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LAW AND JUSTICE ADMINISTRATION*

Hon 'ble Chief Justice Anil Dev Singh

My esteemed brother Judges; Prof. N.L.Mitra, Vice Chancellor, National Law University, Jodhpur, Distinguished members of the Faculty & Dear Students of National Law, University, Jodhpur, and Ladies and Gentlemen, I feel deeply privileged to have been invited to release the first issue of SCHOLASTICUS -Journal of National Law University.

Hon'ble Chief Justice Anil Dev Singh, releasing first issue of SCHOLASTICUS and Vice-Chancellor Prof. (Dr.) N.L Mitra, looking on.

Excellence is hallmark of this young institution. One wonders, how a University, which started its academic program in July 2001 could acquire such eminence in a short span of time. Since I have been associated with the Institution from December 2002, I know it is the result of dedication, hard work and vision of the worthy Vice Chancellor Prof. N.L. Mitra and his enlightened members of the faculty and Registrar of the University, Mr. Ratan Lahoti.

Speech delivered while releasing the first issue of SCHOLASTICUS on November 3,2003 at the National Law University, Jodhpur. *" Hon'ble Chief Justice, Rajasthan High Court and Chancellor, National Law University, Jodhpur.

LAW & JUSTICE ADMINISTRATION -CULTURAL PROCESS

The University treats law and justice administration as a cultural process, which springs and evolves from the whole mass of knowledge. The University in order to widen the horizons of students has adopted a multi-disciplinary approach. It has performed a unique feat of solemnizing marriage of law with twelve other disciplines. This union is well thought of and is not likely to break since it is being handled by experts and not novices who cannot even cope up with on marriage, what to talk of 12 marriages at the same time. The union of law with other disciplines, which are being taught in the University, is essential, as lawyers are required to deal with cases emanating from all fields. Unless a lawyer is familiar with fields other than law, he will not be able to do justice with the briefs of his clients. At present two buildings for the School of Constitutional Governance and the School of Science have come up. Buildings for remaining ten schools will be constructed in course of time.

LAWYERS REQUIRED TO COPE UP **WITH MULTIDIMENSIONAL PROBLEMS**

Law students have to equip themselves with all-round knowledge so as to be able to deliver the goods when they become lawyers. The lawyers in this country have to grapple with multidimensional problems.

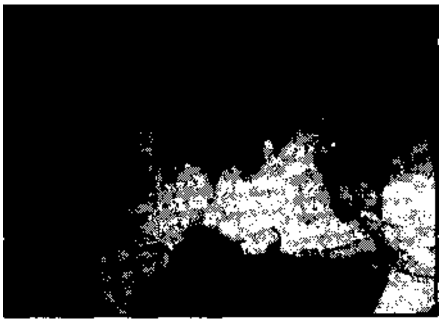
This country is undoubtedly progressing but still much is required to be done. There are thousands of people who cannot afford two square meals a day, who do not have shelter, who do not have clothes to cover their bodies, who do not have right to draw water from village wells or use footwear because of their so called low caste. There are people who are untouched by progress. Their children cannot go to schools. Women are still being subjected to atrocities and rapes. Gang rapes are committed for taking revenge and for executing the directions of *Panchayats.* Riots are the order of the day. Children are made to work in hazardous trades. They are made cripple and left on the road to beg. Trafficking in women and children is rampant. The irony is that all this prevails in spite of the fundamental rights guaranteed by Part-Ill of the Indian Constitution.

Wonderful judgments have been delivered by the courts expounding Article 21 of the Constitution. But it needs a massive effort by the enlightened, including the lawyers, to secure to the people fundamental and human rights.

CHOICE

I am focusing on this aspect of the matter only to bring to your notice that you may have to choose between becoming a corporate lawyer; and a lawyer of, and for the people. Whether you would like to sit in a cushy chair of corporate office or you would like to work for bringing succor and relief to the people by representing their cases in the courts.

People are being burnt alive. Fifty-nine, mostly *karsewaks*, on February 27, 2002 were burnt to death by mob of about one thousand persons at Godhra railway station. In retaliation, a large number of people were killed in equally inhuman way in various parts of Gujarat. In spite of Article 21 in the Constitution, the ghastly drama was enacted and there was massive failure of law and order. Those who live by law have to act collectively and generate a wave to sweep away the satanic propensities of the people who indulge in violation of human rights.



A section of the audience at the function

AFTERMATH OF ASSASINATION OF MRS. INDIRA GANDHI

After the assassination of Smt. Indira Gandhi on November 1, **1984,** several thousand Sikhs were killed. They were pulled out **from** houses, vehicles, trains etc. Votaries of violence went about extinguishing life for several hours without hindrance. The persons who were butchered would have preferred beast to human being for company and must have yearned for a place where fear would not have entered-something Gurudev Ravindra Nath Tagore cherished for. I quote:

"If I were the soil
If I were the water
If I were the grass or
Fruit of flower
If I were to roam about earth near beast and birds
there would be nothing to fear in never ending ties.
Wherever I go, It will be the limitless me."

Communal violence keeps on erupting at alarming frequency. There has to be band of committed and dedicated lawyers to fight for the people's rights. It is not very remunerative, but there is lot of satisfaction in it. You will have to exact compliance of rule of law from the officials and functionaries of the State and even private persons. How a person wants to worship his God should not be a matter of hate and contempt for him, jeopardizing and threatening his liberty. In Sikh Riot's case- Bhajan Kaur versus Delhi Administration- where a Sikh widow has claimed compensation, the State took the stand before the High Court of Delhi that the life and liberty of the victims was violated by private individuals and not by the State and therefore, the State was not responsible for paying compensation to the victim's family. Rejecting the stand, it was held by the High Court that it is the responsibility of the State to maintain law and order. It was also held that the State was responsible under Article 21 of the constitution to pay compensation to the relatives of the victims who lost life during mob violence. Article 21 is a pillar of human rights and it should serve the purpose of securing human dignity, human survival and human development. You (students) have to strive to give a new vision for peaceful future of the people so that they can cooperate, coordinate and coexist with each other. If you do that, Article 21 will never be reduced to a mere platitude or dead letter, dormant, decomposed and dissipated.

Custodial deaths are still taking place in the country. I am just giving an illustration of one of the case to bring home the point. A young man of 25 years was taken into custody for investigation of a petty theft. After two hours, his dead body was handed over to the family. The body bore tell; tale signs of brutality, which was inflicted on him by the police. You have to gear up to fight injustice by all the knowledge and strength at your command.

When parents of small children are incarcerated for the crimes, which they may have committed, the hapless children are ignored and left to fend for themselves. There may not be any one to wipe their tears, respond to their smiles or prevent them from wayward life. These children cannot be forgotten and abandoned. What will happen to children who see heartless world around them in which they are not wanted and they do not receive any thing from the society except deprivation. It should be the concern of the State and the society to see that their basic necessities of life including food, education and shelter are provided to them. It becomes the duty of a social lawyer to secure these rights for the children.

You have to fight legal battles for the people to ameliorate their conditions. You have to acquire excellence in the field of law. You have to acquire sensivity and burning desire to serve the society.

They say nothing great is ever achieved without enthusiasm. If you want to be successful, you should be enthusiastic. Success is directly proportional to the enthusiasm you have. This is a general rule. If you are the team leader and you want that you must succeed in the task before you, you have to enthuse your team members. You have to enthuse the society to eradicate ills. You can do that only when you believe in yourself and believe in your cause and believe in the success thereof. There are a few persons with something extra in them. That something may be only one degree extra in them than others. Water turns into steam when it is one degree more than the temperature at which it boils. Steam as you know can move even the biggest engine in the world. This one degree is *your enthusiasm and passion for work.* Hard work, sincerity, love for work get rewarded. Do your work and do not worry for the result.

Follow the Triple Principle

In our culture there is a triple principle, which should be followed *Yajna*, sacrifice and renunciation. *Dharma*, righteousness, equity, ethicalness, goodness, honesty, integrity, Justice, probity, *Yoga*, harmony, peace. Follow the triple principle and make others to follow as well. Only then the country will reach the dizzy heights, which it deserves.

THE ROLE OF THE SUPREME COURT OF INDIA IN CONSTITUTIONAL GOVERNANCE*

K.K. Venugopal

When speakers commence their presentations with the statement that they are privileged to be asked to deliver that particular lecture, it is more often than not treated as a platitude. But, believe me. in this case, I feel genuinely privileged to deliver this lecture in honor of a person for whom I have had great admiration and affection ever since I first met him in 1979, when I went over to **Delhi** as the Additional Solicitor General of India.

Very much has been written about Justice V.R. Krishna Iyer, but **having** known him personally for about 25 years, what overwhelms **you** is his humanism and his simplicity. All this is reflected in his **writings,** his speeches, his judgments and his actions. I have **listened** to him not only in India, but also in Bangladesh and **Pakistan** at SAARCLAW conferences, when, with intense passion **and** in ringing tones, he painted the tragic situation of the poor and **the** underprivileged in all our countries. I have seen the judges and **lawyers** in these countries crowding around Justice Krishna Iyer **with** admiration, bordering on reverence and basking in the warmth **of his** personality.

During a long career spanning many decades, Justice Krishna Iyer **has** excelled in whatever he has been engaged in as a brilliant **lawyer, a** judge with his heart overflowing for the common man,

* **The** First Justice V. R. Krishna Iyer Lecture delivered on January 31, 2004 at ***e National** Law University (NLU), Jodhpur. Chaired by Prof. (Dr.) N. L. **Man,** Vice-chancellor, National Law University and graced by Hon'ble Justice **V. R. Krishna** Iyer. ~ **Senior** Advocate, Supreme Court of India.

the underdog and the underprivileged, a jurist with over 70 books and innumerable articles to his credit, a revolutionary, a statesman, an orator and above all, a good human being. Add to this his picturesque language and wonderful vocabulary which vividly brings home to his readers the point that he is making. Imagine a judge describing the difference between the Presidential system of Government in the United States and the Westminster system prevailing in Britain, in these terms:

> Not the Potomac, but the Thames, fertilizes the flow of the Yamuna, if we may adopt a riverine imagery.

In my opinion, Justice Krishna Iyer's contribution to the development of jurisprudence in the country places him in the same class as a Denning or a Felix Frankfurter. This is the reason why I feel greatly honored to be able to be present here and to dedicate this paper on 'The Role of the Supreme Court in Constitutional Governance' to this great Jurist.

We go back to the beginning, when the great leaders, who had fought and won Independence from Britain, joined in the stupendous venture of ironing out Constitution for as diverse a population as one could find anywhere in the world - a diversity based on religion, ethnicity, race, language, and also on caste.

The first and foremost question before the Constituent Assembly was the nature of the new State that was to be brought into existence. It was logical that with the experience of the working of the Government of India Act, 1935, the founding fathers would opt for the Westminster system of Parliamentary Democracy. The existing Provinces had a certain amount of autonomy in regard to some subjects. On the withdrawal by the British Parliament of its responsibility for governance of British India, legal sovereignty reverted back to the people of those Provinces. At the same time, with to the lapse of suzerainty of Britain over the Princely States, the sovereignty, which would have vested in the Rulers, was extinguished through the various Instruments of Accession which brought about the merger of these States with the new Union of States. Unlike a true federal government where sovereign states enter into a compact for surrendering, in their mutual interest, part of their sovereignty in favour of a strong Central Government, the units which formed part of the Dominion of India existed only for administrative convenience. In the larger interests of the unity of the country, the distribution of legislative powers leaned heavily in favour of Parliament. Emergency powers and special powers were retained by the Union, which could be used to undermine the autonomy of the States. As a matter of fact, it was open to Parliament, by merely consulting the States, to wipe out of existence any State by merging its territory with any other State or to divide an existing State into two new States

In this background, it would not be permissible to describe the new Constitution as a federal one and at the most it could be described as quasi-federal. The hopes and aspirations of the people were contained in the Resolution of the Indian National Congress on the objects of the Constitution which, on the 20th November 1946, declared:

> — [T]hat it (the Congress) stands for an independent sovereign republic wherein all powers and authority are derived from the people and for a constitution wherein social objectives are laid down to promote freedom, progress and equal opportunity for all the people of India, so that thjs ancient land attain its rightful and honored place in the world and make its full contribution to the promotion of world peace and the progress and welfare of mankind—.".

However, the terrible catastrophe which overtook the people of the country resulting in a bloody carnage and the loss of thousands of lives, resulted in the partition of the country, and on the 15th of August 1947 two new nations, India and Pakistan, were born. In this background, when the Constitution was being drafted, instead of the diversity arising out of the multi-cultural, and multi-lingual pluralistic character of the new nation being treated as an asset, fears were expressed that these very characteristics would be regressive factors which would affect the unity of the nation. Dr. Ambedkar, a day before the Constitution was adopted, said:

> I am of the opinion that in believing that we are a nation, we are cherishing a great delusion. How can people divided into several thousands of castes be a nation? The sooner we realize that we are not yet a nation in the social and psychological sense of the word the better for us —. In India there are castes. The castes are anti-national. In the first place because they bring about separation in social life. They are anti-national because they generate jealousy and antipathy between caste and caste.

Dr. Rajendra Prasad expressed his anxiety on the day the Constitution was adopted on 26th November 1949. He said:

> If the people who are elected are capable and men of character and integrity they would be able to make the best even of a defective constitution. If they are lacking in these, the Constitution cannot help the country. After all, a constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it. India needs today nothing more than a set of honest men who have the interests of the country before them— . We have communal differences, caste differences, language differences, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and will rise over the prejudices which are born of these differences—. In India today I feel that the work that confronts us is even more difficult than the work which we had when we were engaged in the struggle. We did not have then any conflicting claims to reconcile, no loaves and fishes to distribute, no powers to share. We have all these now, and the temptations are really great. Would to

> God that we shall have the wisdom and the strength to rise above them, and to serve the country which we have succeeded in liberating.

Constitutional governance, would, therefore, according to the President of the Constituent Assembly, depend upon the men and women 'who control and operate' the Constitution.

The challenges of governance therefore commenced amidst the fears expressed by the founding fathers. We will now proceed to examine whether the hopes and aspirations of 'We, the people of India', who had given themselves the Constitution, have been fulfilled during the period of the last five decades.

Looking at the practical implementation of these ideals, there are a variety of aspects which we would have to address ourselves to. India has undoubtedly made great strides during the past five decades in the field of governance, the first and foremost aspect being that democracy has come to stay as a permanent feature of the Indian ethos. The greatest success of the country is of its being able to feed a population nearly three times larger than what it was in 1947. Industrialization has taken place rapidly and we are today ranked tenth amongst the industrially developed nations of the world. Our GDP has according to the recent reports exceeded 8% during the last quarter. We are now a global leader in the field of information technology and telecommunications. The Rupee continues to strengthen against the Dollar and our Foreign Exchange reserves have crossed the $ 10G billion mark. These indicators, if taken by themselves, would make us proud to be Indians. But, unfortunately, there are very many regressive factors, which we will have to address ourselves to. First and foremost will be the accountability of the political wing and the bureaucracy of the State through which the parties in power at the Center and the States evolve policy and implement the same. There is a need to ensure that elections are totally and wholly free and fair. We have to maintain basic rights and the rule of law for which purpose the Independence of the Judiciary will have to be guaranteed. Access to justice should be available not only to the rich and the powerful but also to the disadvantaged, the illiterate, the underprivileged and the deprived sections of society. For participatory democracy to function, we will have to have transparency and responsiveness in Government as well as access to information. Civil society, including the social, economic, cultural, religious and political groups has to be given greater freedom to participate in the process of governance. Above all, corruption, which is all pervasive, has to be eradicated. When one thinks of the fact that over 34% of the population of the country is illiterate and 26% live below the poverty line, one wonders as to whether the positive indicators set out earlier are offset by these negative factors. When we talk of percentages it means, in absolute terms, that about 375 million persons are illiterate smd about 286 million live in poverty.

Addressing ourselves to Constitutional governance, we have to ask ourselves the question as to what exactly is the meaning conveyed by this term. The word 'governance' has now become extremely popular in regard to corporate governance, e-governance and so on. I would understand 'governance' to mean the decision making process and the implementation of those decisions. In the case of the Constitution of India, we have very little difficulty in identifying the objectives of Constitutional governance, as these are contained in the very Preamble of the Constitution, - namely, 'JUSTICE; social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and opportunity; and FRATERNITY, assuring the dignity of the Individual and of the nation.' The Preamble describes India as a 'SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC REPUBLIC Achieving these objectives, undoubtedly, are the ultimate goals of Constitutional governance.

THE EMERGENCY

I have commenced this lecture by declaring my confidence in the permanence of democracy and democratic institutions in the country. But, naturally, there have to be caveats. How can one ever forget the period of the Emergency declared on 26th June 1975 and which continued till 18th January 1977. The tragedy was that the very provisions of the Constitution were utilized for suspending civil liberties. A fear psychosis pervaded the entire country and enveloped democratic institutions including the Supreme Court of India itself. Censorship of the media was institutionalized. Political opponents including the present Prime Minister and the Deputy Prime Minister were arrested and detained. Wherever High Courts were bold enough to strike down the detentions, on oral mentioning in the Supreme Court of India, the judgments releasing the political leaders were stayed, without a scrap of paper having been filed.

The issue before the Supreme Court in the cases of the preventive detentions was whether the detenu could invoke his right to life and liberty once Article 21 of the Constitution stood suspended by reason of the declaration issued under Article 359 of the Constitution. The argument that the right to life and liberty was basic and that Article 21 was not the sole repository of the right to life and liberty was negatived by a majority of four judges with Justice H.R. Khanna dissenting. In his dissent, this is what Justice Khanna had to say:

> I agree with the learned Attorney General that if we are to accept his argument about the scope of the Presidential Order of June 27, 1975, in that event we have to accept it in its entirety and go the whole hog; there is no halfway house in between. So let us examine the consequence of the acceptance of the above argument. This would mean that if any official, even a head constable of police, capriciously or maliciously, arrests a person and detains him indefinitely without any authority of law, the aggrieved person would not be able to seek any relief from the courts against such detention during the period of emergency. This would also mean that it would not be necessary to enact any law on the subject and even in the absence of any such law, if any official for reasons which have nothing to do with the security of State or maintenance of public order, but because of personal animosity, arrests and puts behind the bar

> any person or a whole group or family of persons, the aggrieved person or persons would not be able to seek any redress from a court of law.

It now transpires that a specific question was put to the Attorney General as to whether there would be any remedy if a police officer, because of personal enmity, killed another man.

The episode is best described in the words of Justice H.R. Khanna himself, in his book *Neither Roses nor Thorns:*

> I sought some clarifications about certain aspects to which Niren De (the Attorney General) gave replies. It was, however, found by me that some of my colleagues who used to be very vocal about human rights and civil liberties were sitting tongue-tied. Their silence seemed rather ominous. In the course of discussion I put it to Mr. Niren De that Article 21 related not merely to personal liberty but also to life. In view of his submissions would there be any remedy if a police officer because of personal enmity killed another man? The answer of Mr. De was unequivocal: 'Consistently with my argument', he said, 'there would be no judicial remedy in such a case as long as the emergency lasts', and he added: 'It may shock your conscience, it shocks mine, but consistently with my submissions, no proceedings can be taken in a court of law on that score.' The above answer put the matters in plain light and left nothing in doubt so far as the position of the State was concerned.

Obviously, the fear psychosis had overwhelmed the Judges of the Supreme Court while, on the other hand, a large number of judges of the High Court were bold and fearless and upheld the rights of the individual notwithstanding, the Emergency.

The bold and independent judges, who were parties to these judgments, were transferred from one High Court to another High

Court. These transfers obviously, were punitive in nature. With the blanket censorship covering all access to information the only manner of knowing the despotic and dictatorial events taking place were through pamphlets that were sent from foreign countries to Indian citizens, which escaped the censorship of postal authorities. Along with democracy, constitutional governance was a casualty and the question to be asked is how is it that all these institutions including the media and the courts were unable to resist the onslaught on basic rights and freedoms enshrined in the Constitution. It is in this background that one finds that those judges who had during normal times withstood pressures from the Government were now supine and had miserably failed the people of the country. Of course, the shining exception was the dissent of Justice H.R. Khanna, who when he signed the judgement, knew that was he sacrificing his appointment to the highest judicial office in the country, that being the Chief Justice of India. He resigned without regret when he was overlooked for the office.

However, there is some little consolation which one can derive out of this great tragedy that had befallen the democratic foundation on which the Constitution was built being that the people of the country gave a resounding vote against the perpetrators of the Emergency by sweeping them out of power when the next elections were held. This meant that never again would this country have to face the trauma of the Emergency that was imposed on them, for the reason that the political rulers would look at the writing on the wall and know the fate which would overtake them if they were to repeat the same mistakes.

It is obvious that unlike many of the High Courts, the Supreme Court of India did not cover itself with glory in seeking to stand up for the people of the country against the oppression brought by the imposition of emergency; but the story is different when we look at the role played by the Supreme Court of India in regard to ensuring the conduct of free and fair elections in the country.

ELECTIONS

There are two areas where the Supreme Court has exerted itself to ensure that democratic institutions are insulated and protected so that they may function independently and effectively to safeguard democracy. One is the print media and the other is the institution of the Election Commission of India.

The provisions of Article 324 of the Constitution, which confer the powers of .superintendence, direction and control of the conduct of elections on the Election Commission of India, were capable of many interpretations. In the case of *Mohinder Singh Gill* being a judgement of Justice Krishna Iyer, the Supreme Court ensured that the primacy and the plenary powers of the Election Commission in regard to all matters relating to elections were upheld. Justice Krishna Iyer in that case said:

> Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. Myriad maybes', too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a Constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the systems into elected despotism - instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with a potency of its benignant power and within the leading strings of legal guidelines can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as the Great National Parchment.

Having assured the Election Commission its independence, the Supreme Court of India embarked upon a course that would entitle the common man to exercise his franchise fairly and effectively. In ensuring intelligent exercise of the right to vote obviously the voter

'(1978)1 SCC 405.

had to be armed with all necessary information regarding the qualifications as well as antecedents of the candidate. The Vohra Committee Report had painted a bleak picture of the standard of many of the politicians who were representing the people in the Legislatures and in Parliament. The Report described the tragic state of affairs to which the political system in the country had descended due to the induction of gangsters, criminals and members of the mafia into politics. It said:

> Some political leaders become the leaders of these gangs, armed senas, and over the years get themselves elected to local bodies, State Assemblies and the National Parliament. Resultantly, such elements have acquired considerable political clout, seriously jeopardizing the smooth functioning of the administration and the safety of life and property of the common man causing a sense of despair and alienation among the people—. These syndicates (the smuggling syndicates) have acquired substantial financial and muscle power and social respectability, and have successfully corrupted the government machinery at all levels and wield enough influence to make the task of investigative and prosecuting agencies extremely difficult; even the members of the judicial system have not escaped the embrace of the mafia.

In this background, the Supreme Court of India in *Union of India* v. *Association for Democratic Reforms*[2] decided that it was time **thai** it stepped in and through judicial activism exposed the **background** of these criminals, gangsters and smugglers who were **seeking** seats in the legislatures and in Parliament. A mandamus **•as** issued directing the Election Commission to compel **candidates** to disclose their past convictions along with criminal **cases** pending against them, to declare their assets and liabilities, as **well** as their educational qualifications.

^ooojsscciQ^

It is a tragedy of Constitutional governance in this country that all political parties, without any exception, vociferously condemned the decision on grounds that could only be described as pretexts and excuses. Would not one then come to the conclusion that political parties across the board desire to enlist the support of such criminal elements who would be able to capture booths and constituencies at the point of the gun, while at the same time seeking to repudiate the judgement on high and noble grounds like encroachment by the judiciary on the preserve of Parliament?

The sequel was that while pretending to do lip service to the judgement, an amendment was passed to the Representation of the People Act, 1951, merely providing for disclosure of convictions which were disqualifications under the existing law and expressly declaring that a candidate need furnish information only under the Representation of the People Act notwithstanding any judgement of the Court or the direction of the Election Commission. Happily, the judges of the Supreme Court had no hesitation in striking down the amending act which sought to negate the very basis of participatory and informed democracy through the people electing not gangsters and criminals, but enlightened socially oriented, committed persons as their representatives.

It is obvious that Constitutional governance in the country would be in jeopardy if in areas relating to the politics of the country where the politicians are *ad-idem* on a particular policy, the Supreme Court were not to intervene with a strong hand.

CORRUPTION

I believe that in this country there is no individual who has not been exposed to the influence of corrupt forces operating on his daily life. The ubiquitous presence of corruption in various forms has led to the saying, 'In India, corruption is a way of life.' Bribery through money is not the only facet, but nepotism and influence-peddling are the different ways whereby corruption starting at the top among the Ministers of Government at the Center and State levels legitimizes corruption by the bureaucracy and the public services and then trickles down to the public sector and the private sector. I hasten to **add** that there are many exceptions at all levels. There are Cabinet Ministers and high functionaries who cringe at the very thought of being associated in any manner with any aspect of corruption.

It is a well-known fact that when tenders are floated for public projects, the bidder builds the bribe element into his cost of the project. That is the reason why economists think of corruption as increasing transaction costs and conceptualize it as a tax on a project charged by politicians or government officials. Of course, **the** more the regulation, the more the licenses, quotas and permits **are** made a part of everyday life, and windfall profits are granted to those entrepreneurs who, through corrupt or other means, obtain such licenses.

India has been placed as the 71st most corrupt country in the world **with** Sri Lanka at number 52 and China at number 59. It is no consolation that Pakistan is 77th and Bangladesh, as the most **corrupt** among nations, is at 102. The Prevention of Corruption **Act,** 1947, replaced by the Prevention of Corruption Act, 1988, has **made** a small dent in regard to the all-pervasive nature of this **malaise.** And what we find is that it is the public servants at the **lowest** levels who are charged under this Act, with the political **wing** of the State wholly impervious to the rigors of this Act. **The** depth to which the cynicism of the political wing has sunk is **seen** from the repeated election promises made by the major **political** parties to the effect that the Prime Minister and the Chief **Minister** downwards, (including the Secretaries to Government) **would** now be subjected to the jurisdiction of the Lok Pal, consisting of retired Chief Justices and judges, whose **independence** is totally guaranteed. The first Lok Pal Bill was **moved** in 1968 and, as if it was premeditated, it was allowed to **lapse.** In 1971, the Lok Pal Bill was also allowed to lapse on the **dissolution** of the 5th *Lok Sabha.* No government was prepared to **frankly** confess that the last thing that the\. would ever do, notwithstanding election manifestoes, was to abandon their **privileged** position as the rulers of the country and allow themselves to be subjected to investigation, trial and conviction, **like** any other public servant. They, therefore, persisted in their charade. The 1977 Lok Pal Bill was moved and, to prove the Government's sincerity, was even referred to a Joint Committee but again the Bill was allowed to lapse when the Lok Sabha was dissolved. History repeated itself again when the Lok Pal Bill, 1985, the Lok Pal Bill, 1989, the Lok Pal Bill, 1996 and the Lok Pal Bill, 1998 were all allowed to meet the same fate. And now, as we all know, the present Bill of 2001 is also going to lapse in the next one week. My only hope is that the hypocrisy involved in making promises in the election manifestoes about how courageously the Prime Minister, the Cabinet Ministers and the Members of Parliament are going to boldly and fearlessly expose themselves, like other public servants, to the discipline of the Prevention of Corruption Act, will not be repeated again in the election manifestoes that are around the corner.

However, by reason of the intervention of the Supreme Court we have the Central Vigilance Commission Act, 2003. In the now famous case of *Vineet Narain* v. *Union of India,*[3] popularly known as the *Jain Hawala case,* the premier investigating agency in the country, the Central Bureau of Investigation (CBI), set up under the Delhi Special Police Establishment Act, was subjected to the jurisdiction of an independent Central Vigilance Commission (CVC), replacing the existing Central Vigilance Commission and requiring that statutory status be given to the CVC. The appointment of the Director of the CBI was to be made by a committee headed by the CVC. A large number of guidelines were issued to ensure fearless and independent investigation of cases by the CBI. But what is interesting is the statement in the judgement to the effect:

> — [T]hese directions made under Article 32, read with Article 142, to implement the rule of law, wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and, by virtue of Article 144, it is the duty of all authorities, civil and judicial, in the territory of India, to act in aid of this Court.

[3] (1998)1 SCC 226.

A series of judgments of the Supreme Court, which had laid down guidelines in respect of a large number of areas, not expressly covered by statute, were relied upon in support of the exercise of this power, which otherwise would have had the flavor of legislation.

The Central Vigilance Commission Act, 2003 covered members of All-India Services and Group 'A' officers of the Central Government, meaning thereby, Secretaries to Government downwards till Under-Secretaries. In addition, the different levels of officers of public corporations and local authorities under the control of the Central Government were also included. Significantly the Prime Minister and other Ministers were left out, apparently, for being covered by the Lok Pal Act, which, has not yet fructified and may never fructify. It is now obvious that constitutional governance in the country is facing its greatest threat by reason of the massive and large-scale corruption affecting every walk of life. As long as the Legislatures and the Executive are not prepared to ensure the active implementation of the criminal law of the country, I am afraid India will continue to descend lower and lower in the scale of corruption among the countries of the world.

It is true that the Lok Pal Bill, which includes Members of Parliament within its scope, has not become law. But again the Supreme Court has stepped in and in *P. V. Narasimha Rao* v. *State* the Supreme Court, through judicial activism, has interpreted "public servant' in the Prevention of Corruption Act, 1988, to include Members of Parliament. Of course there was a massive hue and cry about this but the Supreme Court did not hesitate to dismiss the review petition, which was filed by the Center to dismiss the petition.

THE JUDICIARY

It is a historical fact that in the first three decades of the working of the Constitution, the Executive and Legislative wings of the State

[4] (1998) 4 SCC 626.

came into conflict with the Supreme Court. A number of laws bringing about agrarian reforms had been struck down by the Supreme Court as being violative of Article 31 of the Constitution. Every effort by Parliament at amending the Constitution and validating the laws met with failure. The breaking point came when in *Golaknath's* case[5] where the Supreme Court held that an act amending the Constitution was not itself an organic law and was subject to the prohibition contained in Article 31 of the Constitution, which invalidated any law inconsistent with the fundamental rights contained in Part III of the Constitution. However, the doctrine of prospective overruling was invoked by the Supreme Court to declare the land reforms laws invalid, albeit prospectively. But what enraged the Executive and the Parliamentarians was the judgment of the Supreme Court in the *Kesavananda Bharati* case.[6] The Supreme Court declared that no amendment to the Constitution was permissible that would violate the very foundation or the basic structure on which the Constitution was structured; for example, the rule of law, the secular character of the nation, the republican Constitution and some of the fundamental rights were all declared to be part of the basic structure of the Constitution. No exhaustive definition of those characteristics which would relate to the basic structure was ever set out in any judgment of the Supreme Court. The result was that at no time would Parliament know with certainty as to whether the proposed amendment of the Constitution would withstand judicial review.

With the declaration of the Emergency in 1975, an aggressive Congress Party, through the then Union Law Minister, sought to put the judiciary in its place. In a speech, which if made today, would have resulted in contempt proceedings being initiated against the Law Minister he had the following to say, with the deliberate intention of browbeating the highest judicial institution in the country:

> An atmosphere of confrontation was sought to be created by those whose duty it was to see that they

[5](1%7)2SCR762. [6]
(1973) 4 SCC 225.

> did not encroach upon the field which did not legitimately belong to them. Nothing should be left undone now to ensure that such a situation did not recur. If even after the amendment (that is, the forty second Amendment to the Constitution) confrontation continues, then I think it will be a bad day for the judiciary.

b was only when the Congress Party was wiped out of political **power** at the elections which were held in 1977, that the Supreme **Court** was able to redeem itself from the loss of credibility, which **it** suffered, when it delivered the *ADM, Jabalpur* case.[7] Even **though** the three organs of the State are equal and coordinate under **the** Constitution, historically the aftermath of the Emergency with **the** perpetrator being disowned by the people, turned out to be a **fortuitous** opportunity for the Supreme Court to gain primacy **among** the three wings of the State. As a result, a resurgent Court **was** able to freely, and with little dissent from the Legislative and **Executive** Wings of the State, ensured that the failure of governance on the part of the Executive and Parliament did not **afiect** the people of the country with the Supreme Court **intervening** in matters of far-reaching public interest under **- purported** exercise of the judicial powers of the State. The areas of **judicial** activism of the Supreme Court touched every aspect of **koman** life including prison conditions, environment, forests, **women** and children, the weak, the disadvantaged and illiterate and **poverty** stricken sections of the people of the country, the ancient **monuments,** heritage of the country, the rights of minorities and so **on.** In *Sunil Batra* v. *Delhi Administration** Justice Krishna Iyer **declared** in his inimitable language:

> For what is punitively outrageous, scandalizing unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. Part III of the Constitution does not part

'(1976)2 SCC 521.
'(1978) 4 SCC 494.

> company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority.

This was the stepping-stone for many more judgments on prison justice, by the Supreme Court of India.

