying assumptions about the people's utility functions, for example, altruism; envy; desire to conform; historical background;

rationality learning; and, imitation and the informational asymmetries, the authorial endeavor proceeds to find the most useful efforts.

Applying the model to several areas of law part of the book looks into the nature and scope of 'gift' as a modus to bring in new partners and reassure old partners in their continuing commitments as against the other conventional view that finds the basis of gift in values of altruism.

The book looks into 'signaling' as a model in order to examine and explain the family relationships in the context of family law' and, throws light on a variety of interesting features. For example, the structure of marital obligations and the State's (un)willingness to enter into the enforcement or interfere with the intra-marital agreements. The author's efforts to appreciate the constructional importance of 'signaling' are noteworthy in evaluating the ultimate intent of the State to explore as well as limit the unsignalled exploitation.

A question namely, whether the 'criminal punishments' bring in the intended outcome of an innate realization in the wrongdoers across the globe occupies the center of the discussion wherein the reader gets to appreciate the role of signaling i.e., reconciliation between societal concerns and individualized consequences.

How do the collective expressions of the civil society demonstrate the allegiance or non approval to the policies and actions of the State and its instrumentalities? Are the behavioral patterns of the community at large ultimately get to be shaped by the personal concerns? Raising an interesting query on these lines, the author provokes a reader for a deeper insight into the inferences of the people's behavior that may be narrowed into a cost benefit analysis.

Very continuingly, this debate advances into issues of social parameters, calling the concerns of a reader on the outcomes of racial discrimination and nationalism being seen from the perspective of State controlled or dominated actions. At the end, the work progressively places the understanding and evaluation of the innate institutional intricacies with the interventional roles of law as an instrument to shape and evolve new societal outcomes.

Basing the analysis on the fundamental premises of control law., i.e., promotion of behavioral compliance rather than prevention of practical inconvenience through the use of punishment mode, the author leaves reader to ponder over as to whether principles and doctrines of contractual obligations and their relationships in the ever evolving societal contexts, may, best be appreciated in the maximization of community concerns and minimization of mutually infringing loses.

Part III of the book which concentrates primarily on the normative values of legal theory critically evaluates the economic perspectives in relation to 'efficient' versus 'dysfunctional' social norms and forces a reader to evaluate for oneself as to whether behaviors are controlled by the strategic outcomes and if so, whether there exists any contextual relevance to the public policies and 'whether' and 'at all' law and market interface with community aspirations.

Thus, in the tri-fold approach the author (i) progressively conceptualizes the inter-relationships for effective understanding; (ii) persuasively argues for the application of theories to construe a variety of legal issues; and, (iii) finally leaves the reader to individually judge and adjudge the relationships between varieties of regulations.

Thus, "Law and Social Norms" explains the interpretative relationship of instruments and actual outcomes and how they must be appreciated in the larger context of welfare and progressive development of the society.

Dr. V SESHAIAH SHASTHRI*

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