We have only to open the newspapers today to find in the headlines the far-reaching effect of the judicial activism of the Court. It is possible to argue that in very many cases the Supreme Court is virtually encroaching upon the exclusively domain reserved under the Constitution to the Executive and to the Legislatures. It may be so, but we do not find any complaint to that effect being vociferously articulated by the political wing of the State. The reason is not far to see. It is the corruption, the indifference and the apathy of the legislature and of the executive to the rights of the people and the violation of such rights that has forced their submission to the will of Othe Court. Truly, it can be said that even if the Supreme Court of India were not able to wipe away every tear from every eye, it is not because of any failure on its part to do its utmost in this direction.

But we have to reconcile ourselves to the fact that the higher judiciary in the country as well as the subordinate judiciary suffer from weaknesses and the greatest failure of the court system in the country is to tackle the huge arrears which are pending in the courts in the country. The statistics submitted to Parliament in the year 2001 states 'that a staggering 2.4 crore cases are pending in the country's courts as on October 31, 2001; 2,03,25,756 cases in the High Courts and 21,995 in the Supreme Court.' What is frightening is not the mere volume of pendency but the time taken for the disposal of cases at all levels. Criminal cases, on an average would take 3 to 4 years at the trial stage, and with the civil cases taking a much longer time of about 8 years in the trial court, 3 to 4 years in the High Court and if the matter were to come to the Supreme Court another 3 to 4 years. The system practically denies the middle and the lower middle classes access to justice, as they cannot possibly afford to wait for a period of 15 or 20 years before their cases reach a final conclusion. I have no doubt that a large number of litigants do not dare to enter the portals of the courts with their claims because of this one reason alone and the concomitant huge expenses involved in carrying on the protracted litigation. The fast track courts set up about 2 years back have sought to make a dent but it is not an answer to the malaise. I wonder how the judges can be complacent about this situation when they so freely entertain and issue orders in public interest litigation for compelling government to fulfill its obligations swiftly and expeditiously? Obviously if the judges are asked about this, their answer would be that they do not have enough judges, enough court halls, enough staff and enough infrastructure. Surely, the Supreme Court of India can *suo motu* take up the issue as art of public interest litigation and chart out guidelines, as they have done in innumerable cases, for compelling the swift and expeditious disposal of cases for bringing down the arrears? I ask myself the question - of what use is the catena of fundamental rights granted by the Constitution if an Article 32 petition, which itself is a fundamental right, is rejected with a direction that the case should be filed in the High Court. What purpose is served if a violation of a fundamental right is not remedied within a reasonable period of 3 months to 6 months, because otherwise the right would then cease to be fundamental and would merely pass off as any other right? Unless and until the Supreme Court sets its own house in order, it would appear that in this area which deals with the dispensation of swift and effective justice, constitutional governance would be the casualty.

1 now come to a deeper malaise. The breaking news is the issue by a Magistrate, in Ahmedabad, of non-bailable warrants for the arrest of the President of India and the Chief Justice of India, after taking a bribe of Rs. 40,000 We have been hearing of the dreadful state of affairs prevailing in the subordinate judiciary so far as integrity and rectitude are concerned.

In an article, which I contributed to the Journal of the Bar Council of India inl981[9] that is, over twenty years back, this is what I had to say:

'Vol. 8,JBCI459(1981).

> However, like distant thunder, we start hearing rumors of corruption, nepotism and favoritism entering the portals of the courtroom as well. The subject is taboo and like the Chinese monkeys, one shall not see, hear or speak of this evil; but if there is a likelihood of this nightmare ever becoming a reality, then it is necessary to hunt down the causes and neutralize the same before it becomes a reality.

At least three Chief Justices of India have spoken about this most terrible among diseases, which is afflicting the judiciary; two of them after retirement and Chief Justice Bharucha while he was in office. According to Justice Bharucha, about 20% of the judges, and this includes the higher judiciary, are corrupt. A Bill for amending the Constitution, by setting up a National Judicial Commission and also for disciplining judges belonging to the higher judiciary was to be moved in Parliament. But, unfortunately, this Bill would also be a casualty on the dissolution of Parliament in the next few days. If a Judicial Commission consisting of the Chief Justice of India and other Judges of the Supreme Court or the Chief Justices of the High Courts was to be set up for entertaining complaints against members of the higher judiciary, one could at least hope that there is some likelihood of accountability being enforced on this powerful wing of the State. I am afraid that if there is any further delay in the setting up of the National Judicial Commission the credibility of the institution itself will be affected, including, unfortunately, that of the vast number of judges belonging to the higher judiciary, who are upright, fearless and conscientious.

There are very many areas which would legitimately have to be dealt with when dealing with constitutional governance. This includes the freedom of information, transparency, the accountability of the holders of high offices, the caste system which Dr. Ambedkar in his speech in the Constituent Assembly had described as anti-national, the attacks on secularism and the abuse of power by the Central Executive in dismissing State Governments and imposing President's rule in the States. All

these, and more, would have to be dealt with, but on another occasion. We have, however, the satisfaction that, above all, India is a vibrant, functioning democracy. In spite of poverty and illiteracy, we may hope that over a period of the next 10 years a rapidly expanding economy would provide for the 'trickle down **effect'** where the Government would be able to manage its budget so as to set apart substantial amounts for poverty alleviation, **primary** education, drinking water, health services and all those **basic** needs which will go to make up a complete human being. **The** Supreme Court of India has declared that the fundamental **right** given to every person in this country under Article 21 of the Constitution, namely, protection against the deprivation of life and **liberty** other than by the procedure established by law, is not a **mere** right to an animal existence but a right to live with human **dignity** with all faculties intact, with a roof over one's head, with **clothes** on one's back and possessing the tools of one's trade. This is how Justice Krishna Iyer has understood Article 21 in his judgement in the *second Sunil Batra* case:[10]

> So it is imperative, as implicit in Article 21, that life or liberty, shall not be kept in suspended animation or congealed into animal existence without the freshening flow of fair procedure.

I have no doubt that whatever may be the regressive and negative **factors,** the country, in spite of the fears that coalition governments **can** never succeed, would be able to rise to the task of improving **the** quality of life of the poorest among the Indians so that constitutional governance in future would not be directed towards **the** well-being of those who are already rich and affluent and **educated** but also towards the 300 million illiterate and poverty **stricken** people of this country.

" *Sunil Batra (II)* v. *Delhi Administration,* (1980) 3 SCC 508.

DIALECTICS ON INTERNATIONAL LEGAL REGIME IN SOVEREIGN DEBT CRISIS

N. L. Mitra

1. A FEW GENERAL COMMENTS

/./ *Introduction: Slow progress in TRIMS*'

Developed world draws cold feet[2] in taking TRIMS to its logical trends. But in order to ensure global development m the ordinary course of economic rational the low-end secondary industry[3] has to be relocated or at least out-sourced to the developing world while the developed world to take a strategical position in the high-end industrial products and services. It is not economically rational to

* Vice-chancellor, National Law University, Jodhpur.

[1] Trade Related Investments in WTO legal regime.

[2] One of the demands of the developing countries is that WTO negotiations should now deal with the actualization of TRIMS, but developed countries are not in favor to take any immediate steps.

[3] Secondary industry comprises basic core sector industry, which is fundamental to industrialization. This industrial sector requires unrestricted flow of cheap and unskilled workers. The theory of industrialization suggests that industrialization is a wholesome process, it starts at the place where there is abundant supply of cheap workers and in which place materials could be comparatively cheaply collected. With the passing of time the skill level of the workers would increase in the neighborhood. Increase of skills would bring technology progress and demand for increase of wages. The core industry or low end product industry then has to give way to higher skill industry, such as a spinning industry giving way to weaving industry and then to dying, tanning and chemical industry. Ultimately the place may be known for fabric and design industry, which requires workers of high skills or drugs and pharmaceutical industries. That is how low-end product evolves into high-end products. So, any basic industry prepares the place gradually to service sector industries to grow ultimately whereas low-end industry penetrates in the countryside. In brief, this is the history of industrialization, and theory of industrial dynamics.

carry on secondary industry producing low-end product to be carried on in the developed world with high subsidy under the protection of tariff or non-tariff barrier as well as preventing industrial outsourcing especially when primary sector is not open due to various reasons both of locational (economic) and political compulsion. This is not only against the dynamics of industrial civilization but is also against the philosophy of GATT.[4] Developed world have more comparative strength to relocate the human resources in the high-end industrial enterprises and in services. Any backtrack of the developed world may endanger its own industrial capitalism.[5] It is true that the developed world argue for a compatible legal order to facilitate the investment flow in the developing world by way of natural consequence of industrial dynamics. A trustworthy economic and legal system would be albeit necessary for rapid investment-flow across the world. One of the important limbs in the total 'system structure' for facilitating the quick flow of investment is a *trustworthy and efficient* sovereign debt crisis management mechanism.

1.2 Complexity of the issue

Adam Smith wrote in 1776, "when it becomes necessary for a state to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open and avowed bankruptcy is always the measure which is both least dishonorable to the debtor, and least hurtful to the creditor." So failure of a sovereign debt is neither a new development nor a new experience in the global economic phenomena. There are however, too many complexities in dealing with sovereign debt. *First*, sovereign debt does not have collateralization on creating security interest nor is there any clear perception of priority principle in the claim settlement. *Second*, who shall declare that a sovereign is a bankrupt or is facing a near bankrupt situation because of liquidity crunch and is requiring the restructuring of its debt? *Third*, who shall

* **Free** trade in goods, services and free flow of investment through out the **world,** without any barrier, can only ensure global development and maximize **freedom** - this is the fundamental philosophy underlying GATT. " It is now argued that the danger of capitalism lies in capitalism.

administer the restructuring of the assets? *Fourth,* what would be the economic power of a nation-state in bankruptcy situation in so far as the running of the government of the country and in its macro-economic management? *Fifth,* What is going to happen if asset-restructuring scheme fails and there is an insolvency situation? *Sixth,* how would the claims be settled and in what priority? Who would determine the priority situation? *Seventh,* what would be the extent of power of the committee of creditors both on settlement of past debt and for drawing future debts? *Eighth,* how would the disputes be resolved between the creditors *inter se* and between any creditor and the debtor-nation? *Ninth,* how and in what methods would one settle national claims and international claims, sovereign claims and individual claims (specifically in government guarantee in private contracts)? *Tenth,* how to resolve actions in multilateral forums? *Eleventh,* what would be path for obtaining discharge from such an economic mess especially in view of the sovereignty attributed to the political status to the debtor member-state? *Twelfth,* Who shall determine which debt to restructure and which not? All these and many others are the naughty issues.

1.3 New Complexities

The new dimension that is added to the above complexities is the methodological complexities in the present situation of sovereign debt. During the last two decades there has been a paradigm shift in the methodology of acquiring debt. With the development of international financial and debt markets and architecture of market instruments the earlier system of bilateral and syndicated contractual model of acquiring debt is no longto- a dominating phenomenon.[6] Sovereigns now acquire debt through debt

[6] Krueger is right in arguing that 'Developments in the composition of international sovereign borrowing over the past decade - notably the shift away from syndicated bank loans towards traded securities as the principal vehicle for the extension of financial credits to sovereign - have improved the efficiency of international capital markets. I particular, they have broadened the investors base for financing the emerging market sovereigns and have facilitated the diversification of risks.' (*A new approach to sovereign debt restructuring, p 6,* IMF 2002).

instruments directly linked up with market. This dominating phenomenon has been accentuated due to newly liberated developing countries in the post -war period taking aggressive role in governance and in the development of economy of a country. Governments of the developing countries are now playing the lead role in economy building by indulging into all types of commercial activities. Naturally, sovereign debts are now not confined and related to sovereign functions, more debts are needed for ordinary commercial functions. Results were immediate. There are innumerable numbers of creditors who do not have continuous relation with the sovereign-debtor and are only interested in the timely repayment of the claim with full interest agreed upon. These claimants do not have any permanent interest in the sovereign debtor's domestic affair. That brings uncertainty over the proposal of debt restructuring itself resulting in hesitation, buying of time and delay that causes further depletion of asset value.[7]

In the early system of syndicated institutional loans the institutions and the sovereign debtor used to reach agreements in the interest of both the parties. Creditors used to have continued business and the sovereign could have the facility of restructuring the claims. Naturally up to early 1980s there was less problem on settlement and there was higher incentives for such settlements. With the development of market mechanism number of creditors became huge and diversified; interest of the creditors became very specific and spaced in a short time. So, coordination between claimants and claims became a challenge in 1990s. As a result, in the last decade or so, IMF was continuously engaged in the deliberation on the problem. The experience of 1990s spread over in number of countries like Bolivia, Cote d'lvorie, Ecuador, Nigeria, Argentina,

Ibid, Krueger rightly argues, 'This leads to considerable uncertainty among all participants as to how the restructuring process will unfold, and contributes to reluctance by the sovereign, its creditors, and the official sector to pursue a restructuring , other than the most extreme circumstances. This in turn, increases ihe likely magnitude of the loss of asset values, which is harmful to the interests of both debtors and creditors.'

Krueger puts it thus: 'During the past several years there has been extensive discussion inside and outside the IMF on the need to develop a new approach to sovereign debt restructuring.' (pi).

South Korea, Turkey, Pakistan, Russia, Ukraine, or Mexico did not provide any uniform methodology of solution. But each time there was something like a fire-fighting arrangement and IMF was involved in crisis management. Hence, the intense debate on sovereign bankruptcy system is understandable though one may not have sympathy with a private law philosophy and architecture of bankruptcy system in such a World of wide discrepancy in income generation and distribution through the liberal capitalist democratic and global legal framework.

It is, nevertheless, worthwhile to discuss about a rule-based international mechanism premised on multipartite agreement. WTO agreement with all its limitations is a specific example of the fact that nation-states of today are not averse to rule-based framework[9] with inbuilt equity and justice mechanism taking into account wide diversity of resource and income generation.

1.4 Patterns of debt crisis and crisis management

Unless one understands the nature of the crisis one may not prescribe the therapy for the crisis management. Sovereign debt crisis may occur in different ways. A country facing the depreciation of domestic currency may face crisis on account of unhedged foreign currency debt.[10] Such a problem may happen due to private sector foreign currency debt or it may also happen due to the sovereign guarantee system in the public sector foreign currency debt.[11] In the case of private sector foreign currency debt

[9] The Reserve Bank of Australia Bulletin, August 2002 observes, "Fortunately, there has been significant progress is addressing the types of vulnerabilities that led to the Asian crisis, and there is also greater awareness of appropriate policy responses to the onset of crisis, including the possible imposition of temporary capital controls. Furthermore, the increased focus on cooperative solutions in dealings between sovereigns and their creditors may also be helpful in suggesting procedures or contractual terms by which private sector debt crisis can also be addressed more effectively. (p 62)

[10] In the case of the Asian crisis countries,(especially Korea, Thailand and Indonesia) the problems were largely problems of servicing unhedged private sector foreign currency debt following the depreciations of the domestic currency. (Reserve Bank of Australia Bulletin, August 2002, pa 61).

[1'] In the case of Brazil or Korea such a type of crisis occurred.

the solution lies on the national legal provision of the country on cross-border bankruptcy law. In the case of sovereign guarantee a satisfactory remedy has to be devised so that sovereign debt can remain within sustainability and the crisis can be managed efficiently.

1.5 International legal framework

Let us at the outset discuss a few dominating principles of public international law developed in the post-UN era including the basic content of UN Charter, Briton-wood agreement and the declaration of Philadelphia, which are required to be respected notwithstanding the pressure being built upon cracking the contour of these basic principles. As for example, the principle of sovereignty is radically changing in international law and relations, especially in the last decade. Legally speaking, can a sovereign become a bankrupt? A question like this would have been dispensed with as a stupid one about two decades ago. Now at least diere are people who would shoot back, 'why not'? Krueger even argued with the analogy of "corporation model'[12] to plead for a rule-based Sovereign Debt Restructuring Mechanism (SDRM-//te) within the structural fold of IMF.[13] The general principle of sovereignty that lies in the fundamental of the UN systems is now being circumvented both politically and economically, politically dsough the floor of the Security Council or otherwise and economically through multipartite treaties binding the sovereign both politically and economically. That does not mean that all nations are agreeable to bring private law principles from municipal laws to be implanted in the international law. The traditional concept that international law between the sovereign nations are still normally required to follow basic principles like, equality, non-interference, impartiality, mutual respect, and cooperation between the nation-states. In spite of the rapid change in the concept of sovereignty, it would be imprudent to think that a

[n] A corporation faces the bankruptcy proceedings soon it faces financial crisis *m* the form of cash crunch. In US such corporation face what is known as 'chapter IP proceedings.

° *Ibid*, 'Existing Rehabilitation Models and their limitation,' p 10-11, which would be critiqued later.

direct discussion on a sovereign to be declared bankrupt would make a sense in the present set up of international relations. It is, therefore, necessary to discuss the above proposals in the context of historical compulsions of the last two decades or so.

1.6 Doctrine of equality in international trade law:

International trade law under WTO regime has included the principle of equal treatment among the member-states through adaptation of two principles, viz., MEN status to all member nation-state and non-discrimination between domestic and foreign parties. The principle of non-discrimination is punctuated with adequate disclosure provisions, information sharing and domestic institutional methods. The member-states demonstrated in all fairness the wisdom in economic diplomacy in full participatory procedure. Therefore, it can now be envisaged that the member-states of UN financial institutions would also be ready to deal with any issue of financial crisis through participatory model within the paradigm of international legal framework. [5]

2. CRITICAL REVIEW OF SOME SUGGESTIONS

2.1 A few proposals for sovereign debt crisis management:

Sovereign debt crisis has now become a regular feature in the international economic relation. The problem and method of tackling sovereign debt crisis is now loudly being talked about among the economists[16] and also in the international economic

[14] I agree with Mr. Truman when he observes, 'My view is that an international bankruptcy court for sovereign debt would be *useful* in addressing those problems, it would be *desirable* (largely for the reasons advanced by Sachs), but it is not now *feasible.* It is closer to being feasible today than when I participated in drafting the Group of Ten's (1996) Rey Report, but it is still not feasible because the intellectual and foundation has not yet adequately laid.'

[15] WTO model of multilateralism and plulilateralism are two models that may also be experimented in debt crisis management.

E.g., J. Sachs, *'Do we need an International Lender of the Last Resort,' Graham Memorial Lecture,* (Princeton University, 1995).

institutions specially IMF.[17] In the last quarter of a century several developed,[18] developing[19] and least developed countries[20] faced the problem of debt crisis and tried to settle the problem in one or the other *ad hoc* recourse, such as, making a new agreement with the creditors to restructure the credit line or taking time extended for the payment or simply refusing to settle the issue until the economy eases. Naturally, creditors are now raising their voice to deal with the situation. Some times back, Sachs, Bulow, Truman, Haldane and Kruger wrote some papers on the issue suggesting some crisis management,system. IMF also prepared a draft policy paper and circulated the same among the member-states. In all these papers several arguments were formulated in order to deal with the problem of inability of a sovereign nation to regularly service its debt. As for example, (1) One of the leading positive economists, Professor J. Sachs argued in detail about the necessity of having a transparent rule of law in the international economic system so as to make it possible for a nation-state to be dealt with on such bankruptcy situation. He argued in favor of a sovereign bankruptcy law with an international bankruptcy court to settle the claims against the nation-state in the best possible way, such as having an agreement on asset restructure. (2) Bulow however argued that it would be necessary in the international economic legal regime to have a regular system on Sovereign Debt Restructuring Mechanism (SDRM) so as to streamline and trim the area of governance in a sovereign-state. Many states, according to him, indulge in ordinary commercial activities (which is not the job of a government and indulging in business activities without knowing the rule of the game) and endanger the economic management of the state. Similarly, international financial institutions did squander funds in the name of welfare. He does not mink that the sovereign bankruptcy is in itself an answer to the problem. He goes for a total systemic restructuring of the macro-

IMF (Legal and Policy Development and review Departments).The design of *e Sovereign Debt Restructuring Mechanism - further considerations', A paper **caxulated** to members on November 27, 2002. * As **for** example, Russia and Turkey.

As **for** example, Asian crisis especially in Korea, Thailand and Indonesia. The **example** also extends to Argentina, Brazil, and Mexico. [31] As for example, Bolivia, Cote d'lvoire, Ecuador and Nigeria.

economic management of the sovereign-debtor. (3) Truman, on the other hand, suggested the establishment of a 'rescue fund' within the present legal framework of IMF for helping in restructuring debt of a country facing debt crisis. He argued that any SDRM mechanism has to be evolutionary because the international community has also to be ready for such a system. (4) Ms. White identified three issues in the problem, viz., rouge creditors, priority of claims, claims restructuring procedure and deal. For that Ms. White pleaded for some international institutional framework and would not mind a Bankruptcy court. (5) Ms. Anne Krueger argued for a predictable, orderly, and rapid process for debt restructuring on the basis of a multipartite treaty within the framework of IMF for establishing the structure of SDRM-//Y. (6) Taylor, however, proposed a market oriented and decentralized SDRM structure in the form of SDRM-*very-lit.*

2.2 Jeffrey's international bankruptcy court

Professor Sachs argued in length how occasional creditors could be 'rouges' threatening a national economy because of their immediate and casual attitude and without having any concern for and interest in the national economic revival. He argued in length on making a case for an international rule-based system where the debtor would have a definite route for economic restructure and revival. He argued for mobilization of more resources by the International Financial Institutions (IFI) for architecturing the financial revival of countries facing financial crisis. Professor Sachs has several presumptions. *Firstly,* if there can be bankruptcy proceedings to be conducted against a corporate entity; there is a possibility to have a bankruptcy law against the state as an entity. *Secondly,* the presumption is that the harassed sovereign debtor would likely to come before the bankruptcy court seeking facilities of restructure. *Thirdly,* the International Financial Institutions are free to determine their own course of action and would be quite willing to place a substantial fund at the disposal for sovereign debt restructuring as required by the sovereign state from time to time. All these suppositions are made on the basis of some quick conclusions without taking into account the nature of the international law and plurilateral agreements, especially Briton-wood system.

Professor Sachs did not take into full account the possibility of the committee of creditors to be dominated by those 'rouge' creditors. Besides that, can we now take a private law principle in the public law structure especially when complex constitutional matters are involved? Will he be able to advocate such a proposal to be worked out within the fifty states of the United States? A bankruptcy court, even accepted within the domain of international law. cannot be established and given effect to without the consent of the involved states. Which state would come forward to destabilize its economic structure? If International Funding Institutions are so generous to facilitate the states to restructure their obligations, why do you need a bankruptcy court? The issue can be sorted in round table between the parties and the IFIs. How do you set priority of the claims once the IBC (International Bankruptcy Court) comes into existence without the participation in an agreement of all parties in the determination of priority? The proposal of IBC is too premature an idea; it is not a solution. Taylor argued that it would be very good to bring all sovereign under a definite rule of law regime, but that would take a long time to bring parties to some consensus.

2.3 Bulow 's concept of debt restructuring

Bulow's concept of IBC is completely opposite to what Jeffrey suggested. According to him International Financial Institutions (IFI) and the funding agencies have poured in too much of resources in order to pamper the inefficient and aggressive governments. Governments can neither do business nor they ought to be allowed to do the same. According to him any restructuring of debt system must have to be a precondition of disciplining the government within the government functions. Governments are required to withdraw from commercial functions. Based on financial discipline only restructuring is to be allowed. Therefore, he is totally against any further funds of International Financial Institutions (IFIs) to be misused for debt restructuring unless sovereign-debtor agrees to withdraw from the commercial functioning and needs special consideration for withdrawal.

So Bulow's proposal comprises for an asset-restructuring proposal of a sovereign-debtor with a complete and fair disclosure.[21] The principle of equality is in no way to be looked into. He argued that unless there is a regular system for debt restructuring the debtor-nation would never achieve the discipline in the system of governance. A quick restructuring mechanism would be able to direct the economy in the desired path that can save the interest of both, sovereign-debtor and the creditors. Only such a total restructuring would give a new life to the economy of the nation facing debt crisis. According to him such a legal regime can be established by a multipartite agreements under the care of IMF. Bulow's suppositions are also untrue. His theory of IBC is as defective as that of Sachs. Moreover, he brings dangerously the fiscal and monetary management system of debtor country under heavy scrutiny. He refuses to believe that government of a state has commitment to its people. There are several political and economic compulsions intertwined. It would be impossible for any financial institutions, like IMF, to monitor the complexity of political economy under the ministerial system of a state. This is not only politically unwise but it is next to impossibility.

2.4 Krueger 's SDRM-lite

Kruger in his paper attempted to develop a voluntary mechanism for debt restructuring by a sovereign state. His Sovereign Debt Restructuring Mechanism (SDRM) is based on two challenges to any established system, *firstly,* the present uncertainty in crisis management in debt servicing does no good to the debtors and the

[21] *Ibid.,* Para 24 of page 10 on Restructuring Agreement as follows: When a sovereign debtor proposes a restructuring agreement, it would also be required to provide information as to how it intends to treat claims that are not to be restructured under the SDRM. This will enable holders of registered claims to make a decision regarding the sovereign's proposal with full knowledge of how other claims are to be treated. See also para. 98.

creditors, *secondly,* there are several financial constraints of the debtor on any collective mechanism.[23] This SDRM is based on two basic principles. (l)-It is absolutely applicable on voluntary submission. A state party shall have to request for debt •estracturing.[24] (2) It is to be invoked only in very limited circumstances.[25] Kruger's mechanism is analogous to any corporate rehabilitation plan model having four steps as suggested by him. The mechanism starts with a stay on creditors for enforcement of their claims during the period of restructuring ■egotiations. This has to have measures to protect the interest of the creditors during the stay period. Then starts the mechanism that would facilitate negotiations for new financing during the proceedings of restructuring. Finally, there must be a mechanism to bind the parties to an agreement reached for restructuring on the basis of negotiations with the qualified majority. Kruger went on to

~ Kruger put the same as follows: 'But the greater diversity of claims and ■■crests has also made it more difficult to secure collective action from creditors vftcn a sovereign's debt service obligations exceed its payments capacity. This has reinforced the tendency for debtors to delay restructuring until the last passible moment, increasing the likelihood that the process will be associated *mtt* substantial uncertainty and loss of asset values to the detriment of debtors ad creditors alike.'

[B] "Of course, difficulty in securing collective action is only one of a number of ■kaors that have that have made sovereigns extremely reluctant to restructure ■nr debt. Even if mechanisms for debt restructuring are improved, concerns dma economic dislocation, political upheaval and long term loss of access to capital markets will make countries loath to default on their debt service obligations in all but the most extreme circumstances.'

* "Use of the mechanism would be for the debtor country to request; and not for ■c IMF or creditors to impose. If the debtor and creditors were able to agree to ■esmicturing between themselves, they would of course be free to do so without kavBig to invoke the mechanism.'

[3] "Specifically, when the debt burden is clearly unsustainable. In other words, Ac mechanism would be invoked where there is no feasible set if sustainable ■•croeconomic policies that would enable the debtor to resolve the immediate crisis and restore medium-term viability unless they were accompanied by a senificant reduction in the net present value of the sovereign debt. In such cases, the country concerned would probably already have been implementing corrective policies, but would have reached the point where financial viability ceald not be restored without substantial adjustment in the debt burden. Coantries that are judged to have sustainable sovereign debt burdens may on •cession need to approach their creditors for a reprofiling of scheduled obligations. But it is not intended that an SDRM should be used for such cases.

explain the mechanism taking the details of the corporate debt-restructuring model. The emphasis is on majority restructuring. The mechanism has to come into operation based on the assessment of IMF because, * according to Kruger IMF is technically the most competent body to assess as to in what stage the mechanism would have to come into operation. There has to be enough incentives for the debtor to come forward to volunteer the reconstruction, and there must be an IMF supported program for protecting the interest of the creditors.[26] Any additional finance needed during the process of restructuring would have to be given by agreement the priority. During the restructuring proceedings the Committee of creditors has to play a very significant role for (a) arriving an agreement on restructuring; (b) assisting the debtor to adopt policy that protects value of the assets; (c) agreeing on the priority financing during the process and, (d) working with the IMF for quick restructuring of the assets so that the debtor has enough incentive to seek restructuring in time.

He argued further that unless there is a regular system for SDRM the debtor-nation would never achieve the discipline in the system of governance. A quick SDRM would be able to direct the economy in the desired direction that can save the interest of the both the debtor and creditors and give new life to the economy of the nation facing debt crisis. According to him such a legal regime can be established by a multipartite agreements only under the care of IMF.

In the scheme the IMF oversees the process of restructure and as such, the pivot of the whole mechanism. The contractual binding character is not formalized with any dispute resolution system because that might have further irritants. But what would attract the debtor to come forward in response to sufficient incentive in the face of even political upheaval has not been explained. Kruger must have taken lesson number one from the functioning of World

'There would have to be assurances that the debtor would conduct policies in a fashion that preserves asset values. If, throughout the stay, the member was implementing an IMF-supported program or was working closely with the IMF to elaborate policies that could be supported with the use of IMF resources, this would provide many of these assurances.'

Trade Organization (WTO). In WTO system dispute resolution mechanism has a significant role. In fact WTO has taken a shift from the international legal scheme under UN system, especially where WTO has a dispute resolution body with compulsory jurisdiction. And the decision of the dispute resolution body is binding on the parties; non-fulfillment of obligation would attract sanction. This is an import of private law system imported into the public law through multilateral and plurilateral negotiations and agreements. Kruger's article may indicate the logic, 'if WTO can, why IMF can not!'

2.5 Taylor's[27] market mechanism

Taylor preferred a market driven and immediate system of crisis management based on contractual conditionality but with enforceable mechanism[28]. Taylor was in favor of market friendly contact system because it is immediately capable of being enforced and has a strong moral base in a market system. The present uncertain system has a very adverse effect on the US investors in ihe bond market. There is a strong feeling that US government has done a precious little for protecting the interest of the US investors against the whims of the sovereign debtors. The main problem in me bond market is that there is no definite system of enforcement of bond contract. Besides, bond condition, *inter alias,* includes hundred percent bondholders to agree to any system of readjustment in case of crisis in meeting of obligation by the debtor. Taylor argued that substantial majority should have the

"' Under Secretary of Treasury for International Affairs, US in 2002. [M] fai our view, the most practical and broadly acceptable reform would be to ■we sovereign borrowers and their creditors put a package of new clauses into ■Kir debt contracts. The clauses would describe as precisely as possible what tappens when country decides it has to restructure its debt. In this way the contracts would create a more orderly and practicable workout process. Such daces represent a decentralized, market-oriented approach to reform because «Mh the contracts and the workout process described by the contracts are •aermined by the borrowers and lenders on their own terms. lBap-j7www.ustreas.bovt/press/releases/po2056.htm, page 2).

Currently, the clauses in many bonds require the consent of 100 percent of the hoadholders to change the financial terms. Thus, a small minority can prevent a ■esructuring that the majority of bondholders feel is in their best interest.

right to take decisions on the restructuring of the debt. The substantial majority may also buy out the minority interest. Substantial majority shall have the right to take decisions for protecting the value of assets underlying the debt. The debtor and the substantial creditors shall have to take all decisions for restructuring the debt. Taylor emphasized the 'collective action' clause in bonds to be replaced by 'substantial majority action' clause. According to Taylor the weakest issue is the absence of quick and efficient dispute resolution mechanism. As such, there must be effective mechanism for enforceability of the contract as included in the bond framework. With the effective system of enforcement mechanism the global flow of investment may increase number of times.

3. THE DRAFT OF IMF

3.1 A brief outline

IMF formulated a comprehensive suggestion paper[32] on dealing with the sovereign debt crisis initially with the voluntary submission by a sovereign debtor to opt for the crisis management system and once the option is exercised, the state to be bound to observe a compulsive monitoring system during the restructuring phase. The restructuring phase has detail procedural advisory mechanism and a dispute resolution system with compulsory jurisdiction closely resembling the WTO multilateral dispute resolution model. IMF's paper is the revised version of Kruger's

'Majority action clauses are now in sovereign bonds issued under UK law. However, sovereign bonds issued under New York law generally and by tradition have no such clauses. There is no legal reason why such clauses could not be included.'

[31] The three action plan that Taylor suggested are: a package of new collective action clauses; guidelines for borrowers and lenders as they set the detailed terms of these clauses; and incentives-including financial incentives to encourage countries to adopt such clauses.

" IMF (Legal and Policy Development and review Departments), 'The design of the Sovereign Debt Restructuring Mechanism - further considerations' A paper circulated to members on November 27, 2002.

SDRM model added with a WTO model of dispute resolution mechanism. A sovereign debtor under the scheme would be absolutely free to take a decision for submitting to debt restructuring mechanism. The sovereign debtor would decide which debt to come under the restructuring and which debt to be kept out of the system. It would also exercise the option at its own time. There are two factors that are to be remembered here. *Firstly,* a sovereign debtor would be expected to respect the advise of the **IMF** for the purpose of submission to such a restructuring mechanism because IMF is the expert and impartial body engaged in the pursuit of constantly reviewing the economic position of each country. And *secondly* there should be a sufficient incentive in opting for such restructuring without delay. The present experience is that a sovereign debtor hesitates to come for such an option until the economy of the country is badly damaged and the asset is irreparably depleted. The incentive based arrangement with **the** IMF would ensure that advise of IMF is always seriously taken. There must be sufficient scrutiny against adventurism but at the same time, incentive must be adequate for taking right decisions at **the** right time. Here is the importance of full disclosure • of information[33].

In order to facilitate a timely action, as a part of full and complete disclosure, the sovereign debtor is required to submit three comprehensive lists with discriminatory treatment that the debtor proposes to apply. These three lists are: (1) The *First list* comprising the debts that are proposed to be restructured within SDRM; (2) The *second list* including the list of debts that are proposed to be restructured-outside SDRM, and (3) The third list comprising the categories of debts that are not to be restructured **and** that the state would settle the debts according to the terms of **the** debts.

" More recently, Bank of England's Deputy Governor Mervyn King had an interesting observation. While he thought that the Fund's work on SDRM may **ndeed** help reduce the costs of crisis, it is a question mark whether it could **provide** the sufficient incentives to safeguard against future crisis. He identifies **two** missing links in the international financial architecture. The first is what he **calk** presumptive access limits and the second is an active-lending-into-arrears **policy** in cases where debt payment standstills are needed.

The Committee of creditors as a part of their right to accept the proposed discrimination has a right to stipulate conditions for their support, such as, (a) shifting of claims in the non-impaired list (third list) to SDRM list; and (b) expansion of the non-impaired list with the priority claims of the institutional organizations and creditors on new financing as a part of restructuring process and priority assigned pursuant to a vote by the Committee. Such participatory process of discriminatory treatment sounds logical. We have to examine the extent of the debtor's right to discrimination in the light of the creditors' right. But let us first examine the agonizing conditionality to the proposal of SDRM in the draft form.

The note of the RBI submitted on that paper, emphasized several conditions for such a crisis management regulatory mechanism. Such a crisis management strategy has to be (a) within the structural framework of public international law; (b) based on jurisdiction on voluntary basis of the sovereign member country; (c) with mutual cooperation and understanding and (d) not in conflict with the macroeconomic management system of the member country so that it does not in any way stand to restrict or impair in any way the economic structural design and financial sector management of the member. The RBI comment also pointed out that the mechanism has to be compatible with the human right legal regime of the World.

The suggested design of the IMF on the Sovereign Debt Restructuring Mechanism deserves a critical review in the light of the previous discourse and observations.

3.2 Notable features of the proposed SDRM

The proposed SDRM contains the following basic structure that is in conformity with the basic principles of modern internationa law, such as, (1) respect to sovereignty;[34] (2) voluntary submissioi

[34] Sixth principle laid down in page 7 of the paper as follows: The mechanisr should not interfere with the sovereignty of debtors. The mechanism could nc be activated without the sovereign's request. Accordingly, the sovereign woul only seek to activate the mechanism when it had formed a judgment that th

to the jurisdiction; (3) recognition of the power of the sovereign to exercise discretion to declare one debt unsustainable and another, not[36]; and (4) mutual cooperation facilitating participative system based on incentive for both sovereign debtor and creditors[37] to resolve the issue. (5) The system is also projected as an impartial one with an independent judicious body of experts in Sovereign Debt Dispute Resolution Forum (SDDRF).[38] Thus the adamancy of sovereignty argument in public international law has been made amenable with a judicial body. There is nothing in an international judicial body so long there is voluntary submission and self-performance. Voluntary submission is taken care of by sufficient motivational incentives for agreeing debt restructuring. The catch-point however, is the right of the committee of creditors to twist the hand of the sovereign debtor on the compilation of lists of debts for the restructure. The question of equal treatment for all debts, internal and external, is a matter left to the parties to include in the agreement. Once there is a submission the rest of the procedure is absolutely binding against the sovereign-debtor including a sanction in case of non-fulfillment of obligations under the contract.

3.3 Which debts are unsustainable?

The definition of unsustainable debt is not provided in the draft. In common sense, a debt becomes unsustainable when its servicing is

features of the SDRM would enhance its capacity to restructure its debt rapidly and in a manner that limits economic dislocation.

[35] *Ibid,,* page 9 regarding Activation, runs as follows: Consistent with the principle of sovereignty, the mechanism could only be activated at the initiative of the member. When activating the mechanism, the member would represent that it had formed the judgment that its debt was unsustainable.

[36] *Ibid,* principle 2 in page 6 stipulates that SDRM is only to be used on debts decided to be unsustainable. In page 13 para 32 provides thus "Notwithstanding the likely need for a broad restructuring, a debtor may decide to exclude certain types of claims from a restructuring, particularly where such exclusion is needed to limit the extent of economic and financial dislocation.

[37] *Ibid,* page 7, principle no. 7 suggesting thus: The framework should establish incentives for negotiation.

[38] *Ibid,* page 11, para 28 starts as follows: 'The Sovereign Debt Resolution Forum (SDDRF) would be established in a manner that ensures independence, competence, diversity and impartiality.'

untenable. Theoretically speaking, debt of a state may be bilateral or consortium or institutional. Debt may relate to Sovereign function of the State or may relate to a commercial function undertaken by the State. In the developing world a state in its governance includes a whole list of activities for the development of the country, which are otherwise done by commercial enterprises in a liberal democratic and developed world. The basic philosophy in a developed liberal economy is that let the government govern; regulator regulate and market players, play. All players are commercial private enterprises. All such activities are generally related to trade, industries and commerce. Sovereign activities in the governance is restricted to national security, internal and external, generally indicated as 'law and order' and 'defense'; general administration of law and justice; management of external relations, revenue and regulatory administration in money and currency. The cost of governance is to be met out of the revenue generated by taxation.

An external or internal debt unless the same is bilateral, is generally drawn through debt instrument traded in the financial market. Even in bilateral agreement a debt is to meet any contractual agreement having commercial import. In a developing state, the government increases the agenda of activities engaging it in commercial activities directly or indirectly. In a developed liberal economy in government functions there are more and more private participation. As for example, even in government procurement there are presence of detail rules and guidelines for participation of private parties. Therefore, purity in government functions is a vanishing point. Any claim related to commercial activities (even a deal in arms and ammunition is also a commercial activity) is to be included in eligible claims. Such claims include, *inter alias*, (a) A sovereign debt i.e., money borrowed or a credit advanced; (b) sovereign guarantee on repayment of loan or credit advanced; (c) payments under debt instruments; (d) liability under financial derivatives like currency and interest swaps; (e) payment required for supply of goods and services; (f) payment due under lease; (g) payment needed under letter of credit, bankers' acceptance and bonds, and (h) payment for liability on eligible claims under judgment-debt.

So, there are difficulties in determining whether a debt related to an activity is commercial or sovereign function of a state. Arms deal, for instance, in some states is restricted to security function of the state. Similarly, all manufacturing activities in arms, ammunitions, and other instruments used by armed forces are in the exclusive domain of the state. But in most of the others, manufacturing of arms and ammunition and selling of the same is an ordinary commercial venture under special license of the State. Public utility services are important function of the state now in many developing and developed states. In many others these are carried on as commercial ventures. As such, the test of 'what the private entity' can do, can hardly meet the criteria for distinction of claims. The only valid distinction is domestic debt *versus* foreign debt. The recommended principle is that the claims governed by the domestic law of the sovereign and subject to the exclusive jurisdiction of the courts of the country, is to be restructured outside the SDRM.

It may be argued that a long list of caveat on the committee of creditors would reduce the operational efficiency of the SDRM. In such an argument there is an emphasis given on 'mental set' that SDRM is needed when a sovereign is in a bankrupt situation. The analogy of insolvency or bankruptcy does not apply in the sovereign condition. There may be near-symptoms in the failure of a sovereign to maintain debt servicing. Though in international law a sovereign is treated as a *corpus-sole* having corporate-aggregate status, yet a sovereign is not like a corporation. National resources are not the properties to be similarly handled like a corporation, as it does in case of assets belonging to it. A debt may become unsustainable for very many reasons. Say for example, in India any sovereign debt used for the development of agriculture does not immediately raise the tax revenue of the state because agriculture being a states' subject, does not benefit the Center. Agricultural income being generally kept outside the taxation regime in the states, the aggregate revenue of the Center and the states does not increase. There is a presumption underlying each debt that a debt if properly used in its rational economic sense, would generate the tax revenue thereby sustaining it with adequate resource generation for timely repayment of the debt. It may not always happen in the similar way for various reasons. Such reasons may include, uneconomic and unviable use of debt, corruption and siphoning of the fund, consistent economic failure, infrastructure building not immediately generating revenue, tax-base not increased, sudden economic downturn in the economy of the country, excessive deficit in trade balance, obstacle to capital in-flow, national emergency and may other reasons.

3.4 Some agonizing issues

There are agonizing issues in the process of treatment to debts under SDRM since the economy of a sovereign state is dynamic. The two issues are (i) what about future debts, can the Committee put any restrictive covenant on the growth of future debt; and (ii) what about the extent of power of the Committee to regulate the expenditure of the state? The draft avoided any explanation on the two intrigued matters. But paragraph 32 of the draft[39] raises the two and some other complexities as well that requires elucidation.

3.4 (a) Present versus future debt

All future debts naturally increase the burden of the debtor outside the SDRM unless SDRM is only a switch action, that is, 'a momentary' one time action requiring very short time and space for the entire process to be completed from proposal to execution. But that is neither possible nor contemplated. So all future debts not linked up with the debt servicing ability under SDRM can be objected by the Committee because the same increases the burden

[39] *Ibid.,* Para 32 of page 13 runs as follows: Notwithstanding the likely need for a broad restructuring, a debtor may decide to exclude certain types of claims from restructuring, particularly where such exclusion is needed to limit the extent of economic and financial dislocation. By way of example, a debtor may decide to exclude trade credit and certain types of domestic money market instruments (such as Treasury Bills) so as to preserve its continued ability to mobilize these types of financing. Clearly, creditors holding instruments that are to be covered by a restructuring will take a keen interest in the design of the proposed financing package, and will want to ensure that exclusions from a restructuring serve to help preserve a debtor's capacity to generate resources for debt service, rather than increasing the burden on those included in the restructuring.

on those included in the restructuring. The only ground on which the sovereign debtor may seek exemption under the present draft is 'economic and financial dislocation'.

3.4 (b) Creditors' objection on sovereign's expenditure

Rationalizing and rightsizing the expenditure of the sovereign-debtor is directly connected with its capacity to generate resources for debt servicing. Shall the Committee or the Fund have power to insist on any issue related to the budgetary process of the sovereign-debtor opting for debt restructuring under SDRM? The transparency and disclosure norms are applicable on the debtors, that too, very rightly. The debtor must also be clear about the extent of right of the creditors. Paragraph 32 includes some phrases and parts of speech, which have very long and severe implications. The right of the creditors must be very clear *vis-a-vis* obligations of the debtors opting for SDRM. The draft completely betrays on the issue. It is quite natural for the creditors to demand that any budgetary provision on revenue generation and revenue use including any provision for subsidy is in conflict with the interest of the creditors. But there has to be balancing of interest because international law does not anticipate any 'imposition' nor it allows any subjection of people's interest due to any international agreements between the nations'.[40]

3.4 (c) Extent of economic and financial dislocation

It would be really complex issue to determine the extent of economic and financial dislocation to come outside the clutch of the Committee of creditors. This is the sovereign's prerogative and in a democratic system an essential part of the political economy. Any externality is considered in the international law interference in the internal matters of a sovereign. But from the point of view of the interest of the creditors this is a vital issue of interest of them. One may certainly argue that in the absence of credit worthiness one may be asked to bow to any conditionality. But this may lead

All UN institutions are created subject to the Charter of the UNO holding that the body is created by the agreement between the peoples of the world.

to an argument for attaching common law vitiating factor of undue-influence in international agreement.

3.4 (d) General exclusion

All International agreements on finance, trade, commerce and investments contain general exclusionary provision for national security, food security, public health, public interest and public morality. But excepting economic and financial dislocation nothing is included in the draft. This seems to be very peculiar. The space for self-determination on which debt could be excluded from the scheme of restructuring is interpretatively narrow. The test is that (a) debtor's ability to generate resources for debt servicing is retained and (b) burden of those creditors included in SDRM ought not to be increased.[41] These two conditions are not mutually exclusive. Resource generation for security interest; food security; poverty alleviation; public health; and sustainable development are not excluded from the rumblings of the dispute resolution system. In all trade related economic legislations of global understanding between the nations contain these minimum exceptions. Any procedure of SDRM that may ultimately affect the national security of the country or its future growth is likely to be suspected as a vitiating factor. The incentives generated under various paragraphs of the paper[42] sounds to be insignificant concession for a debtor to come forward for restructuring. The mental framework of the creditors is quite apparent even before this multipartite treaty is in the process of conception. The private sector creditors strongly argue to include even bilateral claims to be included in the

[41] *Ibid,* Para 32 in page 13 stipulates thus: 'Notwithstanding the likely need for a broad restructuring, a debtor may decide to exclude certain types of claims from a restructuring, particularly where such exclusion is needed to limit the extent of economic and financial dislocation. By way of example, a debtor may decide to exclude trade credit and certain types of domestic money market instruments (such as treasury bills) so as to preserve its continued ability to mobilize these types of financing. Clearly, creditors holding instruments that are to be covered by a restructuring will take s keen interest in the design of the proposed financing package, and will want to ensure that exclusions from a restructuring serve to help preserve a debtor's capacity to generate resources for debt service, rather than increasing the burden on those included in the restructuring.'

[42] *Ibid,* See principle 7 noted above

SDRM . If SDRM would compel the debtor to allow committee of creditors[44] to seat on judgment on the macro-economic management system of the state through budgetary process there would be few takers of SDRM on voluntary basis.

3.5 Limited choice to the sovereign debtor

Let us now arrange in sequence all conditionality of SDRM to critically review the entire picture of the argument in the following order, (i) Only the central government of the member (debtor-country) would be able to activate the SDRM.[45] (ii) The debtor has really a very limited choice of keeping any claim excluded from the unsustainable credit line. Perhaps trade-credit or a few domestic money market instruments, like Treasury bill, public debt instrument, may be excluded, (iii) In the aggregate financing package such concession would be approved if only the same do not impair the debt-servicing capacity of the debtor, (iv) The Committee of creditors may claim to have the right to review all such budgetary proposals.[46] (y) The debtor shall have the responsibility of being completely transparent.[47] That shall mean

Ibid, para 74 of page 23 reads as follows, 'During the most recent discussions, the preliminary view of the Executive Board was the official bilateral claims should be excluded from the SDRM, at least initially, but that close coordination would be needed between Paris Club and SDRM restructurings. Nevertheless, the private sector has expressed the strong view that inclusion of official bilateral creditors within SDRM - albeit as a separate class - would be critical if the SDRM is to establish a framework that provided for greater inter-creditor equity. The private sector has also expressed a concern that Paris Club restructurings may not address the sustainability of a sovereign debt since it typically deals only with a window of claims failing due, rather than with the stock of debt, and, for that reason, often relies on repeated rescheduling.'

[44] *Ibid,* para 21 of page 10 provides, 'As a means of encouraging active and early creditor participation in the restructuring process, a representative creditors' committee would be given a role under the SDRM to address both debtor - creditor and inter creditor issues.

[45] *Ibid,* page 14 para 37

[46] *Ibid,* page 13, para 32 quoted earlier.

[47] *Ibid,* page 14 para 37 stated thus: Only central government of a member would be able to activate the SDRM. Once activated, all eligible claims on the central government could be brought into the SDRM restructuring process. For this purpose, the central government would include all administrative divisions and agencies that form part of the central government's budgetary process.

that the debtor shall have to place before the Committee accounts of all claims whether to be covered under SDRM or not. (vi) Any violation of the transparency rule shall attract the breach of member's obligation under the Articles of Agreement of the Fund[48]

That makes the complete circle of the plight of the debtor-nation. The Committee of creditors, as for example, may have continuing objections on the subsidy-structure in government expenditure holding that any subsidy is against the interest of the creditors. The Committee may also like to insist on the fiscal discipline. This shall put the political economy of the member under a cloud of doubts. Any debate on the expenditure on public interest like PDS may lead SDRM in this form, to be contested on the ground of violation of human right as well.

3.6 Government accounting system

Many newly independent and most of the developing nations still could not convert their accounting system into modern accounting practice and are still continuing with 'cash-basis' accounting system. Even in government accounting in big countries like India and China a lot is needed to modernize the system. The creditors may insist on the asset based accounting to lay their hands on assets, which may be a de-motivator for the sovereign debtors to change to modern accounting system. A transparent accounting system needed by creditors would be seen as interference because that would be used as evidences. A thorough and detail accounting and audit system would lead to understanding of the use and misuse of debts. SDRM would in itself require detail and scientific accounting and audit practice. No report can be transparent unless accounting procedure is itself not unquestionable. As such SDRM would call for a transparent and detail accounting and audit

Ibid, page 11 para 26 suggested,'It is recommended that the provision of false information by the sovereign during the restructuring process constitute a breach of the member's obligations under the Articles of Agreement. With respect to sanctions for non cooperation or inappropriate use of the mechanism, it is recommended that the Fund would rely on its existing financial policies, including its lending into arrears policy.'

practice. In many developing countries accounting and audit system is so defective that there would be a requirement of building capacity in the governance for switch over to introduction of such a system of government accounting and audit practice. The Committee of creditors would naturally insist on maintaining accounting system according to the norms laid down in international standard. That may cause serious doubt-in the mind of the sovereign debtor about the intention of the creditors. Asset accounting would lead to exercise of the creditors' right on government assets, including immovable properties, which a sovereign would not like to be divested with.

3.7 Dispute resolution body

One of the guiding principles in the draft is that the SDRM framework would establish incentives for a negotiation, not a detail blueprint for a restructuring.[49] Such a multilateral treaty-based incentive framework is a very litigative method; WTO dispute resolution system is a pointer in view. Whereas the submission to jurisdiction may be voluntary and discretionary, the procedure must be rule based to provide the strength of certainty; predictability and definiteness. There may be a best practice code that may be developed as a procedural system. But the system cannot be allowed to fail under the weight of its own. The draft outlined the procedure of appointing the Sovereign Debt Dispute Resolution Forum (SDDRF) to ensure independence, competence, diversity and impartiality.[50] The draft also enlisted the powers of the Forum,[51] which *inter alias*, include functions of three dimensions, *viz.*, administrative, dispute resolution, and Injunctive relief. The draft has various provisions that would generate

Ibid., para (bullet) 7 in Part II, page 7 suggesting, 'The process, of restructuring sovereign debt is relatively complex, requiring the resolution of a number of difficult substantive and procedural questions. To the extent possible, these issues should be resolved through the give-and-take of negotiations and, therefore, the mechanism should not be designed in a manner that presumes a particular outcome. For example, while the SDRM will identify the types of debt that could *potentially* be subject to a restructuring, whether all or only some of that debt is restructured will depend on the outcome of negotiations.'

[50] *Ibid.*, para 28 page 11.

[51] *Ibid.*, para 29 page 12.

litigations. The dispute resolution body would find it difficult to resolve disputes in such open-ended assignment of functional responsibility. As for example, under SDRM there would be a range of claims identified that could be potentially restructured, but it would be for the debtors to propose the subset of eligible claims that would be covered in restructuring and this is likely to require consultation between debtor and its creditors so as to ensure that the proposed framework could attract, broadly speaking creditors' support. One may wonder in these four sets of agenda where would be the striking equilibrium of interests of the contesting parties!

4. CRITICAL MICRO ISSUES IN IMF'S DRAFT

4.1 Eligible vis-a-vis non-eligible claims

(i) Privileged debt: A sovereign seldom goes for collateralized borrowing. This is done by public entities. Sometimes under the contract a special right is created on the creditor to foreclose some asset on the failure of payment. Sometimes a share of revenue receipts is to be deposited into an escrow account until the payment is made. Any privilege assigned in the contract of borrowing of a sovereign or any public entities is an agreement to ascribe special treatment and the promise must be regarded. Hence secured claims may be forming a separate queue for settlement and restructuring.

(ii) Domestic debt: There is an argument for maintaining the principle of equality and non-discrimination amongst foreign and domestic debts. In a country like India, there is no discrimination between domestic and foreign debt of a corporate body under its corporate law when the entity goes on the process of liquidation. Unless there is any, security interest specially creating a right in favor of any claimant, all claimants are in one line with equal rights. Domestic debt is treated under domestic law and in the domestic courts. That is no reason why any discrimination can be made between the two. Similar restructuring scheme may be applicable though through two forums.

(iii) Bilateral creditors: Foreign sovereign debts may be (a) institutional; (b) multipartite or consortium such as Paris club's lending; (c) bilateral and (d) trade credit. All such lending have bilateral overtone. What special rational argument can there be to treat bilateral lending in different footings unless the party lending stipulates a special condition by way of contract. Any claim excepting the secured ones opting for a separate route should not have any incentive to be treated separately, unless the claim is due to some purpose to be categorized in exceptions (such as, national security, food security, public health, economic and financial necessity etc). I consider the incentive for the claimants of all categories excepting the secured ones should be equally forceful and proportionately applicable.

(iv) Trade creditors: What would be the reason to distinguish between the trade and financial credit excepting that these are different on the time scale? That is not enough reason for a separate treatment.

(v) Institutional credit: Credit offered by International organizations has a different connotation and understanding and hence may not fall under common SDRM. Similarly, Lending of Paris club has different inbuilt mechanism of restructuring. Naturally, these are exempted from the list under SDRM. If the Fund is kept out of SDRM, why any misstatement on the part of the sovereign-debtor be treated as the violation of the Agreement of the Fund?

4.2 Identity of the debtor

A government Company and a Public Corporation are assigned separate personality-character like any other corporations. These institutions have their own assets and liabilities not clubbed with that of the sovereign. These *corps juries* Institutions are subjected to domestic law and domestic courts. Therefore, these institutions though radiating in the name of the sovereign owner, need not be clubbed in SDRM. They must be allowed to operate separately on their own strength and weaknesses provided there is no other continued financial link, budgetary or otherwise, and inflow-outflow of resuurces with and in relation to the sovereign.

4.3 Activation

Activation of SDRM brings the incentive of restructuring the debt of the sovereign in the form of repudiation or reduction of the claim, rescheduling of payment, redesigning of the conditionality and financing the restructuring. The claimants have the incentive of protection of the marketable assets from deteriorating asset value, reassurance in the creditworthiness of the sovereign, and participation in the economic decision making of the sovereign-debtor so as to ensure the protection of interest of the claimants. This advantage is very critical and therefore is sufficient incentive. According to the basics of the public international law within the UN paradigm a sovereign may only be stipulated to volunteer into the operation of international law.

4.4 Provision for information, registration and verification

SDDRF is the centre point in the procedure once the Activation takes place. With the global notification given by SDDRF two sources of information collection shall be activated. All claims are required to be registered with the SDDRF within the stipulated time and secondly the sovereign debtor would provide all known information regarding the indebtedness. These information would lead to preparation of three lists, First with claims proposed to be restructured under SDRM by the debtor; Second with the list of claims to be restructured outside SDRM and third claims intended not to be restructured. Another list is also required to be prepared with the claims having collateral security interests indicating the value of the security-interest. This list may be a part of the claim-list 2 under the head, claims to be paid off and/or restructured within the collection value of the security-interest. The registered claim requires verification by the SDDRF. Any claim not contested by the debtor is to be taken as verified. The verification must be complete with all conditionalities attached to the claim. This may become a litigious process because the litigation is not necessarily between the debtor and a creditor of a claim, the litigation may be inter- creditors as well on various aspects of the credit. Facilities must be accorded to the SDDRF for impartial verification to have access to all records and documents by all parties concerned.

4.5 Stay of enforcement

There is inherent limitation to the rights of claimants against a sovereign. It is justified in arguing that sovereigns ought to bind themselves with a positive moral framework, which the multipartite world bodies are able to administer through an agreed code of behavior. On one side, there is the procedure of implementation of the resolution of the Security Council and on the other the nations have agreed to adapt a rule-based course in the WTO. The agreement of SDRM would be something in line with the later agreements. As such, the agreemental principles must have enclosures in the form of rules on the practices to be followed. Some such related issues are: (a) should there be generalized stay on credit enforcement; (b) what should be the extent of the undue influence and in what circumstances; (c) should the structured majority vote be the only way of restraint on the creditors to stay of enforcement of contract; (d) should there be any parallel to fraudulent transfer of the domestic law on insolvency, such as unreasonable preference and (e) what would be the extent of common law principles like sovereign immunity and sovereignty non-attributable to separate entities?

To my understanding international community, in the form of global bodies are becoming gradually more powerful through a 'rationally consciousness' as the positive moral strength. While a sovereign is immune, the principle of 'non-binding stand' becomes morally weak in a contract paradigm. Any inability or refusal to pay a debt has far reaching consequence in the economic relation of the sovereign with others in financial market. No sovereign of our time can remain neutral to externalities. Besides, a sovereign has the way to distance it from entities. As for example the reserve of the central bank cannot go to meet the debt of the sovereign. Similarly reserves of the public corporations are also not liable to be applied for the purpose of SDRM. Any creditor wanting to bring an action against a sovereign to realize the claim under the contractual terms shall have disincentive to stand alone, so much so, that the 'disincentive' in itself has the bonding effect uniting the creditors for a common mechanism of recovery and restructuring. Formulation of the detail procedural rule based on the philosophy analogous to insolvency or bankruptcy of a person and entity would be not a rational approach. For such a procedural rule it is better determined in the way of trade negotiations because multilateral or plurilateral agreements are better result oriented for procedural regulations. Certain basic principles may be agreed upon at the outset within which the rule-frame can be worked out. As for example, would you distinguish the sovereign debtors from any other institutional debtor based upon any acceptable criteria? What about the principle of non-discrimination, equality of treatment, expert assistance in financial restructuring? What about debt due to national security, food security, public health or development? A rational discrimination works all right in the framework of WTO. There is no reason why the same pattern of negotiations may not succeed in the case of the Fund. The present policy paper is a facilitator. In that sense Box 1 rules are good suggestions for a creditor opting to stand-alone.

4.6 Valuation of claims

For the purpose of inter-creditors relation, valuation of claims in a common denominator would be necessary. SDDRF has to have a clear operational understanding as to when the claims would require to be converted into the denominator currency of the debtor. Generally speaking the currency risk is covered by currency swaps and the interest rate fluctuation by interest rate swaps. So, expression of a claim in a common currency denominator to see the inter-creditors relation is very important issue. To my understanding the cut off date for the purpose could be the date of activation. The date shall also operate as a circuit breaks in market operation of the debt instruments. The 1980's experience can be evaluated for the purpose. However, for general terms the SDDRP may have a list of certified valuer of assets for the purpose of finalizing restructure of claims.

4.7 Creditors participation

The Creditors' Committee has to play a very critical role in SDRM if it has to succeed as a codified rule based system. The committee's first job is to start negotiating with the sovereign to consider the structural proposal, outline of which was to be submitted by the debtor. The negotiation is complex, and keeping the balance of the conflicting interest in the inter-creditors relation is typical. The committee may come in conflict with the regular budgetary functioning of the sovereign. The draft talks about best practice and experience on the functioning of the committee but does not enumerate the same. A definite procedural code on best practices can be drafted provided the policy dimension could be identified. The paper contains only two procedural policies, viz., empowering the committee to address all debtor-creditor and inter-creditor issues.

The debtor-creditor issues are complex as indicated in Part I of this paper. Any analogues mind-set in bankruptcy system and procedure would not help in this respect. Bankruptcy is essentially a private legal system whereas the SDRM system has to be applied in the public law paradigm under the international legal order. As such, any restrictive mechanism on the sovereign power to address the financial and economic need of the nation shall backfire SDRM. One has to be careful about the power of the committee of creditors on the budgetary framework of the sovereign. Not only the thresholds of voting is to be debated, even the character of 'voting' by the committee in the participatory system may have some disturbing consequence. One can review the participatory process only if one can outline the power of the Committee and the nature of the impact of the voting on any proposal of the sovereign. The intricate questions are: (1) Can the Committee participate on the taxation system and structure; (2) Can the committee participate in commenting and voting on the allocation of funds including provision of subsidies; (3) Can the committee vote on the public debt, internal and external; (4) Can the Committee comment

" One line in the note pointed to this issue hinting on the debtor's capacity to generate resources for debt service, at page 13, Para 32 on the instruments and marketing management on public debt instruments; (5) Can the Committee insist on fiscal discipline? If any of these questions has the answer 'yes', one has to respond to the same with knowledge of constitutional governance!

5. Legal framework

5.1 The jurisprudential framework ofSDRM

SDRM under the proposed draft has been designed to be fitted within the framework of the Agreement of the Fund. This will put Fund under an additional burden but facilitating inter-member relations. One may wonder if Fund's claim is not in the SDRM why the sanction for non or wrong-disclosure should attract violation of the terms of the Agreement of the Fund. However, if the debt restructuring is put into the part of the Agreement of the Fund, it shall require legal reform. If there is no mental block of the members with the 'bankruptcy legal regime'[53] and claim restructure is based on the mutual co-operation, respect to sovereignty, and non-interference in macro-economic management of the sovereign, SDRM can be subsumed within the international legal paradigm of the Fund. But there is a consequence on Fund. Since there is a talk on the balancing of the interest of the sovereign debtor and the creditors, including those who claim under bilateral agreement, the Fund has the risk of been thrown into the controversy of ultimate management of balancing of interest. The Fund has now to determine the extent of involvement of the Fund in administering the SDRM. The present form of SDDRF as proposed is likely to operate as an economic tribunal like the Sovereign Bankruptcy Court designed in the paper written by Professor J. Sachs and others rather than facilitating participatory mechanism of dispute resolution with a procedure of detail inquiry. In that situation the Fund may be always engaged in the litigation process of adducing evidences. If Fund has any interest in SDRM, that is that the Fund facilitates a 'debtor-

Para 235 of the draft puts the reader seriously to think that such a mental block does still exists in dealing with sovereign debt in the line of personal insolvency law application.

creditor' settlement for debt restructuring. Fund may even facilitate additional financing for the purpose. Therefore, jurisprudentially it would be prudent to keep SDRM at a safest distance as an autonomous body with its dispute resolution institution, SDDRF. This requires a certain codified structure and a detailed procedure for the mechanism to adhere to best practices.

The second strategy may be that the SDRM be developed by a separate multipartite agreement as a separate body with its own conditionality to which 'International Organizations' in the creditor's role may also approach for restructuring. In such a case the Agreement of the Fund may also not require readjustment. Paris Club did not require any initiative of the Fund to design its scheme of debt restructure. The Fund may only recommend a code for the SDRM agreement acceptable to nation-members of the agreement. Once the agreement is arrived the SDRM with all its other bodies including independent and certified valuers and the dispute resolution bodies should be independent. Fund may only assist the functioning of the mechanism. Personally I would rather prefer such type of legal arrangement, independent of IMF like, say, UNCITRAL.

5.2 SDR June?[4]

The draft disappointed me in the sense that it does not contain any provision for constituting a Sovereign Debt Reconstruction Fund. Whatever is the legal structural framework of SDRM, whether 'Fund SDRM' or 'independent SDRM', constituting a 'SDR Fund' for the purpose of claim restructuring would have facilitated the economic reconstruction of the sovereign debtor within a short time! The SDR Fund could be constituted by the contribution of both the creditors and debtor nations and with some subsistence grant from the IMF.

5.3 Adjustment of national laws

It is quite logical to argue that member-states ratifying the change in the Agreement of the Fund or agreeing to and ratifying a

In the line of Rescue Fund suggested by Professor Truman.

separate multilateral agreement on SDRM have to adjust the national legal regime in line with the Agreement or the Treaty as the case may be. If we do not have any mind to explain in full rights of the creditors of a sovereign-party in the light of insolvency or bankruptcy system then there would be only one requirement, that is, that the national law on bankruptcy and insolvency must have to deal with cross border claims in settling all claims of individuals and entities. Claims against the insolvent party, which are also claims against the sovereign at the same time, are at the discretion of the sovereign to settle whether under SDRM or under the state legal regime.

6. Concluding Remarks

6.1 Is there any hidden agenda?

While sharing the agony of the investors from US, one may even record another agony in the developing world about a hidden agenda in the program being a politically sensitive economic issue. It may now be argued that US-EU lobby is interested 'to establish democracy and market economy' throughout the globe at any cost. So it might be doubted that Debt Restructuring Mechanism through IMF with a Dispute Resolution Body having compulsory jurisdiction and power to validate sanction, would have a hidden agenda, too. The opinion of the Under Secretary Taylor can be interpreted as suggesting that one of the fundamental purpose of the mechanism is to down-size the official sector in the country of the sovereign debtor[55]. There is no denying the fact that in many developing countries public sector takes a lead economic role in building the economy especially in matters of public interest. Infrastructure building, public distribution system, transportation, construction work, industrial development - in all these public

'Limiting official sector support when countries reach unsustainable debt situations is also a key element of our emerging market strategy. Large official sector support packages for countries with unsustainable debt effectively bail out private investors holding high-yield debt instruments. It is becoming clearer that official sector support in such cases is being limited to a significant degree'. (http://www.ustreas.gov/press/releases/po2056.htm) sector plays a big role. In Banking, Insurance, and Financial Institutional sector - the role of public sector has b'een phenomenal especially through out sixties and seventies of the last century. Pro-market economists identify this public sector as the number one enemy of the market economy, suggesting that private players are only the key and competent players in market economy. Same are the economists patting China for economic reform through 'market socialism'! What is the message? Any such predetermined notion would create more stumbling blocks than clear understanding of mutual strengths and weaknesses.

6.2 Use and misuse of International Institutions

In Kruger's article, the decisive role of IMF has been significantly pointed out. IMF has to take key decisions on activation of stay on creditors action, extension of the stay and the approval of restructuring agreement.[56] These decisions are not taken on judicious note by any judicious body. These are supposed to be taken on mere economic rationale. Unfortunately, the track record of the organization is not such that one can eliminate consideration of international politics, of at best, political economy! One may say, 'he who pays would play the tune'. The restructuring agreement would then be the product of arm-twisting, an agony that a newly liberated country would again suffer from! Unfortunately, there is no developing countries' Fund!

'In the light of the central role that IMF financing plays, one could envisage a framework that empowered the IMF to make key decisions regarding its operation. Bearing in mind the key features described in the previous section, these decisions would include the following: (i) First, *activation of a stay in creditor action* would require a request by the sovereign debtor and IMF endorsement. Such endorsement would be based on the IMF's determination that the member's debt is unsustainable and that appropriate policies are being - or will soon be - implemented, (ii) Second, *any extension of the stay* would require a determination by the IMF not only that adequate policies continue to be implemented but also that the member is making progress in its negotiations with its creditors, (iii) Third, *IMF approval of a restructuring agreement* that **had** been accepted by the requisite majority of creditors would be a condition for its effectiveness. Such approval would be based on a determination that it provides for sustainable debt profile' *(ibid).*

I would rather conclude by a cautionary diplomatic note, suggesting that the issue may be taken slow in IMF now because in post-Cancun there is enough mistrust created in WTO working mechanism. In the short run we might agree on the conditionahty on Bond contract. In the long run there may be an attempt to move to an independent Dispute Resolution Body. In between, the Fund must muster a 'Reconstruction Fund' for helping the economy under stress. A graduated and calibrated dialogue would assuage the feeling of the developing and least developed countries. However, I strongly believe that multilateral trade treaties should work well. One of the tests of its neutral working is that all nations are unhappy on the dispute resolution system of WTO. However, if you cannot make everyone happy, the best alternative of neutrality is perhaps to make everybody unhappy!

GOOD CORPORATE GOVERNANCE: TOWARDS GREATER EFFECTIVENESS

D. R. Mehta **1.**

INTRODUCTION

Simply stated, Good Corporate Governance is a duty which a company owes to its stake-holders. It is both a moral and legal imperative. A new regulatory framework emerging all over the world, in measure, large or small, makes it obligatory for the companies to subserve their stakeholders. Time has gone when promoters could presume that the company was only theirs, even to the detriment of the stakeholders. The focus has now shifted from the owners to shareholders and other interested parties of the company. This fundamental shift of last few years is rapidly becoming more pronounced day after day.

Secondly, good corporate governance is a *line qua non* not only for success but even survival of any company, in the current situation of heightened awareness and expectations of its stake-holders, concerned public and more sensitised and stringent regulators. Even ignoring such outside considerations, as a long term internalised commonsensical policy, a company committed to certain basic principles and concerned with the maximization of its stakeholders' value, alone is likely to last in the present competitive environment. While these realizations are dawning on die promoters and managements of companies, their actual implementations vary in degrees. While some enlightened organization give effect to them sincerely and wholeheartedly, others adhere to them only symbolically and formally and that too because of legal compulsions. The issue, therefore is, how to extend the application of good corporate govemarfce to larger

" Former Chairman, Security and Exchange Board of India (SEBI).

number of companies in a smooth and normal manner?

One basic way to implement the principles of corporate governance is to have a strong legal code of conduct. A leading industries association in India came out with a voluntary code of conduct in the belief that self-regulation is the best one. While it is true that moral conviction plays an important part in actualising the principles, a parallel legal system is equally important. A crime could be both a sin and a legal aberration to be dealt with at the levels of ethics and law.

For the above-mentioned reasons, the London Stock Exchange was the first to take the initiative on the subject in the world and, appointed Lord Cadbury to evolve a Code of Conduct for Corporate Governance. The report of Cadbury was a seminal work. The London Stock Exchange implemented the report by amending the listing agreement between the listed companies and the exchange and making it obligatory for the companies to observe the new conditions. It was not the most ideal way of giving legal effect to the recommendations but it did set new norms, methodology and pace for the rest of the world.

2. THE SEBFS INITIATIVE

In India, SEBI took the lead and appointed the Kumar Manglam Birla Committee in 1999 to recommend the system of Corporate Governance. The Committee had the advantage of reference to the Cadbury. Committee Report on Corporate Governance of the UK, the OECD Committee Report and other reports of the USA. The report of SEBI was described by Lord Cadbury, the pioneer in the field of Corporate Governance, as one of the most comprehensive reports on Corporate Governance in the world. The report was adopted by SEBI by issuing a notification for amending clause 49 of the Listing Agreements between the stock exchanges and the listed companies. Its main features are as under:

1. The boards of the companies should be made independent with at least 50 percent independent directors.

2. Since many companies did not have a system of bringing all the important matters before their boards, enabling their promoters to take decisions without the knowledge of directors and shareholders, it was stipulated that it would be mandatory for certain important matters to be brought before the boards which by and large are independent.

3. The board would appoint several committees; the most important of these is the Audit Committee, which has to comprise three independent directors. This, committee lays down the accounting policies, reviews them, recommends the appointment of statutory auditors and also considers the audit report. The other significant committee is for deciding remunerations.

4. The adherence of the new accounting norms has been made compulsory. The companies are expected to have consolidation of accounts of the holdings and the subsidiary companies. Companies, having several divisions, have to have segment reporting. Accounting norms are prescribed as to how to deal with related party transactions and deferred tax payment liabilities etc.

5. The concept of postal ballot.

6. All covered listed companies are required to submit a quarterly compliance report to the stock exchanges within 15 days from the end of the financial reporting quarter. The report has to be submitted either by the compliance officer or by Chief Executive Officer of the company in a format prescribed by SEBI.

7. Statutory auditors of the company will have to certify the compliance of the Corporate Governance Code by the companies.

8. Rules regarding the prevention of insider trading have been introduced so that the promoters, senior executives and other insiders do not get undue advantage because of the confidential information available to them. This aspect was dealt with the second report of Kumaramangalam Birla Committee.

9. The Code has been introduced in a phased manner.

The reason for SEBI going through the indirect and circuitous route of amendment in the Listing Agreement between a stock exchange and a company needs to be commented on. It was because the power of amending the Companies Act did not lie with SEBI and in any case, the procedure to do so was too cumbersome and time consuming. A word is also needed to clarify the position regarding the accounting standards. SEBI has no direct powers to prescribe these; it is the Institute of Chartered Accountants of India (ICAI), which is legally authorized to lay down these standards. Thus, SEBI sought the support of ICAI in this matter. SEBI worked in tandem with ICAI and had latter issued Accounting Standards for consolidation of account; of the holding and subsidiary companies, segment reporting, related party transactions, deferred tax payment liabilities etc. In fact an organic link was established between SEBI and ICAI by making its President the permanent member of the SEBI's Standing Committee on Accoutring Standards headed by Y H Malegam and also the member of Kumarmangalam Birla Committee. By adopting this approach, SEBI could get the new norms of ICAI issued expeditiously. With these changes, the Indian accounting norms now comply with the International Accounting Standards, followed by large number of developed countries barring the USA, which follows the rival accounting system of the GAAP.

There is yet another aspect. The approach of SEBI was one o gradualism. The belief was that initially the large and the leading companies should adopt the Code of Corporate Governance an others could follow them over time. This was in contrast to th view of many of our theoretical reformers, who often rush t" reforms. They do not have any specialization in Manageme

Science and have little idea of managing the change. It is also interesting to observe that not many of our experts talked of Corporate Governance till SEBI started the process. Even those who recognized the importance of the concept ended up by suggesting a voluntary code which was virtually ineffective but had the merit of keeping the industrialists pleased with the suggested system which gave them the freedom to implement the provisions or not to do so

3. THE SECOND PHASE: NARAYAN MURTHY COMMITTEE

Recognizing that process of reforms is an on-going one. The SEBI appointed Narayana Murthy Committee on Corporate Governance. Accordingly the Committee reviewed the progress and made further recommendations. The covering letter of the Chairman of the Committee who gave the report to SEBI sums aptly the rationale of the corporate governance:

> Corporations pool capital from a large investor base both in the domestic and in the international capital markets. In this context, investment is ultimately an act of faith in the ability of a corporation' s management. When an investor invests money in a corporation, he expects the board and the management to act as trustees and ensure the safety of the capital and also earn a rate of return that is higher than the cost of capital. In this regard, investor expects management to act in their best interests at all times and adopt good corporate governance practices.
>
> Corporate governance is the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders. It is about commitment to values, about ethical business conduct and about making a distinction between personal and corporate funds in the management of a company.

The Narayana Murthy Committee noted the following level of compliance of the Corporate Governance code as reported by 1026 companies of BSE and 595 companies of NSE:

- The compliance level in respect of requirements relating to Board of Directors, Audit Committee, Shareholders Grievance Committee, and Shareholders is very high;

- Many companies are yet to comply with the requirements relating to Remuneration *Committee* (which is not mandatory), board procedures, management and Report on Corporate Governance; and

- Few companies have submitted that the provisions relating to management and board procedures are not applicable.

The Narayana Murthy Committee also obtained SEBI's observations on the compliance of the Corporate Governance Code. The views of the SEBI as reported by the *Committee* are worth repeating:

> SEBI observed that the compliance with the requirements in clause 49 of the listing agreement is, by and large, satisfactory; however, an analysis of the financial statements of companies and the Report on Corporate Governance discloses that their quality is not uniform. This is observed on parameters such as the nature of qualifications in audit reports, the quality of the Corporate Governance. Report itself (which is often perfunctory in nature), and the business transacted and the duration of audit committee meetings. Variations in the quality of annual reports, including disclosures, raises the question whether compliance is in form or in substance; and emphasizes the need to ensure that the laws, rules and regulations do not reduce corporate governance to a mere ritual. This question has come under close scrutiny in recent

times.

SEBI has analysed a few recently published annual reports of companies to assess the quality of Corporate Governance. These reports could be classified into the following categories:

- Reports where there is no mention about the compliance with Corporate Governance requirements;

- Reports that state that the company is fully compliant with clause 49 of the Listing Agreement, but where independent auditors have made qualifications in their audit reports;

- Reports that mention areas on non-compliance with clause 49 of the Listing Agreement and provide explanation for non-compliance; and

- Reports that mention areas on non-compliance with clause 49 of the Listing Agreement but provide no explanation for auditor's qualification or for reasons for non-compliance.

SEBI also observed that there was a considerable variance in the extent and quality of disclosures made by companies in their annual reports.

4. SIGNIFICANT RAMIFICATION

The Report of the Narayana Murthy Committee has generally tried to fine-tune the recommendations of the earlier Birla Committee Report. For example the role of the audit committee has been slightly clarified or enlarged. Many of the suggestions given by this committee are already inherent in the Birla Committee Report. The Committee also recommended a movement towards the regime of unqualified financial statements. But this raises a much wider issue of reforming the entire system or audit in India. The Committee has dealt with related party transactions Again the Birla Committee already largely covers this. The Committee has further suggested that the board members should be apprised of the risk assessment and its minimization. It is also suggested training of board members, but this seems to be too theoretical. According to Committee, the Audit Committee should be informed of the utilization of the proceeds from the initial public offering. Already there are some precautions prescribed in this regard. Besides the Committee has recommended that Code of Conduct should be laid down for the board members and senior management. In this matter already the insider trading regulations prescribe various precautions. However, for nominee Directors, the Committee has made significant recommendations with which one may not wholly agree. In the present situation of vast NPAs, the corporate world would undoubtedly be happy if no nominee Directors are appointed by the banks or financial institutions but this would not serve the public interest. Again to say that nominee Directors, if appointed, for the banks and financial institutions or Government should be elected by the shareholders is also a recommendation of similar type. The Committee has dealt with independent Directors as well; it has validly suggested that recommendation of the Naresh Chandra Committee in this regard should be accepted. It may be mentioned here that following the Birla Committee, the issue of defining independent Director was left to the boards of a company mainly because it was felt that a perfect code, if implemented, may give rise to too much resistance. The view was that let this idea of independent Directors be accepted even with this relaxation and after sometime a more stringent definition would be provided.

The two issues on which Narayan Murthy Committee could have probed a little more are relating to subsidiary company and insider trading. According to the formal definition of a subsidiary company, the holding company must have 51 percent shares. There are many companies in India which are very ethical. But there are many others which specialize in taking advantage of the loopholes. There are some very big companies in the country, which have set up hundreds of companies without their own share holding by involving their employees' friends, relatives etc. to do various things including the playing in the stock market. The Report could have addressed itself to this point. For this, the Committee could have recommended the piercing of corporate veil.

Insider trading is one of the major issues on which the governance of corporates depends, but the Committee has not said much on this. In fact, surprisingly, the Committee has stated that there were some practical problems in disclosing the critical business events. This kind of a recommendation may please the corporates, but not the stakeholders or objective analysis. The procedures in this regard are already prescribed by SEBI and Stock Exchanges. The need is to tighten these norms rather than recommending the reference of the matter to SEBI. Already in the advanced markets of the world, stringent provisions in this regard exist.

The ground rules for the corporate governance will need continuous review and updating. The efforts made by Narayan Murthy Committee in this regard are welcome to some extent. SEBI has accepted many of these recommendations in August 2003. Perhaps some more recommendations would be needed. Particularly, on the issue of subsidiaries, discloser of material events and insider trading.

5. NARESH CHANDRA COMMITTEE

Separately, Naresh Chandra Committee appointed by the Department of Company Affairs made some of the following recommendations on the issue of Corporate Governance:

1. The auditors - company relationship, disqualification for audit assignments because of direct financial interest in audit clients, loans and guarantees and business relationships between the company and the audit firm;

2. List of prohibited non-audited services prescribed;

3. Independence standard for consulting another entities that are affiliated for audited firms;

4. Compulsory audit partner rotation;

5. Auditors' disclosure of continent liabilities;

6. Setting up of independent oversee boards or supervising the work of auditors;

7. Setting up an independent quality review board or auditors;

8. Independent director defined. Apart from the criteria of family pecuniary business relationship, one should also not be director for more than three terms of three years and prescribed that not less than 50 per cent of the board of directors should comprise of independent directors;

9. Minimum boards size prescribed;

10. Provisions regarding the audit committee and its powers;

11. SEBI not to exercise subordinate legislation. Special legislation exist

12. Improving facilities in the DC A bffices

13. Setting up of a serious fraud office in the Department of Company Affairs

Many of these recommendations aroused the ire of the corporate world. For example limiting the term of Directors for nine years has been contested. These recommendations are being questioned on the ground of creating space for micro- management by DCA and SEBI. One get the impression that the corporate world in India and its spokesmen are at best interested in paying lip service to the concept of corporate governance. While they do not want to give up their privileges, they also do not want to appear as bad guys. Many of these recommendations were contained in the Companies (Amendment) Bill 2003 which was not approved by the Cabinet.

One of the problems of the Indian system is the growing clout of the large corporates. Many of them are ethical. They are also creators of wealth. It is also a fact that without the promoters, there would be no impulse for enterprise. The cost of corporate governance and regulation too should not be disproportionate to advantages. On the other hand, many of the large corporates with increased business profits and association with the powers-that-be do not sincerely believe in corporate governance and would try to subvert this concept by fair and foul means. The inadequate competition law has to help them acquire more power than what is good for the system. The battle of corporate governance is ultimately to be fought against them.

6. UNITY OF DIRECTION

Before closing, it is also necessary to raise one issue. Which is the agency that is the nodal and legal one to deal with the subject of corporate governance? Is it the Department of Company Affairs, as it asserts, or is it SEBI which is charged with the responsibility of protecting the investors? Indeed while on one hand, Narayan Murthy Committee was engaged with the subject on behalf of SEBI, there was another committee headed by Naresh Chandra appointed by Department of Company Affairs. This is an unusual spectacle. The Naresh Chandra Committee strongly pleaded that SEBI should refrain from exercising powers of subordinate legislation in areas where specific legislation exist as in the Companies Act. This will certainly not improve the matters. Further, who regulates the corporate governance of the banking companies? Is it SEBI, RBI or the Department of Company Affairs? In case of non-banking finance companies raising deposits, which is the regulatory agency? One of the major problems in the country is multiplicity of agencies with different perceptions. The interesting point is that in this situation, prone to confusion, different agencies assert when they exercise power but disclaim any responsibility when there is problem. Some day this issue will have to be squarely faced by transcending the institutional, departmental or ministerial turf battles. Even in a country like Pakistan, entire work of the Department of Company Affairs is regulated by the Chairman of the Securities Exchange Commission. In the UK, facing the similar problem, Financial Services Authority has been set up as a lead regulator with powers dealing with the provisions of the Companies Act, securities, laws and other regulatory issues related to ordinary companies, finance companies, non-banking finance companies and banking finance companies. One wonders when would our system muster the courage and resolve this problem of scattered regulations and responsibilities.

The Birla Committee recommendations accepted by SEBI and described as the most comprehensive report continues to be the basic document on the Corporate Governance. It needs to be revised and updated regularly. But while doing so the basic issue of insider trading, continuous disclosure and piercing the corporate veil will also have to be seriously considered irrespective of some resistance from some corporates not given to the culture of compliance.

THE LEGAL NATURE OF ENVIRONMENTAL PRINCIPLES IN INTERNATIONAL, EUROPEAN COMMUNITY AND GERMAN LAW

Gerd Winter

Much has been said about the semantic content of environmental principles, but there is less clarity about their legal nature. This article shall contribute to the related discussion. I will propose a general concept of principles that can be applied to all levels of the law, national, regional as well as international. I will begin with a short overview of basic propositions called Principles and proceed with an analysis of their legal nature.

1. OVERVIEW OF ENVIRONMENTAL PROPOSITIONS CALLED PRINCIPLES

In general international law two environmental propositions are widely recognized as customary law, namely the procedural duty between states to co-operate in mitigating environmental risks and emergencies, and the substantive duty to prevent, reduce and control imminent and serious environmental harm.[1]

Precaution, meaning the duty to take measures even in situations of uncertain but possibly serious risks, has much been discussed as a candidate for a third norm of international law. However, neither **the** International Court of Justice[2] nor other international dispute

Professor of Environmental Law & Director, European Center for Environmental Law, University of Bremen, Bremen, Germany.

P. Birnie, and A, Boyle, *International Law and the Environment* (2nd ed., **Oxford,** 2002).

" **1CJ,** Judgement of Sept. 25, 1997, Case concerning the Gabcikovo-Nagymaros **Dam,** at paras 111-114.

settlement bodies like the WTO Appellate Body[3] have yet been bold enough to take this step. Although many scholars call precaution a principle,[4] few are prepared to call it a rule because the requirements of the three sources of international law recognized in Art. 38 of the ICJ Statute - treaty law, customary law and general principles of law - set the hurdle of recognizing a binding rule very high. It is true, there is ample treaty law citing the precautionary principle,[5] but treaties only apply inter parties. Precaution is neither customary law because although *opinio necessitatis sive juris* may be widespread it is not at all consuetude. Nor is it a General Principle of Law (as long as by 'law' it is understood national law) because not many domestic environmental law systems have as yet ventured into precautionary legislation.

More environmental propositions have been established by issue-related treaties and named principles, such as, notably, the polluter-pay principle, the principle of transparency and participation, the principle of joint but separate responsibility, and the principle of sustainability.[6] Equitable access to natural resources and the duty of the state to effective management are significant complementary principles emphasized by those authors who write on the background of societies where inequality is tremendous and the administration is widely ineffective.

On the level of the EU environmental propositions have been codified in the EC treaty, Art. 174. Some of them - precaution, prevention, rectification at source, and polluter-pay - are called principles; others - preserving, protecting and improving the quality of the environment at a 'high level' - are called objectives.

These objectives and principles may seem to be uncompromising. However, Art. 174 III puts them on a more realistic footing.

[3] WTO Appellate Body, Report of Jan. 1998, WT/DS26/AB/R and WT/DS48/AB/R (Measures concerning meat and meat products) at paras. 120-125 and fh. 93.

[4] Cf. Birnie and Boyle, *op. cit*,. p. 120.

[5] For an overview, see N. de Sadeleer, *Environmental Principles* (Oxford, 2002) p. 94 *et seq.*

[6] Cf. Birnie and Boyle, *op. cit.* p. 79 *et seq.;* N. de Sadeleer, *op. cit*, p. 23 *et seq.*

According to Art. 174 III in preparing its policy the Community law shall take account of, *inter alia*, the available scientific and technical data, advantages and drawbacks, regional factors, and the economic and social development of the Community.

Environmental protection requirements do not only shape genuine environmental policies but shall also be integrated into the other policies of the Union. This often so-called integration principle is established in Art. 6 of the EC Treaty but also find place, with slight variations, in Art. 37 of the Charter of Fundamental Rights. As will be explained later in this paper, integration is not a principle in the definition of the term here proposed but rather a rule, because in building a bridge between opposing principles it is strictly to be followed.

It is noteworthy that sustainability is not directly named as a principle of environmental policy but is seen as both a task of the Community (Art. 2 EC) and a qualification of the 'principle' of integration (Art. 6 EC).

The draft treaty submitted by the Convention retains the principles and objectives as listed above. Only slight changes have been made. The integration principle stages even twice, namely as a basic right (Art. 11-37) and as a principle (Art. III-4). Sustainability has been included in the objectives of the relations of the EU with the wider world. The new somewhat pretentious formula is that the Union shall 'contribute to the sustainable development of the earth'.[7]

On the national level Germany and Brazil may be cited as two opposing cases, Germany being parsimonious and Brazil rich in constitutional principles of environmental protection. In the German constitution, disregarding the rules on competences there is only one article referring to the environment. In Art. 20a it is provided that the state must protect the natural conditions of life. In addition, jurisprudence of the Federal Constitutional Court has developed an objective duty of the state to protect human health

Part I Title I Art. 3 paragraph 4.

and a subjective right of the individual to ask for such protection. There is however no subjective right to a livable environment. German law does also rarely lay down principles by ordinary legislation. The principles are mostly doctrinal constructions abstracted out of more precise norms of specific laws. For instance, precaution is part of a complex norm of the German Federal Emission Prevention Act which carefully circumscribes how far precaution can go and what other interests must be considered. The same is true with regard to laws concretizing the principles of rectification at source, polluter pays, and sustainable use of natural resources. In contrast, Art. 225 of the Brazilian constitution establishes a much greater number of propositions which are called principles by legal doctrine, including everyone's right to an ecologically balanced environment, prevention and precaution, the duty of public authorities to defend the environment and to preserve it for future generations, the duty to prepare environmental impact assessments, the duty of the polluter to repair environmental damage, and precautionary management of risks.[8]

Considering that on the levels of international, regional and national law the term 'principle' is used in a variety of ways, we will now attempt to clarify the legal nature of principles. We shall do this consulting legal philosophy.

2. THE LEGAL NATURE OF ENVIRONMENTAL PRINCIPLES

Definitions of 'principle' abound in legal and philosophical discourses. In such situation it is advisable to build a definition which best suits the hermeneutic context in which the term shall be used. That context can be characterised by the following questions:

1. What distinguishes 'principles' from 'policies', and what is the source of their binding force?

2. What is the difference between 'principles' and 'rules'?

Although precaution is not explicitly mentioned, jurisprudence has read it into Art. 225. See P.A. Leme Machado, *op. cit.* p. 67.

3. How do principles range in the hierarchy of norms, and what follows from any positioning in the hierarchy?

4. How is governmental action applying principles reviewed by the courts?

I shall discuss these questions in turn.

2.1. Principles and policies

A principle is undoubtedly a candidate for legal effect if it is contained in a law or sub-legal norm. The legislator must however have intended to give the principle such effect. This distinguishes 'principles' from 'policies'. Policies may also be mentioned in a law but if so they are not intended to be binding. The policy character of a propositions contained in a law text can be deduced either from its express wording (e.g. if a postulate is called a task, a value, an objective, or else) or from the vagueness of the language expressing it. For instance, sustainable development is called a task of the Community in Art. 2 EC, and if understood in the broadest sense of bridging ecological, social and economic concerns it lacks determinable content. For these two reasons it is not a 'principle'. It may rather be called a 'policy' or an ideal.[9]

Besides legislation, principles of legal value can also emerge from legal practice, i.e. the common sense of the legal profession and broader societal discourse based on the experience derived from cases. This is the very source of principles in the common law systems, but it is also well known in the civil law systems as a corollary to statutory law.[10] Many land-mark judgements, which have created new principles, have based their arguments on experience and common sense rather than on the text of laws. It is

For distinction between 'ideals' and 'policies', see J. Verschuuren, *Principles of Emrironmental Law,* (Baden-Baden Nomos, 2003) 19 *etseq.*

For an in-depth analysis of the relationship between principles and codified **taw,** see Josef Esser, Grundsatz und Norm, Tuebingen (Mohr) 1964, p. 141 et «eq_ See also his observation (p. 223) that there has emerged a convergence of **continental** axiomatic and Anglo-American topical thought.

true that judges, like policy-makers, may have a vision of good policies. To establish a principle of legal value they must however reason that the principle shall be binding as law.[11]

Sometimes, principles will emerge, like a phoenix from the ashes, in full development and clarity. This is the case when they appear in constitutions and codifications, or in landmark decisions of courts. More often principles emerge incrementally, being carved out of a number of small steps taken in more specific legislation or case law. For instance, precaution was introduced into German law by one specific statute in 1974. Later on, other laws were gradually also orientated towards precaution. Only if one takes all of the laws together one can say that German legislation is characterised by the precautionary principle, and that it should be interpreted in that way.

Ronald Dworkin, an English philosopher, suggests that the content of principles can only be individual rights, not public interests. According to him principles are to be distinguished from 'policies' that **serve** not individual but collective goals. He observed:

> Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals.[13]

However, there is ample evidence that legal practice has also established principles of respect for the public interest. For instance, the public interest in occupational and consumer health protection has for long been accepted as a counter-principle to economic freedoms. Public interests in environmental protection are more recent examples.

1 Esser, *op. cit.* 137.

12 Like e.g. the principle of strict liability in the famous judgement *Rylands* v. *Fletcher*, (1868) LR 3 HL 330. *Cf.* Stuart Bell, Ball & Bell, *Environmental Law*, (4* ed. 1997, Blackstone, London), p. 193 *etseq.*

'- *r^1-" Moht* Seriously*, (Cambridge,1977),atp. 90.

The question of sources of environmental principles is particularly difficult in relation to international law. The traditional categories - treaties, customary law and general principles of domestic law -are too conservative to adequately respond to the demands of worldwide environmental change. The sources of rules and principles of international law - *consuetude* and *opinio juris sive necessitatis,* common features of domestic law, and consensus for international treaties - lack the proactive dynamism needed today.[14]

Some international lawyers react by using the term 'principles' in a looser form. Discussing 'principles' of sustainability, precaution, **etc.,** they do not imply that these have any legal effect.[15] Rather, **such** ambitious 'principles' are regarded as a kind of proto-law. It seems to me that the terminology is somewhat confused. The term 'principle' should be reserved for principles of law. Non-legal principles should rather be called ideals, objectives, policies, etc.

2.2. Principles and rules

Principles and rules have often been opposed as different compositions of the law. There is a wide agreement among legal philosophers that principles are open for balancing against other principles whilst rules have to be applied in any case. Whilst principles are committed to one objective or value and must be compromised if conflicting with opposing principles, rules are conclusive.[16]

Rules may, however, provide that exceptions are possible. Often such exceptions will be door-openers for concerns which represent a counter principle to the principle which primarily stands behind

[14] G. Winter, Anachronien von Gesellschaft, Natur und Recht, in: H. Faber, G. Frank (ed.) *Demokratie in Staat und Wirtschaft, Festschrift fur Ekkehart Stein zum 70.* (Geburtstag, Tubingen, Mohr, 2002), p. 327.
[15] Epiney/ Scheyli, *op. cit.* p. 75 et seq.
[16] R. Alexy, *Theorie der Grundrechte,* (Suhrkamp, Frankfurt, 1994), p. 71 *et seq.;* Martin Borowski, *Grundrechte als Prinzipien,* (Baden-Baden, Nomos, 1998), p. *67 et seq.*

the rule. For instance, according to the German Federal Immission Prevention Act (Bundesimmissionsschutzgesetz) the competent authority is entitled to order a firm to take improvement measures if after the issuance of the primary authorisation scientific progress has revealed new environmental risks. The order is, however, not allowed if the economic burden involved is unproportional. Here, the rule reflecting the principle of environmental protection is relativised by an exception representing the principle of economic freedom.

Rules can even be formulated in a way which allows the balancing of opposing concerns within the scope of the rule. For instance, fundamental rights such as the right to economic freedom are constructed to include first the *prima facie* protection of certain activities (such as economic undertakings) and second the possibility of interference with the protected realm if resaons of public interest (such as environmental concerns) so require.[18] Sometimes principles can be uncompromising. This is the case if they are of extremely high value, and if the core of the principle is at stake. For instance, according to the German constitution the essential requirements of human dignity are absolute. They may not be relativised by other principles. In international law principles with peremptory effect (such as the prohibition of apartheid, of torture, of aggression, etc.) are of this kind. The uncompromising principles should at the same time be conceived as rules, because they have to be strictly applied.

Alexy, *op. cit.,* p., 88. [18]This is very controversial in the German debate on the doctrinal constructior of basic rights. Many authors understand a basic right as a conglomerate o principles. They regard basic freedoms as principles which can be balance* against public concerns and conflicting basic rights. They speak of rules onl; with regard to those specific propositions which case law develops for certai categories of cases. *Cf.* U. Ruehl, Tatsachen, Interpretationen - Wertunger (Baden-Baden, Nomos 1998), p. 384 *et seq.* 1 believe that this conceptio neglects the specific terms of balancing constitutions often provide. There is ri reason why rules should not be conceived to be open for balancing if th« circumscribe the kind of conflicting interests to be considered and give directic on how to do the balancing. There is also room for distinguishing more genet and open rules from more concrete and closed rules.

Principles stand in the background of rules and influence their interpretation and application. They enhance the normative power of rules, advise how to interpret them, help to fill regulatory gaps, guide discretionary powers, and inform about necessary exceptions to a rule.[19] For instance, according to the German Federal Law on Soil Protection the authorities have discretion to deal with past land contamination. They have the choice of making one or more out of the following persons responsible: the original polluter, his or her legal successor, the owner of the land, and the holder of physical control of the land. The polluter-pay principle, which is regarded as a principle although not explicitly stated by the law, has been used to fetter this discretion to the effect that the original polluter if still available should primarily be addressed.

If two or more principles contradict each other, rules solving such conflict are often available or could be established. This is, I believe, the core characteristic of rules: that they are made in order to solve conflicts of principles in relation to more specific issue areas.

There is, however, no rule establishing absolute cardinal or even ordinal ranks between principles. The law may nevertheless characterise a principle to be of particular importance. If so, the principle has, in the concrete case, a *prima facie* priority. over conflicting principles. [20] In consequence the burden of proof is shifted to the defender of the counter-principle. [21] For instance, German land use planning law prescribes that the authorities must consider and adequately balance all interests affected by a zoning plan. Those interests include interests of housing, of trade and industry, of transportation, of environmental and nature protection, **etc.** The law says that some of the interests are to be respected 'as **far** as possible'. For instance land used for agriculture, forestry, or housing shall only if unavoidable be converted for other uses.[22] This means that to destine such land for e.g. industrial or

For more functions of principles, e.g. in relation to extra-legal negotiation and **jrif-regulation,** see Verschuuren, *op. cit.* 38 *etseq.* * Alexy, *op. cit.,* p. 88 *et seq.* [s] **Alexy,** *op. cit.,* p. 146. ** **Art.** 1 para 5 sentence 3 of the Construction Code transportation purposes would be a *prima facie* violation of the principle. The burden of proving that in the case of industrial use will be shifted to the development interests. .

Absent legal prioritisation of all principles are equal in an abstract sense. The relative weight of principles will then change with the given individual circumstances and can therefore only be determined in the concrete case. One rule recognized in such circumstances is that the more one principle will be impaired by a solution the weightier must the prevailing principle be.[2]

An example of a quite sophisticated rule of balancing opposing principles is contained in Art. 6 para. 4 of the Habitat Directive 92/43/EEC: As a starting point the protected demands of the rare species and habitats are given priority over interests in their use. However compelling public interests in the project can overcome this protection. Such interests must again give way if the affected species or habitats are listed as prioritary. The priority is again reversed if the public interest in the project is particularly indispensable (such as the interests of public health and safety).

2.3. Principles and the hierarchy of norms

2.3(a) General remarks

Principles and their corresponding rules can be situated on the same level of a hierarchy of norms. This is the normal situation where principles play their proper role by serving as a source for interpreting rules, filling -up of gaps in the rules, guiding the use of discretion, etc. For instance, as mentioned before, the precautionary principle stands behind its more precise and complex emanation laid down in the German Federal Immission Prevention Act.

Principles and rules can also be situated on different hierarchical levels of the law. There are internal hierarchies of the levels of national, regional and even international law between ordinary law

Alexy, *op. cit.* p. 146.

and higher ranked law controlling the ordinary law, i.e. constitutional law prevailing over national ordinary laws, EC primary law commanding EC secondary law, and international peremptory law commanding international 'ordinary' law. This internal 'constitutional' hierarchy within each level is to be distinguished from the external hierarchy between levels which we might call the federal hierarchy: EC law has supremacy over national law, and depending on certain conditions international law can also have supremacy over national or regional law. The higher level can be one of constitutional law or one of EC or international law. I have mentioned examples of such higher ranked principles earlier, for instance, the protection of the natural conditions of life contained in Art. 20a of the German Constitution, the achievement of a high level of environmental protection in Art. 174 EC, and the prevention of serious harm as a principle of international customary law.

If a principle has been laid down on a higher 'constitutional' or 'federal' level the crucial question is whether these principles have the power to render rules ranked on a lower level in the hierarchy inapplicable if they contradict the principle. I suggest that the answer is: not directly. The constitutional, supranational or international principle must first have been transformed into a rule. Only rules can be attributed the effect of invalidating lower rank principles and rules.[2]

International peremptory law	Principles Rules
International ordinary law	Principles Rules
Regional constitutional law	Principles Rules
Regional ordinary law	Principles Rules
National constitutional law	Principles Rules
National ordinary law	Principles Rules

* Contrastingly, R. Alexy proposes to directly apply principles if only in a more **•pen** way which allows for the balancing of principles with colliding other principles. I do not follow Alexy because his theory would hinder the emergence «f principles out of common sense and common practice. The discourse about ■r» principles would be loaded with the 'threat' that all what is accepted would **dbady** be applicable law. The dynamic potential of principles is, I believe, **tend** on their somewhat elusive status behind the scene.

This implies, first of all, that we must be more careful with calling propositions rules or principles. The higher the level in the norm pyramide the more willing we are to call a proposition a principle although upon closer look it may be framed as a rule which already contains the balancing of different opposing principles.

2.3 (b) German law

For instance, Art. 20a of the German Constitution (GG) contains a qualification saying that the principle of environmental protection is binding only 'in the framework of the constitutional order'.[25] This is generally understood to mean that environmental protection must be balanced against other principles such as property and economic freedoms. Art. 20a GG is therefore a rule, an open one, for sure, but not a principle. Basic rights can also be understood to establish rules on balancing opposing principles. For instance, the basic right to health may be relativised by other principles of public interest. The fact that one principle (the protection of human health) was made a basic right has the effect that the protected freedom has a *prima facie* priority over the principles protecting public interests. The latter bear the burden of proving their *secunda facie* preponderance.

2.3. (c) EC law

In relation to the principles contained in Art. 174 EC I submit that they too can only become operative if transformed into rules. This means that they must be formulated in a more complex way than by merely restating the principle. Opposing principles must be integrated into the rule, such as the principles of proportionality and the principles representing economic freedoms. Only via a complex and more precise rule a principle can render a national law inapplicable. This can be shown if we consider ECJ jurisprudence on fundamental rights under Art. 6U and basic economic freedoms under Art. 28 EC.

[25] 'Constitutional order' meaning the entirety of the constitution.
[26] Hans D. Jarass, *Grundgesetz fur die Bundesrepublik Deutschland*, (5th ed., Munchen, 2000) Art. 20a n.9.

As for basic rights it is true that European courts have only rarely had the opportunity to express themselves on rules combining the basic right principle with environmental protection principles. In comparison to the frequent opposition of basic rights and environmental protection in German domestic law (in particular guaranties of economic freedom and property), it is astonishing to know how seldom fundamental rights in the Community have been invoked as a bulwark against Community environmental measures (though this can sometimes be explained by the restrictive standing requirements of Art. 230 para. 4 EC).

The *Standley* case however can- be seen as a case which does oppose fundamental rights and Community environmental principles. One Standley, a farmer, brought an action against British laws which were founded upon a Community Directive. That Directive prescribed that the Member States must designate bodies of water with high levels of nitrate and limit intensive animal husbandry in the corresponding zones. Standley argued (unsuccessfully) that this was an interference with his property right. In response, the EC J stated that the exercise of basic property rights could be subjected to limitations in so far as 'those restrictions in fact correspond to objectives of general interest t pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed' .[27]

The protection of public health can be such a goal. The Directive serves these ends, as the Court briefly indicated, in a way that Mlows the principle of proportionality.[28] Thus, the principle of protection of public health was integrated into the basic right to private property. This right was constructed as a complex rule on balancing property and human health interests. In the *Standley* case *tas* rule was not considered to be violated by the incriminated Directive.

As for basic freedoms since Danish Bottles the principle of environmental protection has been recognised as a justification for

[ff] **ECJ** C-293/93 *Standley [* 1999] E.C.R. I 2603 (para. **54).**
***8>*cl..* para. 54 & 56.**

encroachments by Member States on the basic freedom of movement of goods.[29] The same is true of the principle of the protection of human health. The *Toolex* case shows this in particular as human health is affected there is not directly through products but indirectly through environmental causal chains such as air and water pollution.[30] In the *Bluhme* case the protection of biodiversity as a legally protected interest was recognised.[31] In *PreussenhElektra* the climate was similarly recognised. With respect to the principles of Art. 174 para. 2 EC, there is case law as to the rectification-at-source principle. This served in *Walloon Waste* as an admissible justification for Belgian import restrictions on waste.[33]

However, in other cases the opportunity to corresponding recourse was missed. For example in *Dusseldorp,* which addressed Dutch export restrictions for waste intended for recycling,[34] the ECJ could have relied on the effectiveness of recycling in domestic or foreign installations as a criterion for allowing or disallowing export restrictions; this criterion could have been derived from the principle of rational use of resources provided by Art. 174 para. 3 3rd indent EC.[35]

In relation to the doctrinal construction of principles and rules we can conclude that the Court has used principles in order to form a complex rule on the admissibility of trans-border trade restrictions. The rule is about the following: Trade restrictions are prima facie

[29] ECJ 302/86 *Commission* v *Denmark* [1988] E.C.R. 4607 (No. 9). For an overview *see:* H. Temmink, From Danish bottles to Danish bees: the dynamics of free movement of goods and environmental protection - a case law analysis (2000) *Yearbook of European Environmental Law*, vol.1, pp. 61-102.
[30] ECJ C-473/98 *Chemical Inspections* v *Toolex* [2000] E.C. R. (No. 38). The case concerns with the prohibition of Trichlorethylen which also spreads via environmental processes.
[31] ECJ C-67/97 *Ditlev Bluhme* [1998] E.C.R. 1-8033 (para. 33).
[32] ECJ C-379 *Preussen Elektra* [2001] E.C.R. I 2099 (para. 73).
[33] ECJ C-2/90 *Commission* v. *Belgium* [1992] E.C.R. 1-4431 (para. 34).
[34] ECJ C-203/96 *Dusseldorp* [1998] E.C.R. I 4075.
[35] The Dutch government did not raise the issue of recycling effectiveness. As a consequence the court was not compelled to invoke that criterion. See G Winter, Die Steuerung grenztiberschreitender Abfallstrome, Deutsche; Verwaltungsblatt 2000, 657 ff.

prohibited but can- *secunda facie* - be justified if based on environmental protection principles.

2.3(d) International law

On the level of international law the distinction between principles and rules can also play a clarifying role. International lawyers have not yet adopted a clear distinction between principles and rules. Often the term 'principle' is used but in fact what is discussed is a 'rule'. This is true for the general principles of international law some of which have the character of rules, and in particular those which even have the status of peremptory norms.[36] For the sake of clarity they should better be called 'general rules (or norms) of international law'. Even the 'general principles of law' in the sense of Art. 38 (1) (c) of the ICJ Statute if consulted as a source of international law will not lead to a principle but to a rule based on those principles.[37] The environmental propositions cited earlier as recognised international law, i.e. the duties to prevent serious harm and to cooperate, are also not principles but rules. By contrast, precaution is certainly not yet a rule. It can however be regarded as a principle, if by principle we mean a proposition which is open for balancing against conflicting principles. Based on such principle we may even consider precaution to be part of a rule of international law which also takes opposing principles such as economic freedoms into account. If so it could be stated as follows[38]:

> States cannot rely on scientific uncertainty to justify inaction when there is enough evidence to establish the possibility of a risk of serious harm, even if there is as yet no proof of harm. In determining whether and how far to apply precautionary measures, states may take account of their capabilities, their economic and social priorities, the cost-effectiveness of preventive measures, and the nature and degree of the environmental risk.

* **See** e.g. Ian Brownlie, *Public International Law* (Oxford, 1998), p. 19.
[r] Esser, *op. cit.* p. 140.
[M] **The** phrasing is based on Birnie & Boyle, *op. cit.*, p. 120.

If specified in this way precaution may be more easily acceptable as a rule of international law. Of course, it does not have a peremptory character in relation to treaty law. But it can influence domestic legislation depending on how the national constitutions decide on the relationship between international and national law.

In consequence, environmental principles as distinct from rules would be able to play their proper role also in international law, i.e. to inform the interpretation of rules and to fill possible gaps in the body of treaty and customary law. They can emerge out of world-wide public discourses and experiences. They are transmission belts between common experience and common sense on the one side and rules of international law on the other. If widely accepted by international doctrine and court practice they can instigate *opinio juris sive necessitatis* and *consuetudo* in order to bring about new customary law. They can even be regarded as general principles of the law if by 'law' we do not only understand national but also international law.[39] In conclusion, principles can be a genuine source of rules also on the international level and may as such accelerate the process of international law-making. In that respect, they show the same potential of the self-creation of law which is well known from common law systems.[40]

2.4 Judicial review of principles

We have seen that there is a difference between policies, principles and rules. Principles are legally binding. They inform the interpretation and development of rules. They may be built into rules by which they may also be assigned a specific legal weight in relation to possible countervailing principles. For instance, as we have seen the rules of the EC treaty on basic freedoms provide that environmental concerns may prevail over the concern for free transborder movement of goods.

See on the history and potential of this source of international law A. Cassese, *International Law* (Oxford, 2001) 155 *et seq.* [40]Esser, *op. cit.,p.* 139.

There is one more dimension to the legal value of principles, i.e. the way how densely the courts will review governmental action applying environmental principles. If the governmental body has actually made use of a principle the courts will tend to have a close look at the case. In other words: If the principle is used to empower an authority the review will be dense. By contrast, if the governmental body has refused to act although the principle may oblige it to go ahead the courts will tend to tolerate such passivity. In other words, if the principle would compell an authority to act the courts will not impose their own understanding of the principle. The reason for this reaction is the following: If the governmental body has already applied the principle it will normally have already weighed it against opposing principles in its decision. The courts have then cultivated ground to check if the balance was correctly struck. If on the other hand the governmental body has desisted from action it is undecided what opposing principles would have to be taken into consideration. As this is widely a political matter reserved to the democratically legitimated bodies, the courts will normally defer to their attitude.

We shall prove this hypothesis by recalling some ECJ judgements.

2.4 (a) The context of providing powers

Principles can inform rules empowering governmental activities
- when a competence basis is required
- when a member state wishes to go further than a Community measure provides.

2.4(a) *(i) Empowering the exercise of community competences*

ID the BSE (mad cow disease) Case the Community had taken ! **legal** measures directed against the export of British beef to other I **Member** states. The ECJ was asked by Britain to check if the competence basis, namely that for agricultural policy, had duly **been** applied. Referring to the environmental policy principles and ■e principle of integration of these principles into other policies fe court pronounced itself quite precisely on the legal concept of '**acting** under uncertainty'. It said:

> Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.[41]

Secondary legislation can however also exceed the margin of competence rules, and the principles of the treaties including the environmental principles can then serve as guidance on when the Community organs exceed the competence. One example of this given by the ECJ is the already cited the *Standley* case. [2] *Standley* invoked the polluter^pay principle against an EC Directive which limited his animal husbandry. On this point the ECJ stated:

> As regards the polluter pays principle, suffice it to state that the Directive does not mean that farmers must take on burdens for the elimination of pollution to which they have not contributed.[43]

From this one can interpolate that the court would have appreciated the act as a violation of the polluter-pay principle if the Directive had burdened the person who was not the source of the pollution.

2.4 (a) (ii) Empowering member states to go further than secondary law

[41] ECJ, C-l80/96 *United Kingdom* v. *Commission,* [1998] E.C.R. I 2265 (No 99). The phrase was again invoked in *Artegodan* v. *Commission,* Court of Firs Instance, Joint Cases T-74/00, T- 76/00, E.C.R. 2000 11-327, at no. 184.

[42] ECJ, C-293/93 *Standley* [1999] E.C.R. I 2603. The relevant passage is ii paragraphs 55 and 56 which read: 'It is true that the action programs which an provided for in Article 5 of the Directive and are to contain the mandator measures referred to in Annex III impose certain conditions on the spreading c fertilizer and livestock manure, so that those programs are liable to restrict th exercise by the farmers concerned of the right to property. However, the systei laid down in Article 5 reflects the requirements relating to the protection < public health, and thus pursues an objective of general interest without tl substance of the right to property being impaired.'

[43] ECJ C-293/93 *Standley* [1999] E.C.R. 12603 (para. 51).

In the area of secondary law, member states can, according to Art. 95 paras. 4 and 5 EC and/or Art. 176 EC, under certain circumstances, enact law that goes further than Community law. The particular preconditions are of no interest here. The only relevant point for our consideration is the question of the applicability of environmental principles. They come into play as specifying the direction into which complementary member state action can move. Thus, Art. 95 paras. 4 and 5 EC allow for complementary action 'relating to the protection of the environment'. The same is implicit in Art. 176 EC. Thus, any complementary action must result in greater environmental protection. The principles contained in Art. 174 para. 2 EC are drawn into Art. 95 paras. 4 and 5 EC by the integration clause and into Art. 176 EC through direct reference to Art. 174 EC. They open up the potential space for but also mark the limits of complementary acts. For example, a member state making use of Art. 176 EC can draw upon the precautionary principle when the Community legal act is limited to defense against imminent and serious danger.

Environmental principles can also guide the making use of safeguard-clauses established on the ground of Art. 95 para. 10 EC. This was expressed by the Court of Justice in the *Monsanto case.*[44] The court, once again going into some details said that the safeguard clause introduced by legislation on novel food could be used for precautionary measures but that such measures had to be based on a risk assessment, observed:

> Nevertheless, those measures can be adopted only if the Member State has first carried out a risk assessment which is as complete as possible given the particular circumstances of the individual case, from which it is apparent that, in the light of the precautionary principle, the implementation of such measures is necessary in order to ensure that novel foods do not present danger for the consumer, in

> accordance with the first indent of Article 3(1) of Regulation No. 258/97.[4S]

2.4 (b) The context of commanding action

2.4 (b)(i) Triggering action by Community organs

A commanding function can be attributed to the principles when they make specifications for the exercise by Community organs of a rule on competences, thereby encouraging rather than limiting action. The obligations that the commanding function imposes is even more marked when, in a situation of otherwise complete passivity or even political resistance, it constitutes a rule compelling the Community's organs to act.

The ECJ gives the Community organs wide discretion in such cases. In the *Safety High Tech* case, following its usual jurisprudence, it stated:

> In view of the need to strike a balance between certain of the objectives and principles mentioned in Article 13 Or and of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether the Council, by adopting the Regulation, committed a manifest error of appraisal regarding the conditions for the application of Article 13 Or of the Treaty.[46]

The judicial self-restraint exposed in this rule is explained by the necessity to strike a balance between opposing principles and the complexity of the implementation of those principles. In more

[45] No. 107 of the judgement.
[46] ECJ C-2B4/95 *Safety High Tech* [1998] E.C.R. 1-4301 (No. 37). The German Federal Constitutional Court has expressed in a similar way. See, for instance, the case where die neighbor of an airport complained that the authorities had not taken appropriate protection, measures. The court ruled that there was no 'evident' violation of the constitutional duty of the state to protect the individual (BVerfGE 56, 54 et seq., at 80).

general terms, we can conclude that if the rule is very open, i.e. if it is only providing for a fair balancing of principles without giving specific guidance, the courts allow very wide legislatory discretion thereby avoiding to replace the legislator's appreciation by their own.

Nevertheless, some more guidance than the mere arbitrariness test may be derived from a closer look at the meaning, aim and conditions of the principles. A core and a penumbra of the principles may be distinguished the core fettering the discretionary margin of the legislator. The core could be defined somewhat in **the** way *ofamaiore ad minus:* when measures combating uncertain risks may be regarded as an extension of the principle of environmental protection measures to defend against imminent and serious dangers should be taken as a legal obligation. If in this way **the** core of principles is identified it can also be taken to already constitute the relevant rule. For if the core is affected there will hardly remain space for bringing opposing principles into the shaping of the rule.

Genuine cases, in which a Community measure is absolute and not only in relation to others and remained below an attainable level of protection, have not yet found explicit treatment by the European Courts. However the EC J in the case of *Safety High Tech* does imply the possibility that afi environmental protection measure can **fail** to attain the high level of environmental protection required by **Art.** 174 EC. In the case the court found the required standard was in fact met as a comparison with the laxer measures of a pertinent mlemational agreement (the Montreal Protocol) showed. Because me court treated this issue only implicitly the question cannot however be considered as decided.

The ECJ has expressed itself on commanding functions mostly in Be somewhat ironical cases where it was the addressee of a Community measure who complained that the Community measure did not go far enough. The plaintiffs in such cases, whose environmentally injurious acts were enjoined by Community law, **argued** that the Community failed to also~*(or* instead) punish the **other** 'sinners'. The argument can be designated as a version of the

NIMBY ('not in my backyard') - principle. The more normal case - where a Community organ, a member state or a third party who would benefit from the Community measure but deems it insufficient files the complaint - has not yet been decided by the courts.

Safety High Tech is particularly relevant as an example of the NIMBY situation. A regulation for the protection of the stratospheric ozone layer prohibited the use of partially halogenated CFCs. The producer, Safety High Tech, argued that CFCs could not be singled out and forbidden without also forbidding halones, for halones which (without controversy) have a higher potential than CFCs for destruction of the ozone layer and, in addition, (unlike CFCs), also have a green house effect. Because of the failure to consider the green house potential of halones the general command of the protection of the environment was violated; further, because of the failure to consider halone's higher potential to destroy the ozone layer the specific command of a 'high level of protection' was also violated. The ECJ replied, on the basis of ex-Art. 130r (now Art. 174), that 'it does not follow from those provisions that Article 130r(l) of the Treaty requires the Community legislature, whenever it adopts measures to preserve, protect and improve the environment in order to deal with a specific environmental problem, to adopt at the same time measures relating to the environment as a whole.'[47]

Although this answer is basically reasonable, the court could hav< gone somewhat further by making use of a German legal construct namely the *Konzeptgebot* (planned approach). The *Konzeptgebol* which was introduced by the Federal Administrative Coui (Bundesverwaltungsgericht - BVerwG), may be invoked i: situations in which a complex set of problems must urgently b solved but are difficult to handle because of limited instruments and administration capacity. Due to this complexity the issues d not have to be solved in one stroke. Rather, the public authoritic may go step-by-step singling out individual actors if this is base

[47] ECJ C-284/95 *Safety High-Tech* [1998] E.C.R. 1-2603 (para. 44).

on a broader plan providing for systematic further action in the future.

In *Safety High Tech* the application of the *Konzeptgebot* would have meant to ask for an overall plan for the phasing out of both CFCs and halones. It seems that in fact there was such a plan in fulfillment of the obligations of the Montreal Protocol. It was defensible to first tackle CFCs, where ready substitutes exist, and then to address the thornier question of halones (which have since indeed been banned).

In *Standley* the *Konzeptgebot* would have required to ask whether the Directive stood in the framework of a general concept of combating all nitrate sources in order to judge the burdens which arose there from on agriculture. Instead the Court of Justice satisfied itself with an isolated consideration of the contribution of farming to nitrates.

2.4 (b)(ii) Directing member states

Directive functions of the environmental principles *vis-a-vis* the member states are less apparent than commanding functions. Certainly the member states are not bound in so far as their own area of competence is concerned. However, in so far as they apply Community secondary legislation and thereby have a certain margin of appreciation they are also under a duty to pay proper heed to the environmental law principles of the Community. [8] This would be a consequential application of the case law in *Wachauf* (which is also codified in Art. 51 of the charter of fundamental rights), namely that the member states when applying Community law are bound by the fundamental rights and principles of the Community.[49] That the integration principle of Art. 6 is nowhere anchored in the national constitution of any member state is of particular interest in this regard. This could lead to the consequence that the member states when applying Community **law** outside the realm of environmental law (say for example

* See: Jans/von der Heide, op. cit. p. 23.
* ECJ 5/88 *Hubert Wachauf* v *Bundesrepublik Deutschland* [1989] E.C.R. 2609 (para. 19).

energy law) would have to respect the environmental principles of Art. 174 EC, including e.g. the principle of rational use of natural resources.[50]

3. CONCLUSION

My reflections about the legal nature of environmental principles can be summed up as follows:

1. Principles should be understood to have a legal value. Non-legal principles should be called policies, ideals, objectives, etc.

2. The legal valueis derived from legislation or court jurisprudence. In the firs

3. Principles are to be distinguished from rules. Principles can be balanced against conflicting principles, rules are conclusive even though they may provide for exceptions or for the balancing of conflicting concerns.

4. Rules providing for the weighing of principles may give one principle *a prima facie* or even conclusive priority over countervailing principles.

5. Principles help to interprete rules, fillgaps in rules, and develop new rules.

   The distinction between principles and rules can be applied to all levels of the hierarchy of norms, be the hierarchy internal to one level or related to different levels.

[50] Similar suggestions have been made by R. Macrory in his paper captioned 'Environmental integration and the European Charter of Fundamental Rights' and presented to the Avosetta Group, in January 2001. See www.avosetta.org. and by N. de Sadeleer in his paper 'Les fondements de Taction communautaire en matiere d'environnement' published in *L' Europe et ses citoyem, Peter Lang 2000,* p. 112.

7. If applied to international law the distinction between principles and rules may help to accelerate the development of the law. Principles can serve as a transmission belt between common experience and common sense on the one side and rules on the other. Rules may more readily be accepted if formulated more precisely as bridges between conflicting principles.

8. Judicial review of governmental action applying or not environmental principles is of different scrutiny depending on whether a principle was used by an authority to empower it to act or whether the authority desists from action although the principle may oblige it to act. The courts tend to apply a closer checking in the first case and defer to the authority's attitude in the latter. The reason for this is to be found in the separation of powers between the judiciary and democratically legitimated governmental bodies.

CRIMINAL ABUSE OF CONSTITUTIONAL PRIVILEGES

K. D. Gaur

1. INTRODUCTION

In a democracy governed by *Rule of Law* the State functionaries, particularly those holding high offices, are required to exercise their constitutional authority judiciously and for *bona fide* purpose in a transparent manner. In the words of Mahatma Gandhi, the Father of the Nation, they hold the office as a trustee under an oath of and secrecy to discharge their constitutional obligations honestly without fear and favour and to uphold the dignity, status and preserve its honor. Strict adherence to a high standard of ethical behaviour is necessary for honest functioning of the new social political and economic order. But to one's utter dismay anc frustration, some of the persons in authority have flouted th< ethical and legal norms with impunity. Some of the instances an highlighted in the instant paper.

2. CRIMINAL ABUSE OF CONSTITUTIONAL PRIVILEGES: SOME NOTORIOUS INSTANCES

2.1 Abuse of privileges

In 1993 in a historic case[1] a person no less than the Prime Ministi of India, P. V. Narasimha Rao with the help of his comrad<

* Vishard UGC Emeritus Fellow, Law Faculty Lucknow University, Luckno Former Professor, and Head, Post-Graduate Department of Law, and Ex-Vic Chancellor, Utakal University, Bhubaneswar (Orissa).

[1] *P.V. Narasimba Rao* v. *State (CBJ/SPE),* AIR 1998 SC 2001. Major judgement was delivered by Justices S.P. Bharucha, S. Rajendra Babu and G Ray and minority judgment by justice S. Aggarwal and Dr. A. S. Anand.

'successfully maneuvered to purchase the right to remain in power and rule the country by bribing the Members of the Parliament. In die General Election for the tenth *Lok Sahba,* held in 1991, the Congress (I) party emerged as the single largest party and it formed the government with P. V. Narasimha Rao as the Prime Minister. In the monsoon session of the *Lok Sabha* in July 1993 a 'No Confidence' motion was moved against the Government by a CPI (M) MP. At that time the effective strength of the House *(Lok Sabha)* was 528 and Congress (I) party had 251 members. It was short by 14 members for a simple majority. The motion of 'No Confidence' was taken up for discussion and thereafter was put to vote. The motion was defeated with 251 members voting in favour of the motion, while 265 voting against it.

On February 28, 1996, one Sri R.V. Kapoor of *Rashtriya Mukti Morcha* filed a complaint with the Central Bureau of Investigation (CBI), wherein it was alleged that in July 1993 a criminal conspiracy was hatched by P. V. Narasimha Rao, Satish Sharma, Ajit Singh, Bhajan Lai, V. C. Shukla, R. K. Dhavan, D. K. Adhikeshavalu, M. Veerappa Molly, M.L. A. and Chief Minister of Karnataka, Mr. Ravonna, Lalit Suri to prove a majority of the government on the floor of the House on July 28, 1993 by bribing members of Parliament of different political parties, individuals **and** groups of an amount of over Rs. 3 crores (thirty million) and **that** in furtherance of the said criminal conspiracy a sum of Rs. 1.10 crores (11 million) was handed over by the aforementioned persons to Suraj Mandal and others.

On the basis of the said complaint, the CBI registered four cases under sec. 13(2) read with sec. 13 (l)(d)(iii) of the Prevention of Corruption Act, 1988, (PCA) against Suraj Mandal, Shibu Soren, Simon Marandi and Shalender Mahto, Members of the *Lok Sabha* owing allegiance to the Jharkand Mukti Morcha (JMM), and Ram Lakhan Singh Yadav, Anandi Charan Das, Abhay Pratap Singh **and** Haji Gulam Mohammed, Memebers of the *Lok Sabha* owing allegiance to the *Janata Dal,* Ajit Singh group (J.D.A.S), voted against the 'No Confidence' motion. Ajit Singh abstained from voting.

The Special Judge designate Delhi on the basis of records came to the conclusion that there was sufficient evidence to justify framing of charges, to initiate prosecution of all the above named persons for criminal conspiracy under sec. 120B IPC read with sec. 7 (public servant taking gratification), sec. 12 (punishment for abatement of offences defined under sec. 7 or s. 11) and sec. 13(2) read with sec. 13(l)(d)(iii) of the PCA.

The accused persons raised an objection before the Special Judge that the jurisdiction of the Court to try the case is barred under art. 105(2) of the Constitution of India because the trial is in respect of matters which relate to the privileges and immunities of the House of Parliament and its members inasmuch as the foundation of the charge sheets is the allegation of acceptance of bribe by some Members of the Parliament for voting against the 'No Confidence' motion and that the controversy to be decided in this case would be in respect of the motive and the action of the members of the Parliament pertaining to the vote given by them in relation to the 'No Confidence' motion.

Special Judge rejected the said contention and held that in the impugned case the voting pattern of the accused persons was not under adjudication and they were sought to be tried for their illegal acts committed outside Parliament, i.e., demanding and accepting bribe for exercising their franchise in a particular manner, and that the accused persons are not being prosecuted for exercising their right to vote, but they are being prosecuted on the allegation that they while holding a public office demanded and accepted illegal gratification for exercising their franchise in a particular manner which is an offence punishable under the 1988 Act[3] and that art. 105 of the Constitution[4] does not provide any protection to the

[2] Sec. 13(2), PCA states: 'Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which a shall not be less than one year but which may extend to seven years and shall also be liable to fine.'
[3] *Id.*, s. 13(I)(d)(iii) 'If he, while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest.'
[4] Article 105 reads: *'Powers, Privileges, etc. of the House of Parliament and of the members of the committees thereof.* (1) Subject to the provisions of this

accused persons. The Court further held that members of Parliament are public servants and are therefore subject to prosecution under the PC A.

In the revision petition filed by the appellants against the said order of the Special Court, Constitution bench of five judges formulated two questions for consideration, viz., (i) Does art. 105 of the Constitution confer any immunity to a Member of Parliament from being prosecuted in a criminal court for an offence-involving offer or acceptance of bribe? and (ii) Is a Member of Parliament excluded from the ambit of the Prevention of Corruption Act, 1988 for the reason that (a) he is not a person who can be regarded as a 'public servant' as defined under sec. 2(c) of the 1988 Act, and (b) he is not a person comprehended in clauses (a), (b) and (c) of sub-sec. (1) or sec. 19 for sanction and there is no authority competent to grant sanction for his prosecution under the 1988 Act?

As regards the second proposition, there is unanimity amongst the judges. All of them have upheld that M.Ps are 'public servant' within the purview of the Act of 1988 and in the absence of an authority competent to grant sanction for the prosecution of any Member of Parliament, the prosecuting agency shall obtain the permission of the Chairman of the *Raj'ya Sabha* or the Speaker of the *Lok Sabha* as the case may be.

Constitution and the rules and standing orders regulating of the procedure of Parliament there shall be freedom of speech in Parliament.
(2) No Member of Parliament shall be liable to any proceedings in any court in respect of any thing said or any vote given by him in Parliament or any committee thereof and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, papers, votes or proceedings.
(3) In other respect, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House and shall be such as may from time to time be defined by Parliament by law, and until so defined (shall be those of that House and of its members and committees immediately before the coming into force of s. 15 of the Constitution (Forty-fourth Amendment)) Act, 1978.'

However, in respect of the first proposition, there is a difference of opinion amongst the judges. The majority judgment was delivered by Justices G.N. Ray, S.P. Bharucha and S. Rajendra Babu and minority judgment by Justices S.C. Agarwal and Dr. A.S. Anand. The majority made a distinction between a bribe-giver and a bribe-taker M.P. In case of alleged bribe-taker M.Ps., other than Ajit Singh, the judges allowed protection against criminal, prosecution under art. 105(2) of the Constitution conferring privileges to the Members of Parliament and held that they are not answerable in a Court of Law for the alleged conspiracy and agreement. Accordingly, Suraj Mandal, Shibu Soren, Simon Marandi, Shailendra Mahto, Ram Lalakhan Yadav and their friends were set free. Ajit Singh, not having casted a vote on the 'No Confidence' motion, derives no immunity from art. 105 (2) of the Constitution.

On the other hand, in case of a bribe-giver M.P. no such privilege was permissible. The Court said that what is otherwise an offence is not an offence when it is committed by a Member of Parliament and has a connection with his speech or vote therein. In other words, if an MP by his speech or vote in Parliament committed an offence, he enjoys by reason of art. 105 (2) immunity from prosecution therefore. But those who have conspired with the M.P. in the commission of that offence have no such immunity and are subject to prosecution.

However, Justice Aggarwal and Justice Dr. Anand while delivering a dissenting judgment have rightly upheld the High Court's finding that there was no justification for interfering with the order passed by the Special Judge initiating prosecution of all the accused including 'taker' and 'giver' of bribe. The Court observed that special privileges based on clauses (2) and (3) of art. 105 to the Members of Parliament extends to secure full freedom to a Member while participating in the proceedings in the House or its Committees by way of speech or by casting vote, but it does not extend to a case of bribery and corruption by a Member of Parliament.

With due respect, it is submitted that the majority judgment has made a distinction between a common man and a Member of

Parliament, the former subject to the rigors of corruption laws, while an M.P is beyond it. Such an artificial distinction between a common man and a lawmaker in a democracy is untenable and is against the very concept of *Rule of Law*. Granting immunity from prosecution to the alleged bribe-taker MPs under art. 105(2) of the Constitution for helping P.V. Narasimha Rao's minority Government survive a 'no confidence' motion has given a wrong signal and demoralized those citizens who were expecting stern action against corrupt lawmakers. Needless to say, the object underlying protection under art. 105(2) of the Constitution accorded by the framers of the Constitution is in respect of the bona fide acts like free speech and fearless voting in the House to genuine law makers against malicious prosecution and not for protecting bribe-taker for acting in a particular way or making a speech on some consideration and casting vote on receiving gratification.

A claim to the immunity from prosecution under art. 105(2) by the MPs who had allegedly taken bribe for an act in the House would place such members above the law. Such a grant would not only be repugnant to healthy functioning of Parliamentary democracy, but would also be subversive to the rule of law, another basic feature of the Constitution, which signifies that howsoever high one may be, he or she is not above the law. This has been asserted by the apex court itself by holding so in a number of cases. In a recent case in the State of *Jammu and Kashmir* v. *Vinaya Nanda*,[5] the apex Court said:

> Corruption at any level, by any person of any magnitude is condemnable which cannot be ignored by the judicial courts, when proved. No leniency is required to be shown in proved cases under the Prevention of Corruption Act, which itself treats the offence under it of a special nature to be treated differently than the general penal offences. No

[5](2000) 1 SCC187.

> populous or sympathetic approach is needed in such cases.[6]

The majority judgment nullifies the very basis of anti-corruption laws, which have been enacted to root out rampant corruption in the country. When lawmakers themselves are not accountable for their criminal acts, there is no justification whatsoever-moral, ethical or legal- to hold others accountable for such acts. By common sense and conviction, both bribe-givers and bribe-takers must face charge equally. In fact, the message, which may not be correct, went across the country that the Supreme Court has put its seal on MPs' right to take bribe for acting in a particular way, making a speech on some consideration and casting their vote on receiving gratification.

It is high time that the lawmakers, taking note of the strong public opinion against the majority judgment in *P. V. Narasimha Rao* (JMM Bribery case), amongst jurists, scholars and legal scientists, overrule the said judgment by making an appropriate amendment in the Constitution. The scope and extent of Parliamentary Privileges under arts. 105 and 194 of the Constitution accorded to the Members of Parliament and the State Legislators respectively should be streamlined, to set an example that in a democracy a common man is as much important as a lawmaker and the *Rule of Law* is applicable to both equally. And a lawmaker should be held accountable as a common man for giving or accepting a bribe under the law of the land.

2.2 Abuse of discretionary power

In 1996 in the *Common Cause, A Registered Society* and the *Shiva Sagar* Tiwari[8] cases the Supreme Court held that a Minister is in a

[6] *Id.*, p. 188 para 2. See *Times of India,* March 16, 2000. Finally Delhi High Court on March 15, 2002 acquitted P. V. Narasimha Rao in *JMM.* MP's bribery case against him and Buta Singh's conviction and sentence of three years imprisonment by Special Judge, Delhi on the ground of lack of evidence as usual and expected.

[7] *Common Cause, A Registered Society* v. *Union of India,* (1996) 6 5CC 530.

position of a trustee in respect of public property under his charge and discretion, and he must therefore deal with people's property in just and fair manner, failing which he would be personally liable for criminal breach of trust. In *Common Cause, A Registered Society,* [9] the apex Court in November 1995 imposed exemplary fine of Rs. 50 lakh on Captain Satish Sharma, former Petroleum Minister in the P. V. Narasimha Rao's Government for arbitrary exercise of discretionary power of Minister in allotment and distribution of petrol pumps and cooking gas agencies; and ordered the CBI to probe into the allotment scam and institute criminal proceedings for committing breach of trust against Satish Sharma for abuse of office during his tenure as a Minister. The bench consisting of Justices Kuldeep Singh and Faizanuddin, setting aside the order of allotment of petrol pumps said:

> —No criteria were fixed, no guidelines were kept in view, none knew how many petrol pumps were available for allotment, application were not invited. The allotments have been made in a cloistered manner. The petrol pumps- a public property have been doled out in a wholly arbitrary and discretionary manner.[10]

The Court explained that in a welfare state the Government provides a large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas

* Shiva *Sagar Tiwari* v. *Union of India*, (1996) 6 SCC 558 and *Shiva Sagar Trwari* v. *Union of Indies* (1996) 6 SCC 599.

Supra n. 7. Pursuant to a news item in *Indian Express* dated 11.8.1995 under *e caption 'In Satish Sharma Reign, Petrol and Patronage Flow Together', H.D. Shourie-Director Common Cause filed, a PIL wrk petition challenging the **allotment** of 15 retail outlets for petroleum products (petrol pumps) by the then **Minister** of State for Petroleum and Natural Gas, exercising the powers of **Central** Government. It appeared that allottees were related to either politicians ***m*** relatives of officials including his own driver and-thedriver of his Additional **ftivate** Secretary out of the Minister's discretionary quota on compassionate **sounds** in a stereotyped manner without following any procedure or guidelines.

Id., pp. 542-54 (para 20). *See Ramana Dayaram Shetty* v. *International* ***Smport*** *Authority of India*, (1979) 3 SCC 489.

agencies, mineral leases, contracts, quotas and licenses etc. The apex court with this concern further observed:

> A Minister who is the executive head of the department concerned distributes these benefits and largesse. He—holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people. —Capt. Satish Sharma in his capacity as a Minister—deliberately acted in a wholly arbitrary and unjust manner. —The allotments made by him were wholly *mala fide"*

In *Shiva Sagar Tiwari*, the apex court levied a fine of Rs. 61 lakhs on Mrs. Sheila Kaul former Union Minister for Housing am Urban Development and former Governor of Himachal Prades and cancelled the allotments of 52 shop and kiosks (stall) fc arbitrarily, oppressively and unconstitutionally allotting the shop to her relatives, friends and staff members during her tenure *z* Minister. The Court directed the Government to formulate a allotment policy within two months and complete the process (allotment within four months. Justice Kuldeep Singh and Justic Hansaria while imposing the fine said:

> Since the properties she was dealing with were Government properties, the Government by the people has to be compensated for breach of public trust. Mrs. Kaul should pay for causing pecuniary loss to the exchequer for acting in an "oppressive

[1] *Id.*, pp. 553-54, (Paras 22,23).
[12] *Shiva Sagar Tiwari* v. *Union of India*, (1996) 6 SCC 558. The Petitioner, advocate of the Supreme Court brought to the notice of the apex court that respondent while serving as Union Minister for Housing and Url Development in 1992 and 1994 allotted two shops to her grandsons, one shoj the maidservant of her son, one shop to the hand loom manager of the f owned by her son-in-law, another to a close friend and one to the nephew of Minister of State P.K. Thangon; and stalls to the relatives and friends of personal staff and officials of the directorate of Estate.

> and malafide manner", while making shop[13] allotments.[13]

Comparing Capt. Satish Sharma's case, the Court said:

> Mrs. Kaul had not only acted in an 'oppressive and malafide' manner, but had been more callous than Capt. Sharma while making the shop allotment. In Captain Sharma's case there was no pecuniary loss caused to the Government, but in her case it is very clear. Mrs. Kaul's action amounted to injury to high principles of public law.[14]

However, the apex court in a review petition field by Mrs. Kaul, quashed the damages on compassionate ground 'having regard to the peculiar facts and circumstances of Kaul, who is stated to be old and ailing and the gross hardship of the case'.[15]

It was thought that the above judgments have set at rest the controversy in respect of exercise of discretionary power by the Ministers etc., and have established jurisprudence of public accountability and transparency in the Governments' working and would be an eye opener to persons in high positions to exercise powers with restraint so as not to make it a farce and mockery of rule of law and democratic process. But to the dismay of the common man and disappointment of the legal fraternity in a review petition, a three member bench of the Supreme Court consisting of Justices Saghir Ahmad, Venkatswami and Rajendra Babu on August 3 1999[16] turned down its earlier decision of November 4, 1996,[17] and ordered for the refund of the sum of Rs.50 lakh to the petitioner and quashed the order of the court for launching prosecution against Capt. Sharma for Criminal Breach of Trust under section 406 IPC.

[13] *Id.*, p. 560 (para 4).
[14] *Times of India*, November 8, 1996, p. 11.
[15] See, *Times of India*, February 20, 2002, p. 1. (Lucknow edn.). The Bench consisted of Justices G.B. Pattnaik, R.P. Sethi and Bishewar Prasad Singh.
* *Common Cause, A Registered Society* v. *Union of India*, AIR 1999 SC 2979. [17] *Supra* n. 7.

While endorsing the finding of the Court, in its earlier decision 1996, that the allotment of petrol pumps made by Capt. Shan was atrocious, specially to those made in favour of the members Oil Selection Board or their sons etc., and reflected a want exercise of power and that the conduct of the Minister was who unjustified, the Court said, nevertheless it falls short 'misfeasance' and the petitioner 'Common Cause', not being applicant for allotment, it could not claim to have suffered a 'damage or loss' on account of the conduct of the Minister. Thi has to be an identifiable plaintiff or claimant whose interest v damaged by the public officer (tort feaser) maliciously or with i knowledge that the impugned action was likely to injure 1 interest of that person. As regards the imposition of pecuni; damages, the Court said,

> State cannot derive itself the right of being compensated by its officers on the ground that they had contravened or violated the fundamental rights of a citizen. Directing the Minister to pay, a sum of Rs. 50 lakh to the Government would amount to asking the Government to pay exemplary damages to itself, which the Court said, "is not tenable under the law.

Lastly, the Court said that principle of 'doctrine of trust' is applicable in case of ministers in discharging their duties advanced a somewhat conspicuous justification, when it said:

> The person does not, on becoming the Minister of State for Petroleum and Natural Gas, assume the role of a trustee in real sense nor does a 'trust' come into existence in respect of Government properties. —The 'doctrine of Trust' cannot be invoked in fixing the criminal liability.—Mere existence of 'power to allot' petrol outlets by Minister of State for Petroleum cannot, be treated as 'property'

> within the meaning of sec. 405, IPC, capable of being un-utilized or misappropriated.[18]

One fails to understand the logic of such a farfetched argument that though the act of the Minister is wrong it is not actionable. *'Ubijus ibi remedium'* 'when there is wrong, there is a remedy', is well known maxim of common law.

With due respect to the Hon'ble Court, it is submitted that in a democracy the Court cannot shirk from its constitutional obligation by pleading its inability to provide remedy applying the colonial theory of 'king can do no wrong.'

Another assumption of the Court, that 'the Minister does not assume the role of a trustee' in the real sense, nor does a 'trust' comes into existence, is misleading. It would perhaps be appropriate to refer the statement of the Hon'ble court in its earlier decision of 1996, wherein the Court after discussing at length a number of cases and referring to various authorities, said:

> The Executive power of the Government is distributed department-wise and one Minister made the head of the Department. He becomes principally accountable and answerable to the people. The law of the land regulates his powers and duties. The legal and moral responsibility or liability for the acts or omissions rests solely on the minister. He cannot be absolved of his responsibility by taking the plea of State action.[19]

The Court further held that 'misfeasance in public office includes malicious abuse of **power'** by public official, which is actionable in **law** of tort. The fact **that** there is no injury to a third person in the present case is not enough to make the principle of public accountability inapplicable in as much as there was injury to the high principles of public law, that a public functionary has to use

[a] Paras 154, 155, 157 and 162.

Common Cause, A Registered Society v. *Union of India,* (1996) 6 SCC 43, at **560 (para** 4).

its power for the *bonafide* purpose and in a transparent manner. Moreover, there was loss to the exchequer as allotments were made without calling tender, which must have yielded revenue to the Government.

It may be pointed out mat in similar situations in a number of countries, state functionaries have been found guilty of 'misfeasance' and 'wrongful exercise of power' and they have been made personally liable. For instance, the Supreme Court of Canada in *Carelli,*[20] awarded damages against the Prime Minister of the Province of Quebec for wrongful cancellation of license of liquor shop and was asked to pay damages personally. The Supreme Court of Bahamas in *Tynes,* [21] awarded exemplary damages for arbitrary, oppressive or unconstitutional action by State officials. Similarly, the Supreme Court of Jamaica in *Samulla,*[22] awarded exemplary damages. It is therefore high time that in democratic government by Rule of Law State functionaries should be made personally accountable for the wrongful exercise of their public duties.

Another fallacious findings by the Hon'ble Court is that 'asking the minister to pay exemplary damages of Rs. 50 lakh was nothing more than, asking the Government to pay exemplary damages to itself,' which the Court said, 'it cannot be permitted under art. 32 of the Constitution'. Such a proposition is perhaps based on wrong assumptions. This is evident from the decision of nine-membei Constitution bench of the apex court in *Superintendent and Legal Remembrance of Legal Affairs,*[23] by a majority of 8 : in 1967.

[10] *Pon Carelli \. Duplejis* (1959) VR 280.'

[21] *Tynes* v *Barr.* (1996) 1, Commonwealth Human Rights Law Digest (CHRD; pp. 117to 120.

[22] *Samulls* v. *A. G. of Jamaica* (1996) 1 CHRD, pp. 120-122. Also see *Deshpriya* v. *Municipal Council, Nuywara Eliva,* (1996) 1 CHRD, 115 (Sr Lanka S. C.) where political discrimination was the motive for restrictinj freedom of expression, aggravated award was ordered.

[23] *Superintendent and Remembrance of Legal Affairs, West Bengal \ Corporation of Calcutta,* AIR 1967 SC 997. The earlier decision of the Court i *Director of Rationing and Distribution* v. *Corporation of Calcutta,* AIR 196 SC 1355 was turned down. The State of West Bengal was carrying on the trad without obtaining a licence as required under sec. 218 of the Calcutta Municipj

It is therefore, respectfully submitted that the Court is well within its powers to direct the Government to pay exemplary damages. Perhaps it would be in the interests of justice that the 1999 verdict in *Common Cause,* [24] be overruled and the 1996 judgment be restored by a larger bench to get the law settled on this important issue and restore the confidence of the people in the administration of justice.[25]

2.3 Abuse of constitutional authority

Installation of Miss J. Jayalalitha as the Chief Minister of the State of Tamil Nadu on May 14, 2001 by the Governor Mrs. Fathima Beevi is yet another example of gross constitutional improprieties. Miss. Jayalalitha was convicted and sentenced to three years of rigorous imprisonment by the Special Judge, CBI, Chennai in *Tansi land* scam case under Prevention of Corruption Act, 1988. This led the Election Commission to reject her nomination papers for all the four constituencies she sought to contest in May 10, 2001 Assembly election and she was declared disqualified to contest. However, she was elected leader of her partyAIADMK **that** registered an impressive victory in the Assembly election.[26]

The unseemly haste in which the Governor administered the oath of office and secrecy the very next day of her election as the leader

Act, 1951. The Corporation of Calcutta filed a complaint under the provisions of **sec.** 541 of the Act in the Court of Presidency against the West Bengal Government for contravening the provisions of sec. 218. The court dismissed **the** claim. However, Calcutta High Court held the State liable to take licence **Kke** a private individual. State went in appeal to Supreme Court. Dismissing the **appeal,** the apex court agreed with the High Court's finding th#t the State is as much bound by the law as is a private citizen and the State of West Bengal was **asked** to pay a fine of Rs. 250/- to the Corporation of Calcutta. [54] *Supra* n. 16. [s] *Supra n.* 19.

Article 173 of the Constitution provides qualification for the membership of fe State legislature and Article 191 deals with disqualification for membership **and** further Representation of Peoples Act provides that a person convicted of an **offence** and sentenced to imprisonment for not less than two years shall be disqualified from contesting an election for six years from the date of release. Miss J. Jayalalitha has been convicted under PCA, 1988 thrice.

of the party, when she was. to appear before a court in a criminal case relating to economic offences has set a bad precedent. The following questions put to Ms. Fathima Beevi by a reporter in Thirnvanthapuram on her return from Chennai after-relinquishing the office of the Governor and her responses thereto are interesting to note.[28]

Q. Why did she (the Governor) hurry to swear J. Jayalalitha in? A. fchad to do it with their belief of auspicious time. I did not want to hurt their feelings.

Q. Does a whiff of morality springs from swearing in one who was convicted?
A. If the question of morality was to be inquired into, democracy will scarcely survive.

Q. Why did she swear in Miss Jayalalitha as chief minister despite her nomination being rejected?
A. Governor had to take decision and the only candle to the Governor on the appointment of a chief minister is art. 164(4) of the Constitution, which enjoins on the incumbent to get elected within six months.[27]

After Jayalalitha, having being declared disqualified by the Election Commission to contest assembly election, perhaps it was obligatory on the part of the Governor to seek legal opinion before installation of Jayalalitha as chief Minister. Article 192 of the Constitution empowers the Governor to decide on disqualification of a legislator 'after obtaining the opinion of the Election Commission and shall act according to such opinion'.[28] But the

P.K. Sundaram, *Times of India News Service,* July 6, 2001, Thiruvananthapuram (Kerala). Extracts from an interview with Fathima Beevi after she relinquished the office of the Governor in the wake of the Union cabinet decision to recall the Governor as a result of her controversial report regarding arrest of two Central Ministers, Mr. Murli Saran Maran and Mr. T. R. Balu by the police in Chennai on June 30, 2001.

[28] Art. 192 says: '(1) If any question arises as to whether a member of a House of Legislature of a State has become — disqualified—the decisions of the Governor—shall be final.

Governor has not even complied with the constitutional mandate. No doubt, art. 164(4) of the Constitution[29] provides that a non-member (of the assembly) could become a Minister/Chief Minister, but such a person must be elected to the legislature within a period of six months from the date of assuming the office. It was, therefore, implied that such a person was eligible to contest the election and he/she did not suffer from any disqualification.[30] It was never intended for a person who is disqualified from contesting election or for a person duly convicted of an offence.

A decision taken on the consideration of one's feelings, belief and auspicious time to appease an incumbent ignoring all norms of propriety can not be justified by any standard. The principle of natural justice demands that an action to be valid must be fair just and reasonable. Justice hurried is justice buried.

What the constitution and laws do not specify are governed in a democracy by healthy parliamentary conventions and traditions. According to the conventions followed in India, if a person is charged in a case of corruption with a *prima facie* evidence, that person quits his or her office as minister or Chief Minister. The persons belonging to all political parties have adhered to the convention. Miss Jayalalitha's own party nominee Mr. Sadapatti R. Muthiah resigned from the Vajpayee Government of being charge sheeted in the disproportionate wealth case against him. Laloo Prasad Yadav and Madanlal Khurana had to quit their chief ministership of Bihar and Delhi respectively on being charge sheeted in fodder and Hawala scams. Mr. Suraj Bhan, the then Governor of Bihar, dismissed one Mr. Samrat Choudhary (a non-member of the Bihar Legislative Assembly), a minister in the Rabri Devi Government, who was under age (i.e. below 25 years

(2) Before giving any decision on any such question, the Governor shall obtain Ae opinion of the Election Commission and shall act according to such opinion.

Article 164(4) reads: 'A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of **that** period cease to be a Minister.'

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Rakesh Bahatnagar, *Times of India,* July 2,2001, p. 6.

of age) after ascertaining the actual facts from the State chief electoral officer.

No doubt, in a democracy the people decide who should rule them, but of course, it is, subject to *rule of law.* So long the constitution stands no mandate can be construed as the peoples' mandate to condone or compound crimes committed by an individual howsoever powerful he or she might be.

It is gratifying to note that in *B.R. Kapur* v. *State of Tamil Nadu*[31] a Constitution Bench comprising of five Judges, S. P. Bharucha G.B. Pattanik, Y.K. Saharwal, Ruma Pal, and Brajesh Kumar, JJ. ruled that it was beyond the discretion of the Governor to appoin as Chief Minister a disqualified person to contest an election While upholding the sanctity of the Constitution over the will o: the people, the Court in its unanimous verdict said:

> A person who is convicted for a criminal offence and sentenced to imprisonment for a period of not less then two years cannot be appointed the Chief Minister of a State under Article 164(1) read with 164(4) of the Constitution of India and cannot continue to function as such.

In other latest case, *Tejpal Singh,*[32] delivered on August 18, 200 by a Bench comprising of Dr. A. S. Anand, R. C. Lahoti, and K.G Balkrishnan, JJ., the apex court had ruled that a non-electei member of the Legislature must get elected within six months o assuming the office and that such a person cannot be reappoints as minister during the same term of the office of the House unles he or she is duly elected.

[31] *B.R. Kapur* v. *State of Tamil Nadu,* 2000(7) SCC 1.
[32] *The Times of India,* (Lucknow edn.) August 19,2001, p. 1 Setting aside Tejpi Singh's appointment again as a minister after six months because he had n< been elected to the House within a period of six months, the Court said, 'such practice would be clearly derogatory to the Constitutional scheme, imprope undemocratic and invalid'.

The above judicial pronouncements are welcome and will certainly go a long way in putting a check on corrupt politicians from holding office and curbing rampant corruption in public life, which has been eroding the core of our democracy.

3. CONCLUSION

The study made in the foregoing pages reveals that the criminal judicial system is indifferent to, perhaps unconcerned with, and little hostile to, the poor and the weak. The Courts are not consistent in their approach. It is found that many a time courts have adopted a narrow and legalistic approach of literal interpretation practiced in colonial era, which is outdated in a democracy. The courts perhaps sitting in ivory tower forget that in a democracy the judiciary too like other two wings of the State-legislature and executive- have an important role to play to advance, protect and preserve socio-economic and political justice as enshrined in the Preamble to the Constitution.

As discussed at length, in JMM bribery case, the apex court by a majority of three to two upheld the right of the lawmakers to commit day light robbery and to get away with it, for helping the Rao's minority Government to survive a 'no confidence' motion under the guise of privileges provided under art. 105 (2) of the Constitution.

Perhaps framers of the Constitution and Chairman of the Drafting Committee Dr. Bhim Rao Ambedkar might not have even visualized in dream that lawmakers in free India could successfully barter a most solemn trust cornmitted to them by those they represented and get its approval by the highest court of the land. Unfortunately, the apex court has once again reiterated the colonial doctrine 'king can do no wrong', though Britishers left India almost 57 years ago. In fact, the judgment is a set beck and has shattered the faith of the common man in democracy and *rule of law*.

Supra, n. 1.

In an another case of abuse of power in 1999[34] a three membei Bench of the apex court turned down its earlier decision of 1996 and ordered for the refund of a sum of Rs. 50 lakh of exemplar) fine imposed on Captain Satish Sharma. As stated earlier, Captair Satish Sharma, former Petroleum Minister, was charged and founc guilty of arbitrary exercise of his discretionary powers in allotmen and distribution of petrol pumps and cooking gas agencies Applying the principle of accountability and transparency in th Governments' working, the court held Capt. Sharma personal! liable for breach of public trust. The court isaid:

> Captain Sharma had doled out th£ petrol pumps as if he was a king' and the pumps were his personal property, he showed scant respect for the office he was holding and also for the rule of law and that his act was unconstitutional.[35]

It was thought that with the 1996 judgment the doctrine of publ trust has finally been incorporated in our legal system. It wou have helped to clean and make the working of outdat< administration transparent and efficient, besides being judiciot However, it had a very short life.

As earlier stated the appointment of Miss J. Jayalalita, a convict and disqualified person to contest election as a Chief Minister, the Governor of Tamil Nadu is a glaring example of abuse constitutional authority in a democracy.

The persons in authority and responsible for the enforcement law and setting legal machinery in motion to safeguard the inter and well- being of the people should not use, abuse and misuse 1 law for their personal and political gains and advantages depicted in a number of cases discussed earlier. Being custodian of law, they have special responsibility and solemn d to protect and preserve the *rule of law* and the interest of the pc the weak, the deprived, the handicapped, and the neglected in

[34] *Supra,* n. 16.
[35] *Supra,* n. 8.

society so that they can avail of and enjoy social, economic and political justice guaranteed under the Constitution of India equally.

In a democracy, persons hold the office as a trustee and are supposed to exercise and discharge powers and duties honestly and sincerely with clean hands to set an example instead of being an object of ridicule and disgrace. Unless the normal and orderly functioning of the public offices are ensured through strong legislative, executive as well as judicial exercise, corrupt politicians and public servants could even paralyze the functioning of such institutions and thereby hinder the democratic policy.

KINETICS AND MECHANISM OF THE OXIDATION OF ALIPHATIC ALCOHOLS BY BUTYLTRIPHENYLPHOSPHONIUMDICHROMATE

Anita Kothari and Kalyan K. Banerji

1. INTRODUCTION

Selective oxidation of organic compounds under non-aqueous conditions is an important transformation in synthetic organic chemistry. For this, a number of different chromium (VI) derivatives have been reported.[1,2] In 1997, Baltork *et al*[3] reported a new Cr(VI) derivative - butyltriphenylphosphonium dichromate (BTPPD). BTPPD is reported to convert alcohols to corresponding carbonyl compounds in yields ranging from 80 to 100%. It oxidises amines to azo-compounds, thiols to disulphides and regenerate carbonyl compounds from their oximes. We have been interested in the kinetics and mechanisms of the oxidations by BTPPD and some reports on the oxidation by BTPPD have emanated from our labpratory.[4-6] In this paper, we report the kinetics of the oxidation of some aliphatic primary and secondary alcohols by BTPPD in dimethylsulphoxide (DMSO) as the solvent. Mechanistic aspects are discussed.

2. EXPERIMENTAL

Materials.- BTPPD was prepared by the reported method and its purity was checked iodometrically. The alcohols were commercial products and were purified by the usual methods. The solvents were purified by the usual methods.[7] [l,l-^{2}H2]Ethanol and

Department of Chemistry, J.N.V. University, Jodhpur. Most of this work has been carried in the laboratories of J.N.V. University, Jodhpur. Thanks are due to the authorities of the University.

Professor, Faculty of Science, National Law University, Jodhpur.

$[2\text{-}^2H]$propan-2-ol were prepared by the reported methods.[8*9] Their isotopic purity, as ascertained by their H NMR spectra, was 92±4% and 90±5% respectively. As the solvent was non-aqueous, toluene p-sulphonic acid (TsOH) was used as a source of hydrogen ions.

Product Analysis.- The product analyses were performed under kinetic conditions i.e., with an excess of alcohol over the oxidant. In a typical experiment, 2-propanol (0.3 mol), TsOH (0.05 mol), and BTPPD (0.02 mol) were made up to 100 ml in QMSO and was allowed to stand in the dark for *ca.* 10 h to ensure completion of the reaction. The solution was then treated with an excess (200 ml) of a saturated solution of 2,4-dinitrophenylhydrazine in 2 mol dm''^3 HC1 and was. kept overnight in a refrigerator. The precipitated 2,4-dinitrophenylhydrazone (DNP) was filtered off, dried, weighed, recrystallized from ethanol, and weighed again. The yield of DNP, before and after recrystallization was 1.41 g (91%) and 1.32 g (85%) respectively. The DNP was found identical (mp and mixed mp) with the DNP of acetone. In similar experiments, with other alcohols, the yield of the corresponding carbonyl compounds was in the range of 80-92%, after recrystallization.

Kinetic Measurements.- The reactions were studied under pseudo-first-order conditions by keeping an excess (x 10 or greater) of the alcohol over BTPPD. The solvent was DMSO, unless otherwise specified. The reactions were studied at constant temperature (±0.1 K) and were followed by monitoring the decrease in the [BTPPD] spectrophotometrically at 364 nm for up to 80% reaction. The Beer's law is valid for BTPPD within the concentration range used in our experiments. The pseudo-first-order rate constants, kobs, were evaluated from linear plots ($r > 0.9990$) of log [BTPPD] against time. Duplicate kinetic runs showed that the rates were reproducible to within ±3%. The specific rate constant, k, was evaluated from the relation: $k = kobs / [alcohol]^2 [H^+]^2$

3. RESULTS

The oxidation of alcohols by BTPPD yielded the corresponding carbonyl compounds as the main product. The overall reaction can be represented as equation (1).

$$3\ R_2CHOH + Cr_2O_7^{-2} + 8\ H^+ \rightarrow 3\ R_2C{=}O + 7\ H_2O + 2\ Cr^{+3} \quad (1)$$

Induced Polymerisation of Acrylonitrile. The oxidation of the alcohols, in an atmosphere of nitrogen, failed to induce polymerisation of acrylonitrile. Further, the rate of oxidation is nol affected by the addition of acrylonitrile (Table 1).

The reaction is first order with respect to BTPPD. Further, th(pseudo-first-order rate constant, kobs, does not depend on the initia concentration of BTPPD. The reaction showed a second orde: dependence on the concentration of alcohol (Table 1).

Table 1. Rate constants for the oxidation of alcohols by BTPPD

10^3[BTPPD]	[Alcohol]	10^4kobs(s^{-1})	
(mol dm^{-3})	(mol dm^{-3})	Ethanol[a]	2-Propanol[b]
1.0	0.1	1.80	1.60
1.0	0.2	7.00	6.52
1.0	0.3	15.5	14.4
1.0	0.5	44.7	41.0
1.0	0.7	85.7	80.1
1.0	1.0	176	164
0.5	0.5	45.3	40.5
2.0	0.5	45.0	42.0
3.0	0.5	43.9	41.6
5.0	0.5	44.2	40.9
1.0	0.5[c]	45.0	40.7

[a] [H^+] = 1.00 mol dm^{-3}; Temperature = 318 K; [b] [H+] = 0.20 mol dm^{-3}; Temperature = 288 K
[c] contained 0.001 mol dm^{-3} acrylonitrile

Effect of Acidity.- The rate of oxidation of of the alcohols increases with an increase in the concentration of hydrogen ions. The reaction is second order with respect to the acid (Table 2).

Table 2.Dependence of the reaction rate on the hydrogen-ion concentration

$[H^+]$ (mol dm^{-3})	$10'k_{obs}$ (s^{-1}) Ethanol[a]	2-Propnaol[b]
0.05	0.433	0.410
0.10	1.73	1.65
0.20	6.87	6.64
0.30	15.8	14.6
0.50	42.9	41.3
0.75	97.0	93.2
1.00		176
164		

* [alcohol] = 1.00 mol dm^{-3}; Temperature = 318 K

[b] [alcohol] = 0.20 mol dm^{-3}; Temperature = 288 K

Effect of substituents.- The rates of oxidation of fifteen primary and secondary aliphatic alcohols were determined at different temperatures and the activation parameters were calculated (Tables 3 and 4).

Table 3. Rate constants for the oxidation of alcohols by BTPPD

Alcohol	$10^{4}k$(mol $l^{4}dm^{12}s^{-1}$)			
	288K	298K	308K	318K
Methanol	0.011	0.039	0.146	0.570
2-Chloro-ethanol	0.041	0.140	, 0.455	1.74
2-ethanol	0.660	1.98	6.23	22.1
Ethanol	6.72	19.9	59.3	176
1-Chloro-propanol-2	23.6	58.7	160	451
1-Propanol	15.5	41.0	111	336
1 -Butanol	37.3	93.1	267	802
1-Pentanol	43.8	115	305	802
2-Methyl-propanol-1	77.2	194	485	1390
1-Methoxy-propanol-2	380	853	2210	6130
2-Propanol	4050	9300	21400	50000
2-Butanol	5740	11200	25300	61800-
2-Pentanol	21700	40500	92000	202000
3-Methyl-butanol-2	45700	86000	176000	385000
2-Hexanol	26600	51000	106000	235000

Table 4. Activation parameters of the oxidation of alcohols by BTPPD.

Alcohol	AH* kJ mol''[1]	AS* J mol''[1] K''[1]	AG* kJ mol
Methanol	97.6±2.1	-2213	10412.0
2-Chloroethanol	91.9±2.4	-3014	10112.1
2-Methoxy-ethanol	86.2±2.0	-2614	94.012.0
Ethanol	79.9±3.0	-2914	88.512.1
1-Chloro-propanol-2	72.1±1.6	-46+4	85.511.6
1 -Propanol	75.0±2.0	-3913	86.511.7
1-Butanol	75.4+2.0	-3112	84.411.7
1-Pentanol	71.311.0	-4312	84.010.8
2-Methylpropanol-1	70.5±2.1	-4213	82.711.4
1-Methoxy-propanol-2	68.1±1.7	-3712	78.911.4
2-Propanol	61.211.0	-4112	73.110.9
2-Butanol	57.811.2	- 5013	72.511.2
2-Pentanol	54.611.7	-5013	69.311.8
3-Methylbutanol-2	51.512.0	-5413	67.511.6
2-Hexanol	52.711.9	-5514	68.811.5

Kinetic Isotope Effect- To ascertain the importance of the cleavage of the a-C-H bond in the rate-determining step, the oxidation of deuteriated ethanol and 2-propanol was studied. The oxidation exhibited a substantial primary kinetic isotope effect (Table 5).

Table 5. Kinetic isotope effect in the oxidation of ethanol and 2-propanol by BTPPD

Alcohol	lO^Cmol^dm'V)			
	288K	298K	308K	318K
Ethanol	6.72	19.9	59.3	176
[U-$^{2}H_2$]-ethanol	1.07	3.34	10.4	32.7
k_H/k_D	6.28	5.96	5.69	5.38
2-Propanol	4050	9300	21400	50000
[2-^{2}H]-2-propanol	774	1870	4510	11200
k_H/k_D	5.23	4.97	4.75	4.48

Solvent Effect.- The oxidation of 2-propanol by BTPPD was studied in nineteen organic solvents. The solubility of the reactants and the reaction of BTPPD with primary and secondary alcohols limited the choice of solvents. There was no reaction with the chosen solvents. The kinetics were similar in all the solvents. The values of the rate constant, k, are recorded in Table 6.

Table 6. Effect of solvent on the oxidation of 2-propanol by BTPPD at 298 K

Solvent	10^3k (mol'4 dm'V)	Solvent	10^3 k (mor4dm12 s''1)
Chloroform	242	Toluene	82.7
1.2-Dichloroethane	275	Acetophenone	371
Dichloromethane	282	Tetrahydronfuran	133
DMSO	930	t-BuOH	105
Acetone	263	Dioxane	138
Dimethylformamide	440	Butanone	204
Acetic acid	43.2	Cyclohexane	12.0
Nitrobenzene	318	Ethyl acetate	118
Benzene	110	Carbon disulfide	44.6
1,2-Dimethoxy-ethane	78.2		

4. Discussion

The values of log k at 288 K, for the fifteen alcohols, are linearly related to log k at 318 K (slope = 0.8821±0.0032; r^2 = 0.9995). The value of isokinetic temperature is 1458+162 K. Current views do **not** attach much significance to value of isokinetic temperature.[10] A linear isokinetic relationship is, however, a necessary condition **for** the validity of linear free energy relationships.[10] It also implies **that** all the reactions, so correlated, follow a similar mechanism.

Solvent Effect.- The values of the rate constant, k, in eighteen solvents (CS2 was not considered as the complete range of the solvent parameters are not available), was correlated in terms of linear solvation energy relationship (LSER) of Kamlet *et al.*"

logk = A + pir +aoc + bp (

Here *n** represents the solvent polarity for solvent-sol interaction of non-specific type, p is a scale of solvent hydrogi bond acceptor basicity, while a represents the solvent hydrogi bond donor acidity; A is the intercept term. It may be mentior here that out of the 18 solvents, for 13 solvents a has a value zero. The analyses in terms of equation (2), a two-parame equation involving *n** and p, and separately with *n** and p gave i following results [equations (3) - (6)].

logk= -1.83+ 1.5010.19 it*-0.20±0.15 a+ 0.20±0.16p (3) R^2 = 0.8534, sd = 0.18, n = 18,y = 0.30

logk= -1.87+1.58±0.19TC* +0.13±0.16p (4)
R^2 = 0.8347, sd = 0.18, n = 18,i|/ = 0.31

logk= -1.85 +1.61±0.18TI* (5)
r^2 = 0.8271, sd = 0.18, n = 18, y = 0.31

logk= -0.95 + 0.41+0.35 p (6)
r^2 = 0.0806, sd = 0.42, n= 18,vj/ = 0.87

Here n is the number of data points, sd is the standard deviati and *i* is the Exner's statistical parameter. The results show that *ca.* 85% of the data on the solvent effect explained by equation (2). According to Exner's criterion however, the correlation is poor. The major contribution is frc the solvent polarity term, *n**, *[cf.* eqn. (5)], both a and p playi relatively insignificant roles.
The data on solvent effect were analysed in terms of Swaii equation (7) also, where A represents the anion-solvating power the solvent and B the cation-solvating power; C is the interce term, and (A + B) is postulated to represent the solvent polarity.[1,1]
log k = aA + bB + C (7)

The results of the correlation analyses in terms of equation (' individually with A and B, and with (A + B) are given below.

$$\log k = 0.49\pm0.03\ A + 1.65\pm0.02\ B - 2.03 \quad (8)$$
$R^2 = 0.9977$, sd = 0.02, ft = 19,\|/ = 0.03

$$\log k = 0.26\pm0.55\ A - 0.90 \quad (9)$$
j ^ = 0.0129, sd = 0.44, n=19,vj/ = 0.97

$$\log k = 1.62\pm0.09B - 1.87 \quad (10)$$
r = 0.9508, sd = 0.10, n = 19,i)/= 0.16

$$\log k = 1.27\pm0.15(A + B) - 2.00 \quad (11)$$
i **r** = 0.8095, sd = 0.19, n=19,\|/ = 0.33

The data on solvent effect showed an excellent correlation in terms of Swain's equation[13] with both anion- and cation-solvating powers contributing to the observed solvent effect. However, the **role** of cation-solvation is major, it alone accounts for *ca.* 95% of **die** data. The solvent polarity, represented by (A + B) accounted **for** *ca.* 81% of the data. In view of the fact *ca.* 81% of the data is accounted for by (A+B), attempt was made to correlate the data **with** the relative permittivity of the solvents. A plot of log k against the inverse of the relative permittivity, however, is not Snear (r^2 = 0.4988, sd = 0.31, y = 0.55).

The solvent polarity term of Kamlet's equation[11] explained *ca.* 83% of the data. Thus it seems that the solvent polarity terms of the two equations represent nearly the same solvent property. This is borne out by the fact that there is a significant collinearity between *x'* and (A + B) for the eighteen solvents (r^2 = 0.7811). *Correlation Analysis of Reactivity.*- Preliminary computation
: showed that the rate constants, k, of oxidation of the alcohols do **act** exhibit satisfactory correlation with either the polar or steric substituent parameters separately. Therefore, the rates were analysed in terms of dual substituent-parameter (DSP) equation
; leqn.(12)]ofPavelichandTaft.[14]

$$\log k = p^* Sa^* + 5\ 2E_S + \log k_0 \quad (12)$$

Excellent correlations were obtained with the reaction constants being negative (Table 7). The negative steric reaction constant indicates a steric acceleration. This may be explained on the basis of high ground state energy of the sterically crowded alcohols. Since the crowding is relieved in the product aldehyde/ketone as well as in the transition state leading to it, the transition state energies of the crowded and non-crowded alcohols do not differ much and a steric acceleration, therefore, results.

Table 7. Temperature dependence of the reaction constants

T/K	p*	5	R^2	sd	ψ
288	-2.41±0.01	-1.2910.01	0.9999	0.01	0.008
298	-2.31±0.02	-1.23+0.02	0.9998	0.01	0.011
308	-2.23±0.02	-1.18±0.02	0.9996	0.02	0.015
318	-2.1510.03	-1.1210.02	0.9994	0.03	0.019

Mechanism.- The presence of a substantial primary kinetic isotope effect confirms the cleavage of the oc-C - H bond in the rate-determining step. A one-electron oxidation, giving rise to free, radicals, is unlikely in view of the failure to induce polymerisation of acrylonitrile. The analysis of the solvent effect indicated the importance of the cation-solvating power of the solvent. The negative polar reaction constants indicate the presence of an electron-deficient reaction centre in the transition state of the rate-determining step. Therefore, the transfer of a hydride ion from the alcohol to the oxidant is indicated. A hydride-ion transfer may take place either by- an acyclic process or *via* a chromate ester. Kwart and Nickle[15] have shown that a dependence of kinetic isotope effect on temperature can be gainfully employed to determine whether the loss of hydrogen proceeds through a concerted cyclic process or by an acyclic process. The data for protio- and deuterio-ethanols and 2-propanols fitted to the familiar expression: $k_H/k_D = A_H/A_D \exp(-\Delta E_a / RT)$[16,17] showed a direct correspondence with the properties of a symmetrical transition state in which the activation energy difference for k_{CH}/k_{CD} is equal to the zero-point energy difference for the respective C-H and C-D bonds (*ca.*4.5 kJ mol^{-1}) and the entropy of activation of the respective reactions are nearly equal. Bordwell[18] has given cogent evidence against the occurrence of concerted one-step bimolecular processes of hydrogen transfer and it is clear that in the present reaction also, the hydrogen transfer does not occur by an acyclic bimolecular process. The only truly symmetrical processes involving linear transfer of hydrogen are intrinsically concerted sigmatropic reactions characterized by transfer with a cyclic transition state.[19] Littler[20] has also shown that a cyclic hydride-ion transfer, in the oxidation of alcohols by Cr(VI), involves six electrons and being a Huckel type system, is an allowed process. Therefore, one can safely conclude that in the oxidation of alcohols by BTPPD, the hydride-ion transfer occurs *via* a chromate ester. Formation of ester intermediates in the oxidation of alcohols by Cr(VI) compounds is well documented.[21] The observed acid-dependence of the reaction points to a rapid reversible protonation of the ester intermediate prior to its disproportionation. A mechanism depicted in Scheme 1 accounts for the experimental results. It may be mentioned that though the formation of the diester and its diprotonation is shown as single steps, these must be taking place in two steps each.

$(R'P)_2Cr_2O_7 + 2R_2CHOH \rightleftharpoons$

```
     R      O      O     R
     |      ||     ||    |          2H+
  R-C-O- Cr-O-Cr-O-C-R
     |      / \    / \       |
     H   HORPORPO  OH  H
```

R OH OH R
[[[[
R-C-0-Cr^+-0-Cr^+-0-C-R
I / \ / \ I
H HORPORPO OH H

-» 2 R_2 C = O + 2 H_20 + (R'P)2$Cr_2$05 + 2 H^+
Cr(IV)

fast Cr(VI) -
> 2 Cr (V)

fast Cr(V) + Reductant -
> Product + Cr (III)

R P = butyltriphenyl

Scheme 1

Initially Cr(VI) is reduced to Cr(IV). It is likely to react with another Cr(VI) to generate Cr(V) which is then reduced in a fast step to the ultimate product Cr(III). Such a sequence of reactions in Cr(VI) oxidations is well known.[21]

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BREAKING BARRIERS

A SOCIO-LEGAL ANALYSIS OF THE RIGHT TO ACCESS TO JUSTICE

Shubhankar Dam

1. PROLOGUE: THE HUMAN QUEST FOR JUSTICE

Aspiration for 'justice' is as old as humanity itself. And endless has been the voyage of humanity to discover its meaning. Throughout the pages of academic history, philosophers have debated its meaning without the prospect of any consensus. Aristotle provided a complicated account of justice, dividing the same into two categories, a general concept of justice as 'the lawful' and a particular concept as 'the fair and equal.'[1] Emphasizing on the nature of 'General Justice,' he suggested, '.. justice is complete virtue to the highest degree because it is the complete exercise of complete justice.'[2] While Thomas Aquinas regarded justice as a habit which makes a man 'capable of doing what is just and of being just in action and in intention,'[3] Mencius observed that '[a] 11 men have things they will not do, and of what makes this so can be fully developed in the things they will do then 'Justice' results.'[4] Aristotle's sentiments found echo in Adam Smith when he argued that justice is a virtue, the observance of which 'is not left to the freedom of our own wills, which may be

* IVth Year B. A., LL.B. (Hons.) Student, the National University of Juridical Sciences (NUJS), Kolkata.
' Aristotle, The Various Types of Justice, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice* 36 (2000).
[2] *Id.*
[3] Thomas Aquinas, The Nature of Justice, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice, supra* n., 1 at 50.
[4] Mencius, Justice and Humanity, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice, supra* n. 1 at 57.

extorted by force, and of which the violation exposes to resentment, and consequently to punishment.'[5] John Stuart Mill after analyzing the diverse applications of the term 'justice' concluded, 'it is a matter of some difficulty to seize the mental link which holds them together, and on which the moral sentiment adhering to the term essentially depends.'[6] However, on a discussion based on the etymology of the word, Mill argued that "justice is a name for certain moral requirements which, regarded collectively, stand higher in the scale of social utility, and are, therefore, of more paramount obligations...'[7] More recently, John Rawls in his approach to justice suggested that 'the fundamental idea in the concept of justice is fairness'[8] and offered an analysis of the concept of justice from this point of view.

The difference in the opinion of philosophers notwithstanding, every Constitution has *its* own philosophy of justice. The genesis of the high rhetoric on justice inscribed in the Preamble to the Indian Constitution may be found in the Objective Resolution of Pandit Nehru that was adopted by the Constituent Assembly on January 22, 1947.[9] The Constitution, following from the Objective Resolution resolves to '... to secure to all its citizens: JUSTICE, *social, economic and political..."* The provisions of the Constitution reflect the steel resolve of our makers to ensure that the high ideal of justice found adequate promise in our supreme *lex.* The principle of universal adult suffrage[1] and the right of every citizen, irrespective of his propriety or his educational

[5] Adam Smith, Justice as a Moral Sentiment, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice, supra* n. 1 at 144.
* John Stuart Mill, Social Justice and Utility, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice, supra* n. 1, at 170.
[7]W.atl71.
[1] John Rawls, Justice as Fairness, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice, supra* n. 1 at 282 -283.
* See *Constituent Assembly Debates* (CAD), 304 (16th Dec. 1947). Clause 5 of **the** Resolution reads: 'Wherein shall be guaranteed and secured to all People of India *justice-social,* economic and political; equality of status, of opportunity, **and** before the law; freedom of thought, expression, belief, worship, vocation, association and action, subject to law and public morality;'
[10] Art. 328.

qualifications, to participate in the political process,[1'] reaffirm; vision of political justice. Similarly, equal opportunity to men women, irrespective of their caste, creed, language and religic matters of public employment[12] is no less an evidence of pol justice. The makers of our Constitution were not oblivious t< gross inadequacy of 'political democracy' without econ justice.[13] In their enthusiasm to guarantee the same, the m recognised the right to an adequate means of livelihood,[14] the to ensure that the operation of the economic system did not 1 in the concentration of wealth and means of production t< common detriment.[15] The philosophy of economic justice further manifestation in the duty cast on the state 'to secure... workers agricultural, industrial or otherwise, work, a living A conditions of work ensuring a decent standard of life anc enjoyment of leisure...'[16] The goal was the banishment of po[1] not by expropriation of those who have, but by the multiplic of the national wealth and resources and an equitable distrib thereof amongst all who contribute towards its production. [7] constitutional eloquence would, however, provide little sua institutions entrusted with the solemn endeavour to provide ji were not accessible. Political democracy would be of little and the high aspiration of economic justice, an unrealistic h< necessary institutions failed the test of accessibility.[18]

1 Art. 84.
12 Art. 16.
13 See D.D. Basu, *Introduction to the Constitution of India,* 24 (1995) The quotes Pandit Nehru in his inaugural address at the Seminar on Parlian Democracy in these words: "Democracy has been spoken of chiefly in tl as political democracy, roughly represented by every person having a vote vote by itself does not reflect very much to a person who is down and o person let us say, is starving or hungry. Political democracy, by itself, enough except that it may be used to obtain a gradually increasing mea economic democracy, equality and the spread of good things of life to oth the removal of gross inequalities."
14 Art. 39 (a).
15 Art. 39 (c).
16 Art. 41.
17 *Supra* n., 13 at 24.
18 See generally *supra* n., 13.

The paper endeavours to discuss the justification for a right to access to justice in a constitutional democracy, its meaning and its future. What gives a person the right to access to justice in a constitutional democracy? First, we shall endeavour to trace the genesis of the right in two principles now firmly entrenched in our constitutional jurisprudence; supremacy of law and the independence of judiciary. Thereafter, we shall endeavour to provide the right to access to justice with a definite content. Attempts have been made on many earlier occasions to provide the right to access to justice with content.[1] There is, however, no consensus on what the right may include. We would suggest that the right to access to justice might be said to constitute two broad components, one relating to the *judicial* process and the other relating to the *political* process. The distinction is important because without recognition of the political processes as part of right to access to justice, one may be attempting an analysis with implied assumptions, which may or may not be true. The duty to translate these un-stated assumptions into actuality, often, falls within the jurisdiction of the political authorities, requiring little or no intervention from the judicial processes. The right to access the court, the right to fair trail, the right to legal aid and so on may be regarded as the rights relating to the *judicial* process while the right to contribute to law reforms, the right to living wages, the right to secure work may be regarded as one relating to the *political* process of the right to access to justice. The discussion in this paper is limited to the judicial process of the right to access to justice. We propose that the right to access to justice relating to the judicial process includes the right to access the court, the right to

** See generally Anon, The Path to Equal Justice: A Five-Year Status Report on access to Justice in California, Oct. 2002 available at ■np://www.calbar.ca.gov/calbar/pdfs/accessjustice/2002-Access-Justice-Report.pdf; David Goldstein, *et al, Improving Access to Justice: Legal Services Funding and Private Bar Involvement in Public Interest Lawyering Around the World, Advanced Seminar in Ethics and Public Interest Lawyering,* Spring 3000, available at http://www.pili.org/library/access/improving_access_to_JBStice.htm; Norman Daniels, *et al, Justice is Good for Our Health: How greater economic equality would promote public health.* available at inp://www.bostonreview.net/BR25.1/daniels.html; John E. Bonine, *Sfttnding to Sme: The First Step in Access to Justice,* available at tap://www.law.mercer.edu.elaw/standingtalk.html fair trial, the right to speedy trial and the right to legal aid. We shall argue that these categorizations form what may be called the *core* of the right; development of constitutional jurisprudence may require that they be expanded. Finally, in the epilogue, we look at the future. Do the contingencies of the future and the increasing pressure on democratic institutions require that more be done? Is the access more sham than true, more in letter than in reality? Is it still a call in the wilderness, a candle in the wind that beacons but little hope?

2. ACCESSING JUSTICE: TRACING THE JURISPRUDENTIAL GENESIS

In this section, we propose to trace the jurisprudential basis for the right to access to justice. Do we have a right to access to justice? Does the right presuppose the existence of any system of political governance? The existence of an independent judiciary presupposes the supremacy of law that the judicial process, itself, has a mandate to uphold. We shall argue that an independent judicial mechanism is the consideration that the state makes in return for the commitment that an individual makes to the state to submit himself to the due process of law.

In his celebrated treatise authored in 1885, Prof. Dicey regarded supremacy of law as an essential of the rule of law.[20] He argued that a constitutional democracy requires that law rather than the arbitrary will of men hold the pride of place in the political governance.[21] Thousands of years before Prof. Dicey had even formulated his theory of the rule of law; supremacy of law had found pronounced prominence in the philosophy of *Rajdharma*, the constitutional law of ancient India.[22] Unlike the unlimited monarchy of the West, ancient Indian jurisprudence advocated the supremacy of *Dharma*, i.e. the rule of law. The law was the king

[2] A. V. Dicey, *An Introduction to Constitutional Law*, (Chapter 4 1998) (1885).
[21] See *id.*
See Rama Jois, *Seeds of Modern Public Law in Ancient Jurisprudence* (hereinafter *Seeds)*, 22 (2000). See also Rama Jois, *Legal and Constitutional History of India* (hereinafter *Constitutional History)*, 581 (2001). [23] *Id.*, at 24.

of kings and nothing was superior to law.[24] All *dharmas* merged into the philosophy of *Rajdharma* and it was, therefore, the paramount *Dharma*.[25] It was the supreme power in the State; the embodiment of ultimate purpose of human life, and the king was only the instrument to realize this goal of *Dharma*. The sovereignty of the regal was limited and so were his executive and judicial powers.[27] While the monarch was required to consult the Council of Ministers and to act according to the advice of the majority, in judicial matters he was under an obligation to accept the advice of the judicial officers.[28] The philosophy of *Rajdharma* in this sense was truly the constitutional law of ancient India, a philosophy that suggested the limitations of power of the monarch while providing him with a conception of welfare state as a vision to aspire for.

The philosophy of 'supremacy of law' has found adequate expression in our system of constitutional polity. Dr. Ambedkar once observed in the Constituent Assembly:

> The Constitution is *a fundamental* document. It is a document which defines the position and power of the three organs of the State - the executive, the judiciary and the legislature—In fact, the purpose of a constitution is not merely to create the organs of the State but to limit their authority, because, if no limitation was imposed upon the authority of organs, there will be complete tyranny and complete oppression.[29]

The philosophy of the supremacy of the Constitution soon found its judicial patronage too. The principle was also reiterated by Gajendragadkar C.J., who suggested:

[u] *Id.*
[25] *Id.*, at 26.
[26] See *Seeds*, supra n., 22 at 57.
See *Constitutional History* at 35-6. [a] *Id.*, 36. [29] Quoted in *Constitutional History, supra* n., 22 at 23.

> In a democratic country like India which is governed by a written Constitution, it is the Constitution which is supreme and sovereign—. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature in India in the literal absolute sense.

In *Keshavananda Bharati* v. *State of Kerela,* the majority in explaining the doctrine of basic structure regarded the supremacy of the Constitution as evidence of the doctrine.[32] Sikri C.J., provided a hierarchy to his explanation of the basic structure, observing that the supremacy of the Constitution was crucial.[3] Similarly, Shelat and Grover JJ.[34] and Jaganmohan Reddy J.[35] also emphasized on the supremacy of the Constitution as evidence of basic structure. In *Indira Nehru Gandhi* v. *Raj Narain,*[36] commenting on the supremacy of the Constitution Beg J., observed:

> We can say that the concept of the supremacy of the Constitution is, undoubtedly, more suited to the needs of our country that any other so put forward. It only places before us the goals towards which the nation must march but it is meant to compel our Sovereign Republic, with its three organs of Government to proceed in certain directions. It assumes that each organ of the State will discharge its trust faithfully. Can we deny it that supremacy which is the *symbol and proof of the level of our civilization?*[37]

[30] *In* Special Reference No. I of 1964, AIR 1965 SC 745 *at* 746.
[31] (1973) 4 SCC 225.
[32] *Id.,* at 287.
[33] *Id.*
[34] *Id.,* at 580.
[35] *Id.,* at 666.
[36] 1975 (Supp) SCC 1,520.
[37] *Id.* para. 569.

The court was, therefore, of the opinion that limited government was fundamental to the democratic polity of India, a feature that could not be annihilated in pursuance of the amending powers of the Parliament.

What is the significance of the recognition of the philosophy of *Rajdharma* as part of modern Indian constitutional law? If supremacy of law is to be meaningful, there must exist an independent mechanism to adjudicate an assault on its supremacy. Independence of judiciary is the *sine qua non* of democracy. [8] Without any such independent structure, one may violate the supremacy with impunity creating lawlessness, weakening at the very foundations of democracy. What, therefore, gives meaning to the philosophy of constitutional supremacy is the independence of judiciary. While there was no *strict* separation of powers in the institution of monarchy in ancient India, the King was required to exercise his judicial authority in accordance of the opinion of the judicial officers of the court.[39] However, none could be appointed Judges in the administration of justice if they did not possess fearlessness, impartiality and independence.[40] They were under a clear mandate not to connive with the king when he acted unjustly[41] but to beseech the king against the order, which will lead 10 injustice.[42] The judges, said the ancient texts, were under an obligation to protect the *Dharma* even if their decisions were against the wishes of the King.[43] Independence of the judiciary was, therefore, prevalent in the sense that judges were under a mandate to uphold the *Dharma* and not dispense justice according to the whims and caprices of the regal power. It was not independence in the structural sense of the term, implying three separate organs of government but the nature of working of the judicial officers that created an independent judiciary. Modern constitutional law in India too has safely secured the independence

[m] **Per.** Kuldip Singh J., in *S.C. Advocates on Record v. Union of India*, (1993) 4 **SCC** 331.
* *Constitutional History, supra* **n.** 22 at 36.
* ***Seeds,*** *supra* n. 22 at 497.
* *Id.* at 496.

of the judiciary in its Constitution. Commenting on tt significance of the independence of the judiciary, Pandian observed[44]:

> —[I] t is the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society like ours— To have an independent judiciary is to meet all challenges, unbending before all authorities and to uphold the imperatives of the Constitution at all times, thereby preserving the judicial integrity, the person to be elevated to the judiciary must be possessed with the highest reputation for independence, uncommitted to any prior interest, loyalty and obligation and prepared under all circumstances or eventuality to pay any price, bear any burden and to meet any hardship and always weeded only to the principles of the Constitution and 'Rule of Law.[45]

Explaining the task of the judiciary in a democratic polity, tl learned Judge held:

> Each of the functionaries is independent and supreme within its allotted sphere and none is superior to the other. Justice has to be administered through the courts and such administration would relate to social, economic and political aspects of justice as stipulated in the Preamble of the Constitution and the judiciary, therefore, becomes the most prominent and the outstanding wing of the constitutional system for fulfilling the mandate of

[4] *Supreme Court Advocates on Record Association* v. *Union of India, supra* n 38.

[45] *Id.,* para. 63 quoting (I-B) B. Shiva Rao, *The Framing of India's Constitution* 196 He further added: This motivated selection of men and women to th judiciary certainly undermines public confidence in the rule of law an resultantly the concept of separation of judiciary from the executive a adumbrated under Article 50 and the cherished concept of independence *a* judiciary untouched by the executive will only be forbidden fruits or a **myt** rather than a reality.'

> the Constitution. The judiciary has to take up a positive and creative function in securing socio-economic justice to the people.

We would submit that the jurisprudential basis for the recognition of the right to access to justice lies in the principles of the supremacy of law and the independence of the judiciary. The latter is a tacit recognition of the principle that the judiciary would uphold the majesty of law without fear or favour, whether assaulted by the state or otherwise. The Constitution recognizes the freedom of speech and reasonable restrictions that may be imposed in the exercise of the said freedom. But with freedom of speech and expression and no corresponding duty to obey the law, man may be retracing his steps to the state of nature Hobbes contemplated.[47] The existence of an independent judicial mechanism may, therefore, be seen as a compromise between the freedom of speech that the state ensures and the duty to obey the law. While an individual has the freedom to express himself, the freedom is circumscribed by the duty one owes to the state to obey the law. In other words, in pursuance of the freedom of speech guaranteed to him, one may comment upon the character of another individual in society only so long as the same does not amount to defamation. Once an individual exceeds the limits of his freedom of speech, the independent judicial mechanism must impartially adjudicate on the wrong done to another in exercise of one's freedom of speech. The absence of any such mechanism is an open invitation to lawlessness and the rule of might, contrary to the supremacy of law we discussed earlier.

Supra n. 44, para. 83. [47] Thomas Hobbes, Leviathan, Chapter XIII (1651) He argued: Hereby it is manifest that during the time men live without a common power to keep them in awe, they are in that condition which is called war; and such a war as is of every man against every man... Whatsoever, therefore, is consequent to a time of war, where every man is enemy to every man, the same is consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry... no arts, no letters, no society, and, which is worst of all, continual fear and danger of violent death; and the life of man, *solitary, poor, nasty, brutish and short.*

An independent judicial mechanism is a consideration that the state makes to its members for obeying the law.[48] When a man gives up his right to settle a dispute, by might or otherwise, the state is under a considerable obligation to provide him with an effective forum for seeking justice.[9] Ancient Indian jurisprudence stressed that the very object with which the institution of 'kingship' was conceived and brought into existence was for the enforcement of *Dharma by* the use of the might of the King (State) and also to punish individuals for contravention of *Dharma* and to give protection and relief to those who were subjected to injury and in whose favour Dharma (law) lay.[50] The *Smritis* greatly emphasized that it was the responsibility of the king to protect the people through proper and impartial administration of justice. The institution of kingship, as is evident from the *Smritis,* finds its legitimacy in the ability of the regal authority to provide justice to the people. A similar conception of political governance has been provided by the Social Contractuals too. Explaining the fundamental law of nature, Hobbes states:

> —[I] t is a precept or a general rule of reason that *every man ought to endeavour peace,* as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war...From this fundamental law of nature, by which men are commanded to endeavour peace, is derived this second law: that a man be willing, when are so too, as far forth as peace and defense of himself he shall think it necessary, to lay down this right to all things, *and be contended with so much liberty against other men as he would allow other men against himself.'*[52]

[48] See P. J. Fitzgerald (ed.), *Salmond on Jurisprudence,* 89 (1999). The author argues that a modern state's system of administration of justice ensures that private vengeance is transmuted into the administration criminal justice; while civil justice takes the place of violent self-help.
[49] D. Harris, *Justifying Welfare State,* 145 (1987).
[50] *Seeds, supra* n. 22 at 489.
[51] *Id.*
[52] *Supra* n. 47 Chapter XIV.

The peace in society that Hobbes regards as a precept for every man can become an actuality only if the 'social contract' can provide for an impartial judicial mechanism. Though contextually different, even Locke in his theory of social contract recognised the absence of a common superior to appeal to in times of application of force. He observed:

> Men living together according to reason, without a common superior on earth with authority to judge between them, are properly the state of nature. But force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war; and it is a want of such an appeal [that] gives a man the right of war even against an aggressor, though he be in society and a fellow subject—Want of a common authority puts all men in a state of nature; —But where no such appeal is, as in the state of nature, for want of positive laws and want of positive laws to appeal to, the state of war once began continues with a right to the innocent party to destroy the other whenever he can, until the aggressor offers peace and desires reconciliation on such terms as may repair any wrong he has already done—.[53]

Locke argued that the presence of an authority on earth to appeal to for relief is one great reason of men's putting themselves into society and quitting the state of nature.[54] It is the presence of the authority that will exclude the continuance of the state of war, enabling the power to decide the controversy.[55] Its effectiveness is pertinent consideration in ensuring that members of a state decide not to seek justice by the law of force. Left to fend for themselves, instincts of self-preservation would drive individuals to seek shelter in the abode of the mighty.[56] However, orderly a society

[53] See John Locke, *Second Treatise on Government,* Chapter II (1690).
[54] *Id.*

Id. at Chapter 3. The author suggests that '—in the state of nature the law of nature is alone in force, and every man is in his won case charged with the may be, and to whatever extent men may appear to obey the law c reason rather than that of force, the element of force is nonetheles present and operative. Without the institutionalized lav enforcement mechanism, one would tend to redress his wrong b; the otherwise, latent appeal to force.[57]

An effective dispute resolution mechanism is at the heart of ai efficacious democracy. The same may only be achieved if the stati decides to uphold the rule of law without fear or favour. Th< underlying idea of an effective independent judiciary is not t< satisfy dissent but to ensure a security of feeling that the state i: committed to protecting the weak and the infirm against an} injustice that may have been caused. To the strong and the mighty it is a caveat; an expression of caution that the arm of law is lonj enough to humble its might. The state would lose its mora authority to aspire for the strict adherence to the law unless it car correspondingly provide for an instrument that may uphold the lav* without fear or favour. The right to access to justice grants legitimacy to the institution of state while providing meaningful content to the philosophy of supremacy of law. It is the right tc access to justice which grants legitimacy to the institution of state while providing meaningful content to the philosophy ol supremacy of law. The justice delivery system is in a perilous state of affair today. Inequities, impartialities, delays and injustice form the principal order of the day. It is not long before the foundations of democratic polity will meet new challenges, threatening the integrity and sovereignty of this nation. The legitimacy of the state lies in promoting *equal* and *impartial* access to justice. If *Dharma* is to find an eternal place in our social existence, *Rajdharma* is the means to it. It is the command of the law and *not* the king that ensures *Dharma,* its rightful place in society. If the prosperous future of this nation is to be safely secured and the cherished ideals of democracy passed on to the progeny, judicial fraternity must stand up to the challenge of recreating an order of justice

execution of it. In the civil state, on the other hand, the law of nature is supplemented by the civil law, and the maintenance of the latter by the force of the organised community renders unnecessary and //Mpermissible the maintenance of the former by the forces of private men.' *Supra* n. 52

mechanism that shall stand out as a true tribute to the constitutional values of equality, impartiality and independence.

The question, therefore, assumes crucial significance is the meaning of the right to access to justice. What is protected in the name of right to access to justice? What are its components? We would submit that the right to access to justice includes rights that are both procedural and substantive in nature. While the right to access to the court and the right to speedy trial may be regarded as rights of procedural nature, right to fair trial and the right to legal aid may be said to fall in the category of the latter, i.e. substantive rights. It is true that speedy trial is indeed a facet of fair trial. However, we would submit that the considerable amount of evolving jurisprudence of the nature and content of the right to legal aid requires that we embark on a separate discussion rather than as part of right to fair trial. In each of the subsequent parts of the paper, we make an endeavour to discuss the nature and content of each of the constituents of the right to access to justice that I have suggested forms part it.

3. Right to Access the Court

The efficacy of a functioning democracy is built upon the edifice of the right to access to courts, i.e., the right to remedy. A right without a remedy for the enforcement of the right is of little avail.[58] Rights find meaning only when they can be effectively enforced. The right to access the court is the right to approach the court seeking a remedy. All other rights, including the right to fair trial, the right to speedy trial and the right to legal aid would be of little consequence if the primacy right to access the court is not available. It is clearly the fountainhead of all other rights that form the core of the right to access to justice.

The makers of the Constitution appreciated the enormous significance of a fundamental right to a remedy. They guaranteed not only fundamental rights but also the right to a remedy.[59] Their

" See generally *Rudal Shah* v. *State of Bihar,* AIR 1983 SC 1086.

But see art. 32(4): The right may however be suspended in a manner provided mder the Constitution.

vision found prominence in art. 32 that provides for the right to move the Supreme Court for the enforcement of the fundamental rights guaranteed in the Constitution. Commenting on the inclusion of the said article in the Constitution, Srimati G. Durgabai observed:

> —[T] he right to move the Supreme Court by appropriate proceedings for the enforcement of a person's rights is a very valuable right that is guaranteed under this Constitution. In my view that is a right which is fundamental to all fundamental rights guaranteed under the Constitution. The main principle of this article is to secure an effective remedy. Without it a right serves no purpose at all, nor is it worth the paper on which it is written.[60]

The inclusion of the article has been spoken of by others in glowing terms too. Prof. Shibban Lai Saksena regarded the article as the 'crowning section of the whole chapter,'[61] while Rev. Jerome D' Souza considered the same to be 'of the gravest character, and of the most far-reaching importance.' Similarly winding up the debate on article 25 of the Draft Constitution Dr. Ambedkar commented thus;

> If I was asked to name any particular article in this Constitution as the most important-an article without which this Constitution would be a nullity-I could not refer to any other article except this one. *It. is the very soul of the Constitution and the very heart of it.*"

In exercise of its power under article 32(1), the Supreme Court may order writs *in the nature of* habeas corpus, mandamus, prohibition, *qua warranto* and *certiorari.* The Supreme Court has also accorded immense significance to the vision of the

[60]IV CAD, 937 [9th Dec, 1948].
[61] *Id.,* at 938.
[62] *Id.,* at 943.
[63] *Id.,* at 953.

Constitution makers. In *Romesh Thappar* v. *State of Orissa* referring to the importance of the article Patanjali Shastri J., observed:

> Article 32 provides a 'guaranteed' remedy for the enforcement of these rights, and this remedial right is itself made a fundamental right by being included in Part III. This court is thus constituted the protector and guarantor of fundamental rights and it cannot, consistently wit the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights.

The status of the right to remedy was further elevated in *Fertilizer Corporation Kamgar Union* v. *Union of India.* The Court regarded the jurisdiction conferred by art. 32 as an 'important and integral part of the Constitution.'[66] The court reiterated that a right without a remedy was a legal conundrum of the most grotesque kind[67] and fundamental rights would be meaningless without an effective remedy. It follows then that the right to remedy provided under art. 32 is beyond the amending powers of the 'constituent assembly'. Therefore, no amendment can destroy or repeal, to borrow from Dr. Ambedkar, the 'very heart and the very soul' of the Constitution.

Notwithstanding the high status of the right to remedy under the Constitution, how real is the right? Do the people of India have a true and meaningful access to an effective remedy? Or is the right more imaginary than real? We propose that there are three primary aspects that destroy the meaningful exercise of the right to a remedy. They are: limitations of language, limitations of technicalities and limitations of territory. The limitations are grave enough to stultify the exercise of the right, jeopardizing thereby all other rights that form part of the right to access to justice.

****AIR** 1950 SC 440.
[45] (1981) 1 SCC 568.
** *Per* Chandrachud J., para. 11.
*'*Id.*

Part XVII of the Constitution deals with provisions relating to Official Language. Chapter III deals with the language of the Supreme Court and the High Courts. Article 348(1) provides that all proceedings in such courts shall be in English unless Parliament by law otherwise provides. Article 348(2) provides that the use of Hindi or any other language used for the official purposes of the State may be used in the proceedings of such High Court if the Governor with the previous consent of the President authorizes such use. However, such provision would not apply to any judgment, decree or order passed by such High Court. The priority given to the use of English in the proceedings of the court over regional languages is evident from the very language of the article. It has the effect of making the knowledge of English a precondition for the effective enforcement of the right.

In law, every person has the right to represent his case without the services of a lawyer. Under the current system of court functioning, a petition must be drafted in English, argued in English unless otherwise provided and the judgment and order be made in English. The access to an effective remedy of an illiterate person or more appropriately a person illiterate in English is more illusory than real unless one decides to hire the services of a lawyer. Primacy to the use of English language seriously inhibits the successful enjoyment of the right by people to whom it matters the most. The Constitution itself recognizes the limitations of language as an index of impediment to an effective access. It is evident from art. 350 which provides that every person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union of a State in any of the languages used in the Union or in the State, as the case may be. The inclusion of such a provision in the supreme *lex* illustrates the concern of the framers about the singular importance given to the use of English language in the justice delivery mechanism. However, if the Constitution recognizes the right to make a representation of grievances in any language used in the Union and the judiciary of the most important organ entrusted with the task of redressing grievances, it belies logic to allow representation in any language to any authority except a judicial authority. The rationale of the same must be reconsidered if right to access the court is to find meaningful expression in the lives of ordinary people. *Democratization* of the right to remedy will remain a cherished value unless issues of limitations of language are adequately addressed.

Limitations of technicalities are of as much importance in a discussion on the right to access to the court. If the right to access to courts is to be exercised without the services of a lawyer, technicalities of law that makes it an esoteric discipline is the single most crucial factor. The jurisdiction of the Court under art. 32 is limited only to fundamental rights and in matters involving violation of such rights there is a need to *humanize* the justice delivery system. The Court must be made accessible even without ;he procedural technicalities usually attached to litigation in court. Otherwise, people would have to remain dependent on the services of lawyers even for the enforcement of fundamental rights. The jurisdiction of the Court under art. 32 is sufficiently wide to entertain petition without insisting on technicalities.

The Supreme Court has taken appreciable steps in humanizing justice by not insisting on procedural technicalities, otherwise attached with court work. The Court has accepted letters,[68] postcards[69] or notes addressed to judges of Supreme Court revealing a *prima facie* violation of a fundamental right as writ r^titions. Similarly, the Court has enlarged the scope of *locus standi*[70] to allow persons not directly affected as petitioners. In a country yet to grow out of the abyss of illiteracy and poverty, the same by the Supreme Court to allow public-spirited individuals to :ake up the cause of the distressed and downtrodden can be hailed JS exemplary. Public Interest Litigation (PIL) is 'humane justice' *m* work and its recognition by the Court has led to the development of a novel jurisprudence on constitutional law and at the same time

" *Tushar Arun Gandhi* v. *State of Orissa,* (1997) 1 SCC 1; *Upendra Baxi* v. ***Slate*** *ofU.P.*, (1981) (3) Scale 1136; *Sunil Batra* v. *Delhi Administration,* (1980) 3 SCC 488.

* *Bandua Mukti Morcha* v. *Union of India,* (1984) 3 SCC 161. ""£/>. *Gupta* v. *Union of India,* AIR 1982 SC 149; *Bar Council of Maharashtra* » M *V. Dhabolkar*, (1976) 1 SCR 306, and *Mumbai Kamgar Sabha* v. *Abdul* ***thai,*** AIR 1976 SC 1465.

brought succor to thousands if not millions of Indians. Yet we are far from the time when all Indians can claim a rightful place in the justice delivery system. Implementation of orders passed under petitions filed under art. 32 remains still remains a matter of grave concern.[71] Judicial orders require energetic enforcement. Mere words of concern will do no more than console victims of state atrocities. Justice will remain a far cry until the judiciary takes active interest in ensuring that its orders find obedience with the executive and other authorities.

The last of the limitations that hinders an effective access to court; is that of territoriality. The limitation was recognised as early as in ; the Constituent Assembly when members spoke of the inaccessibility of Court to people in remote areas when it is located far away in Delhi.[72] Enforcement of fundamental of rights by issuing writs is limited to the Supreme Court and appropriate High Courts. Article 32(3) provides that the Parliament may by law empower any other court to exercise within its local limits the power exercisable by the Supreme Court under art. 32(2). After five and half decades of constitutional governance, the aspiration remains unfulfilled. The need to allow local courts power to enforce fundamental rights was echoed in the Supreme Court when Naziruddin Ahmed observed:

> All courts should be open to the people. If there is a fundamental right which is violated, and if the man whose right is violated is a poor man, it would be wrong to drive him to the Supreme Court or some other Court duly empowered in this behalf, which will be superior Court. I want to see al courts have the power to decide fundamental rights or breaches of fundamental rights or breaches of fundamental rights and this should be given to all Courts civil or criminal. If a difficult point of constitutional right is raised in any civil and criminal Court in a small

See generally Arun Shourie, *Courts and their Judgments*, Chapter 3 (2001).

[12] *Supra n.* 60 *at* 931.

71

> case, then that court should be enabled to decide it immediately.[73]

An effective solution may lie in a law by the Parliament that empowers local courts to enforce fundamental rights at a local level. But until that is achieved, the right to access the court shall remain in a stale state providing access only to the economically well off. As the fountainhead of all other rights, the right to access the court sustains legitimacy in a democracy. The right is too fundamental, too basic to restrict its availability to the upper echelons of society. One may only recall the words of Chief Justice Ronald H. George who once commented, "If the motto 'and justice for all' becomes 'and justice for those who can afford it,' *we threaten the very underpinnings of our social contract.'"*

4. RIGHT TO FAIR TRIAL

Right to fair trial enjoys a pride of place in our scheme of rights' jurisprudence under the Constitution. But what does a fair trial imply? What are the constituents of a fair trial? Ronald Dworkin argues that words such as 'equality' and 'liberty' connote abstract values, the application of which to precise circumstances has to be performed by the courts.[75] The same is true even for a value as abstract as 'fairness'. Unlikely that any constitution in the world would ever endeavour to lay down the precise meaning of "fairness'. And, therefore, the courts are left with no option but to lest laws and state actions on the abstract touchstone of values, deciding whether *it* regards a law as fair or not. The right to fair •rial, similarly, is a compendium of principles that have found judicial patronage as evidence of fairness. Many of such principles have been statutorily recognised while others have been regarded by the court as components of reasonableness, equality and liberty. We would submit that the right to fair trial is *essentially* composed of six principles of fairness. The list is not an exhaustive

California Chief Justice Ronald M. George, State of the Judiciary speech, 2001 quoted in *supra (EqualJustice)* n., 19 at 3.

See generally Ronald Dworkin, *Freedom's Laws: Moral Reading of the American Constitution* (1999).

enumeration of the constituents of fair trial. However, we woi submit that the 'justice' jurisprudence evolved by courts and , occasions statutorily provided *upholds the following* as *the core* the right to 'fair trial.' They include the right to be presum< innocent until proven otherwise, the right to an open trial, tl impermissibility of evidence collected illegally as admissib during trial, the right to appeal, the right to speedy trial, and tl right to legal aid.

4.1 Presumption of innocence

The right to be presumed innocent until proven guilty has ofte been commented as being *fundamental* to a fair criminal justk system. In *Kali Ram* v. *State ofH.* P.[76] the court held that 'one < the cardinal principles which has always to be kept in view in *o* system of administration of justice for criminal cases is that person arraigned as an accused is presumed to be innocent unles that presumption is rebutted—,'[77] In *Ashish Batham* v. *State <* *M.P.* thet court observed that the 'basic presumption in th administration of criminal law and justice delivery system is th innocence of the accused and till the charges are proved beyon reasonable doubt on the basis of clear, cogent, credible c unimpeachable evidence, the question of indicting or punishing a accused does not arise—.[79] Commenting on the consequences c convicting an innocent person, Khanna J. observed that '[I] t is n doubt true that wrongful acquittals are undesirable and shake th confidence of the people in the judicial system, much worst however, is the wrongful conviction of an innocent person'[80] an the reverberations of the same 'cannot but be felt in a civilize society.'[81] It would indeed be unfair if the state coulci haul up , person for the alleged commission of an offence and require tha he prove his innocence in a court of law. Every person has ai obligation to justify the consequences of his actions. Therefore

[76] (1973) 2 SCC 808.
[77] *Per* Khanna J., *id.* para. 23.
[78] (2002) 7 SCC 317.
[79] Per D. Raju J., *id,* para. 8.
[80] *Supra* n. 2, para.27.
[81] *Id.*

one who alleges must provide evidence that the allegation is true. The necessity of the same becomes far more compelling when the person is no less than the omnipotent state with sufficient resources at its disposal to deny a person his right to life and liberty. The theoretical basis for the right to be presumed innocent until proven otherwise may be located in the same.

However, the perils of blindly emphasizing on proof beyond reasonable doubt are no less significant. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy or degree of doubt.[83] It must not be forgotten that the excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma.[84] In *Lai Singh* v. *State of Gujarat,* the court rightly pointed out that while, 'it is true that under our existing jurisprudence in criminal matters, we have to proceed with presumption of innocence, but at the same time presumption is to be judged on the basis of conceptions of a reasonable prudent man. *Smelling doubts for the sake of giving doubts for the sake of giving benefit of doubt are not the law of the land'.*[86]

It must, therefore, be appreciated that while presumption of innocence is part of our criminal justice jurisprudence, the same has its own limitations. The requirement of 'proof beyond reasonable doubt' has its own restricted frontiers and the accused has the benefit of 'reasonable doubts of a *reasonable* man.' It is neither the fanciful doubts of a judge nor the capricious feeling of hesitation that the law aspires to protect. The principle is no more than a facet of fair trial, far less a mechanism to avoid incarceration in appropriate cases. Increasing rates of acquittal, even in apparently undeserving cases, has necessitated newer

" See 103, Indian Evidence Act, 1872: The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any other law that the proof of that fact shall lie on any particular person.

Shivaji Sahabrao Bobade v. *State of Maharashtra,* (1973) 2 SCC 793, para. 6.

[u]*ld.*

[K] (2001) 3 SCC 221. [16]

Id., para. 88.

strategies to ensure that the principle of presumption of innocence does not become a means to an illegitimate freedom. Consequently, the last decade has seen a number of legislations that have sought to reverse the burden of proof on the accused, requiring that they prove their innocence in the court of law.[87]

It must be appreciated that such reversal of burden of proof is not a negation of the principle of presumption of innocence of the accused that we have already referred to as cardinal and fundamental. Even under legislations that have made an endeavour to reverse the burden of proof, the prosecution is under an obligation to satisfy the court about the existence of certain basic facts, subsequent to which a court may require that the accused prove his innocence. For example, under the Narcotics and Psychotropic Substances Act, 1988 mere possession of certain substances is a criminal offence. If certain nature of substances is found in the possession of a person, he shall be presumed to be guilty until he is able to satisfy the court of his innocence. What is of crucial importance is that at the stage of trial, the prosecution is under an obligation to conclusively prove that the substances were , indeed found in the possession of the accused. Until the j prosecution is able to discharge this initial burden, the court cannot proceed on the assumption that the person is indeed guilty under , the relevant provision of law. As is evident, the principle of j presumption is as much applicable even in cases where the burden j of proof is sought to be reversed. It is only the limitation of its j scope or applicability that is relevant in such legislations, j However, if the law were to provide that the prosecution is under j no obligation to even satisfy the court that the substances were j indeed found in the possession of the person, it is unlikely that the i law will stand the test of constitutional challenge. Clearly, such a j law would be an affront to the very essence of presumption of *i* innocence and therefore, on the right to fair trial.

j

[87] For example see the Prevention of Terrorism Act, 2002 and the Narcotics **and** Psychotropic Substances Act, 1988.

4.2 Public trial

Trial in open court is an indispensable attribute of fair trial.[on] Most textbooks define crime as a wrong against community in contradistinction to tort, which is a private wrong.[on] A crime is, in other words, a wrong that shocks the conscience of a community. It is in the communal nature of its consequences that justifies the intervention of the state on behalf of the victim. Consequently, community must have an interest in the manner in which a trial is conducted against an alleged offender. Such access reiterates the communal nature of a crime and the right of the community to participate in the process that may decide to deny the alleged offender his right to personal liberty. The characteristic of open trial also flows from the 'therapeutic value' to the public of seeing its criminal laws in operation, purging the society of the sense of outrage felt with the commission of many crimes. ° Without a right to access any such process, inconsistent would be the assertion that a crime is a wrong against a community and, therefore, against the right of the state to intervene on behalf of the victim.

Public trial as a procedural principle of criminal trial embodies the value of fairness for the offender. Community participation during trial ensures a check on the possibility of judicial excess, or worse, on any connivance between the prosecution and the judicial authority. Public trial provides the alleged criminal with an air of confidence that his right to personal liberty shall not be deprived without the due process of law. The right of the media to participate in the trial process ensures that the process is carried on in a fair and just manner. A courtroom is a temple of justice and everybody has a right of access.[91] A judge may regulate but cannot prohibit access to it.[92] The principle of public trial has found statutory recognition under sec. 327 of the CrPC.

'' *Kartar Singh* v. *State of Punjab,* (1994) 3 SCC 569 at para. 269.
K See Michael Jefeerson, *Criminal Law,* Chapter 1 (2001).
90 *Supra* n. 14.
'' *Chatisgarh Mukti Morcha* v. *State ofM. P.,* 1996 Cr. L. J. 2239.
92 Proviso to sec. 327(1), CrPC.
93 Sec. 327(1) CrPC: The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open

The right to an open trial, however, is not an absolute one. Sectioi 327(2) provides that the inquiry into and trial of rape or an offena under sec. 376, sec. 376A, sec. 376B, sec. 376C or sec. 376D d the Indian Penal Code, 1860 (IPC) shall be conducted *in camera* There are occasions when the right of accused is supplanted by ai overriding public interest. In *Vineet Narain* v. *Union of India,* accepting the submission of the Solicitor General that a part of th proceedings be held *in camera,* the Verma C.J. observed that '[i] is settled that the requirement of a public hearing in a court of la? for fair trial is subject to the need of proceedings being held ii camera to the extent necessary in public interest and to avok prejudice to the accused.' Echoing similar sentiments, the court i *Naresh* v. *State of Maharashtra*[95] while emphasizing on th importance of public trial suggested that the court 'cannot overlool the fact that the primary function of the Judiciary is to do justic between the parties who bring their causes before it'.[96] Therefon if the principle that all trials before the courts be held in public i treated as universal and it is held that it admits of no exception whatever, cases may arise where by following the principle justice itself may be defeated.[97]

4.3 Impermissibility of evidence collected illegally

Is a trial based on evidence collected in contravention of la unfair? Simple as the answer may seem, an analysis of tt evolution of the law would suggest that the matter is not free froi polemics, far less settled. The power of search and seizure in ai system of jurisprudence is an overriding power of the State for tl protection of social security and that power is *necessarily* regulat< by law.[98] Sections 91-105 of CrPC deal with provisions relating search and seizure. However, there is no explicit provision th makes evidence collected in contravention of law inadmissib

Court, to which the public generally may have access, so far as the same c conveniently contain them.

94 (1998)1 SCC 226.

95 AIR 1967 SC 7.

"Id.

97 See *id.,* see also *supra* n. 63.

98 *Pooran Mai* v. *Director of Inspection,* (1974) 1 SCC 345.

during trial. In *Poor an Mai* v. *Director of Inspection*, the appellant submitted that the search and seizure conducted by the authorities was illegal for being in contravention of sec. 132 of the Income Tax Act, 1961 and, therefore, could not be used before the Income Tax Authorities against the person from whose custody it was seized. Rejecting the contention the court held that 'even *assuming* that the search and seizure were in contravention of the provision of section 132—they still liable to be used *subject to law*—and therefore, *no Writ of Prohibition in restraint of such use could be granted.'*[100] In the event that the court had found on facts that the search was not vitiated by illegality, it is difficult to appreciate as to why the court went ahead with an observation on an issue not warranted by the facts of the case. Explaining its rationale on the consequences of an illegal search, the court held:

> Now, if the Evidence Act, 1872 which is a law consolidating, defining and amending the law of evidence, no provision of which is challenged as violating the Constitution- permits relevancy as the only test of admissibility of evidence and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence.[101]

There seems to be two propositions on the basis of which the court reached its conclusion. First, that no provision of the Evidence Act had been challenged as violating the Constitution and secondly that there is no explicit provision in the Evidence Act that excludes the admissibility of relevant evidence. On the first argument, it may suffice to state that by the same reasoning, the conclusion may have been different if the relevant provisions of the Act had been challenged as being constitutionally invalid. The second reasoning appears to have followed from the first one itself, i.e. since no provision was challenged as being violative of the Constitution, no

(1974)1 SCC 345.
°W, para. 25. [1] *Id*,
para. 23.

implied limitation could be read into any of the provisions of the Act to exclude admissibility of relevant evidence. The reasoning on both counts is highly suspect. However, the harm committed was salvaged to a limited extent when the court in *Ali Mustaffa* v. *State ofKerela*[102] observed that the judgment in *Pooran Mai* could not be read as having laid down 'that a contraband seized as a result of illegal search or seizure, can be used to fasten that liability of unlawful possession of the contraband on the person on whom the contraband had allegedly been seized in an illegal manner.' The law on the issue was further mired into controversy when the court in *Prithi Chand* v. *State of Haryana*[103] relying on *Pooran Mal*[m] held that 'evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act--Even if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into." The same ratio was reiterated by the court in *State of Punjab* v. *Jasbir Singh.*[106] It finally fell upon the constitution bench in *State of Punjab* v. *Baldev Singh*[101] to clarify the position of law on admissibility of evidence collected illegally in the light of the conflicting decisions of the court earlier. Rejecting the argument that *Pooran Mal*[m] could be read as having laid down any general principle of law, Anand C.J. observed that:

> If Pooran Mai judgment is read in the manner in which it has been construed in State of H. P. v State of Prithi Chand, then there would remain no distinction between recovery of illicit drugs etc. seized during a search conducted after following the provisions of section 50 of the NDPS Act and a seizure made during a search conducted in breach of the provisions of section 50 of the NDPS Act.' [109]

[102] (1994) 6 SCC 569.
[103] (1996) 2 SCC 37.
[104] (1974)1 SCC 345.
[105] Supra n. 30, para. 14.
[106] (1996)1 SCC 288.
[107] (1999) 6 SCC 172.
[108] (1974) 1 SCC 345.
[109] *Supra* n. 34, para. 45.

The court observed that the prosecution cannot be permitted to take advantage of its own wrong.[110] Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society.[111] A conviction resulting from an unfair trial is contrary to the concept of justice."[2] *While considering the aspects of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors.*[1] The court, therefore, concluded that it cannot allow admission of evidence against an accused where it is satisfied that the evidence has been obtained by a conduct of which the prosecution ought not to take advantage of. A conviction based on evidence collected in contravention of law is indisputably antithetical to any conception of a fair trial. To allow evidence of such nature as admissible would be to undermine the majesty of law and an open invitation to lawlessness on the part of authorities. Rule of law, the cornerstone of our constitutional democracy, requires that power be exercised with the authority of law and not without it.

4.4 Right to appeal

Generally speaking and subject to just exceptions, at least a single right to appeal on facts where criminal conviction is fraught with *long* loss of liberty is basic to civilized jurisprudence. [14] It is integral to fair procedure; natural justice and normative universality save in special cases."[5] The right assumes crucial significance and stands at a different pedestal because of the possibility of loss of personal liberty. As noted earlier, 'wrongful acquittals are undesirable'—'much worse, however, is the ! wrongful conviction of an innocent person.'"[6] It is the possibility i of such an omission that makes the right to appeal a cherished end in the administration of criminal justice. The theoretical basis of the right may be located in the possible deprivation of personal

[u0] *Id.*
''' *Id.*
[1,2] *Id.*
[m] *ld.*
[1U] *M. N. Hoskot* v. *State of Maharashtra,* AIR 1978 SC 1548, paral 1.
,[u] *Id.*
Supra n. 6.

liberty attributing to the frailties of human mind. The same, however, need not be true in civil cases. Undeniably, judges may commit errors in civil cases too. But the consequences of errors in criminal matters are far more grave and repulsive, justifying a right to appeal on facts as part of fair trial.

The general scheme of appeal provisions in the CrPC indicates a similar approach. However, the Code bases itself on the presumption that the right to appeal is a creation of the statute.[117] The Code provides for a right to appeal to the High Court in cases where a person has been convicted with a sentence of imprisonment for more than seven years.[118] Similarly, the Code explicitly bars any appeal in petty cases especially where the sentence of imprisonment is for a term not exceeding three months or is only a sentence of fine.[119] The underlying philosophy as it becomes apparent from a plain reading of the provisions is that where the possibility of deprivation of personal liberty for a substantial period of time exists, the authors of the Code have deemed it fit to provide for an appeal to a higher authority. However, where the sentence of imprisonment is minimum or is limited to fine only, no such right to appeal has been provided for. It reiterates the earlier argument that on occasions where the trial includes the possibility of long deprivation of liberty, it is only just and fair that the process includes a right to appeal.

However, it is not to suggest that the right to fair trial is composed of an exhaustive list of these four rights. For example, the right not to be prosecuted after the statutory period of limitation is undeniable a facet of fair trial.[120] Similarly, when it is shown that public confidence in the fairness of a trial would be seriously undermined, a party to such trial may seek the transfer of a case anywhere within or outside the State. It is the right to have a trial transferred to a court in a different jurisdiction if fairness cannot be guaranteed in the former place of trial. The principles mentioned

[117] Sec. 372 CrPC.
[118] Sec. 374(2) CrPC.
[119] See sec. 376(b); sec. 376(c); sec. 376(d), CrPC.
[120] *State of Punjab* v. *Sarwan Singh,* AIR 1981 SC 1054.
[121] *Abdul Nazar Madam* v. *State of Tamil Nadu,* (2000) 6 SCC 205.

herein do not reflect any exhaustive enumeration of the right to fair trial but are merely illustrative.

4.5 Right to speedy trial

Right to speedy trial stands on a firm foundation in our constitutional law jurisprudence as evidence of right to fair trial. Any meaningful concept of individual liberty, which forms the bedrock of a civilized legal system, must view with distress patently long periods of imprisonment before persons awaiting trial can receive the attention of the administration of justice.[12] It is indisputable that an unnecessarily prolonged detention in prison of undertrials before being brought to trial is an affront to all civilized norms of human liberty.[123] Speedy justice is also a component of social justice since the community, as a whole, is concerned with the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings.[124] It is in the interest of all that guilt or innocence of the accused is determined as quickly as possible in all circumstances.[125] Speedy trial is the essence of criminal justice and there can be no doubt that delays in trial by hself constitutes denial of justice.[126] The right encompasses all stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial.[127]

Right to speedy trial has not been specifically included in Part III of the Constitution. However, it is well settled that life and personal liberty can be deprived by a procedure that is 'reasonable, fair and just. No procedure that does not ensure a reasonably quick trial can be regarded as 'reasonable, just and fair' and would fall foul of art. 21. There can, therefore, be no doubt that speedy

[12>] *Hussianara Khatoon (I)* v. *Home Secretary,* (1980) 1 SCC 82, para. 7.

[123] *Id.*

"* *Babu Singh* v. *State of UP,* AIR 1978 SC 527.

[125] *A. R. Antulay* v. *R. S. Nayak,* AIR 1992 SC 1701, para. 54.

[126] *Hussianara Khatoon* v. *State of Bihar,* AIR 1979 SC 1360, para. 2.

[127] *Supra* n. 48.

[m] *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248. [Q*]

Supra n., 124, para. 5.

trial is an integral part of the fundamental right to life and libe: enshrined in art. 21.[130] It is interesting to note that the Si> Amendment to the US Constitution recognizes the right of t
tot
accused to a speedy and public trial. However, the recognition the right raises many more perplexing questions of constitutior law than it answers.

When can a trial be said to have delayed? Is the nature of offen relevant in deciding the issue of delay in trial? Is the right violati on delay of trial or it is said to have been violated when there *unreasonable* delay? What are the consequences of a delayed tria Are the consequences same even if accused were to be responsib for the delay in trial? Is it relevant as to whether the accused WJ prejudiced by the delay in trial? Judicial minds have debated the: questions for long.[132] The questions are difficult and there are r easy answers. The apex court was faced with the dilemma of the; questions on many occasions, most notably in *A. R. Antulay* v. *i S. Nayak}*[33]

In *Sheela Barse* v. *Union of India,*[134] the Supreme Court observe that the consequences of violation fundamental right to speedy trii would be that the prosecution itself would be liable to be quashe on the ground that it is a breach of fundamental right. Th simplistic answer provided by the learned judges, however, ha subsequently posed many problems in implementing the right t specific situations. It must be appreciated that the right to spee trial is fundamentally different from the other rights recognisei under the Constitution. Explaining the differences, the Suprem Court in the *A. R. Antulay*[1 5] quoted the following observations o the US Supreme Court in *Barker* v. *Wingo*[136] as evidence o

[131] Sixth Amendment, US Constitution states: 'In all criminal proceedings, th< accused *shall* enjoy the right to a speedy and public trial.'

[132] See *Raghubir Singh* v. *State of Bihar,* (1986) 3 SCR 802.

'"(1992) 1 SCC.

[134] (1986) 3 SCC 632.

[135] *Supra* n. 135, para. 68.

[136] 33 L.Ed 2d 101.

differences between the right to speedy trial and other constitutional rights of the accused.

> *Firstly* while all other rights of the accused are for his protection, right to speedy trial includes a societal interest in providing a speedy trial which exists separate from and at times in opposition of the interests of the accused.
>
> *Secondly,* the deprivation of the right may work to the advantage of the accused for delay is not an uncommon defense tactic.
>
> *Thirdly* it is impossible to determine with precision as to when the right has been denied. It is difficult to say how long is too long in a system where justice is supposed to be swift but deliberate. *Fourthly,* the amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived.

On the basis of these noticeable differences, the Court formulated its understanding of the consequences of the violation of the right to speedy trial. The court suggested that in any case relating to the denial of speedy justice, the first question that needs to be answered is: who is responsible for the delay?[137] The court opined *at proceedings taken by either party in good faith, to vindicate Aeir rights and interest, as perceived by them, cannot be perceived as delaying tactics nor can time taken in pursuing such proceedings be counted towards delay of the trial.[138] In other words, an accused cm allege denial of the right to speedy trial only if he has not contributed to the delay of the trial. The court suggested in deciding the issue of violation of the right to speedy trial regard ■ust be had to the nature of the offence, the surrounding circumstances including number of accused and witnesses, workload of the court concerned, prevailing local conditions and so

Supra n. 135, para. 86.

[m]*ld.*

on. The court must employ a *balancing test* to determine whether the delay in trial had prejudiced the accused. The delay may have been occasioned by the tactic or the conduct of the accused himself. Accused later cannot be allowed to take advantage of his wrong.[140] The consequences of delay must be judged on the facts of each case. If the accused is found to have been prejudiced in the conduct of his defence and it could be said that the accused had thus been denied an adequate opportunity to defend himself, the conviction would certainly have to go.[141] In other words, if the cause of delay is the accused himself, he cannot have the benefit of the right to speedy trial. The court concluded that *ordinarily* speaking, where the court comes to a conclusion that the right to speedy trial of an accused has been infringed the charges or conviction as the case may be shall be quashed. However, cautioning against any easy approach, the court observed that not every causes are prejudice to the accused.[142] And, therefore, the court suggested that quashing of charges is *not the only course open.* The court observed that if the nature of the offences and other circumstances of the case may be such that quashing of charges may not be in the interests of justice, it may consider making an order regarding the conclusion of the trial within a fixed time or where the trial has concluded consider reducing the sentence.[143]

We would submit that the conclusion of the court regarding the consequences of violation of the right to speedy trial is indeed suspect. We would submit that if the court comes to the conclusion that the right to speedy trial has been violated the court has *no* option to quash the charges or conviction as the case may be. The court is patently erroneous when it suggests that *that is not the only option open.* We would submit that that is indeed the only course open. There *cannot* be any exception to the rule, as the court seems to suggest. It may be a completely different issue as to whether the right has been violated in the first place. And the same may be

[139] *Id.,* para. 86.
[140] See *id.*
[141] *Id.*
[142] *Id.*

decided in different cases in different ways taking into account the 'nature of the offence and other circumstances.' However, it is patently erroneous to suggest that the same are significant variables in deciding the consequences of the violation of the right. While they may be important variables in deciding whether the right has been violated or not, they have no consequences in deciding how the violation of the same can be remedied. Therefore, I would submit that the court is correct when it suggests that in deciding as to whether the right to speedy trial has been violated, it shall take into account the nature of the offence and other circumstances. However, it is as much incorrect when it suggests that even if there is a violation of the right to speedy trial, quashing of the charges or the conviction is *not* the only course open. Violation of fundamental right cannot be remedied by passing an order for concluding the trial with a given time frame. Nor can it be remedied by reducing the sentence of the accused. The only option is to undo the very process that led to the violation of the fundamental right. Therefore, We would submit that if the court comes to the conclusion that the right to speedy trial has been violated, it would be left with no option but to consider quashing of the charges or the conviction as the case may be.

4.6 Right to legal aid

Is right to legal aid an evidence of fair trial? When law recognizes the right of a person to represent himself in his own case, where does one locate the jurisprudential basis for a constitutional right to free legal aid? An accused has a right to assert his innocence in a court of law. But without professional legal services, the right may not be worth the paper that provides it. Even the intelligent and educated layman has small and sometimes no skill in the science of law. [44] If charges with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.[145] Left without the aid of a counsel he may be put on trial without a proper charge, and convicted upon irrelevant, inadequate and

Per Douglas J., *Fort Richard Argersinger* v. *Raymond Hamlin,* 35 L Ed 2d 530 af 535-36.

inadmissible. If that be true of men of intelligence, how m more true is it of an ignorant, illiterate or feeble intellect persor Judicial justice, with procedural intricacies, legal submissions critical examination of evidence, leans upon professional expert and a failure of equal justice under the law is on the cards wl such supportive skill is absent for one side.[14] Free legal service the poor and the needy, therefore, are an essential element of 'reasonable, fair and just' procedure.[149]

In *Hussianara Khatoon* v. *State ofBihar*[i5∘] the court held that right to free legal services is clearly an essential ingredien reasonable, fair and just procedure for a person accused ol offence and it must be held to be implicit in the guarantee of 21. Though the constitutional basis for providing free legal ai found in art. 39-A, the same is also a constitutional right of c accused person who is unable to engage a lawyer and secure 1 services on account of reasons such as poverty or indig< situation.[151] A fair representation is at the core of the right to trial. With effective representation, the celebrated aspiratioi fairness in trial would only be 'sound and fury signifying nothi When only the rich can enjoy the law, as a doubtful luxury and poor, who need it most- cannot have it because its expenses p beyond their reach, the threat to the continued existence of democracy is not imagery but very real. ' Unmistakably, the of democracy depends upon making the machinery of justic effective that every citizen shall believe in and benefit bj impartiality and fairness. The recognition of the pressing i for legal aid to ensure the legitimate administration of crin justice is a tacit recognition of the extent to which law is divo from the reach of the teeming millions of our nation, institution of law still remains an esoteric discipline, provi

[147] *Id.*
[148] *M. N. Hoskot* v. *State of Maharashtra,* (1978) 3 SCC 544.
[149] *Hussianara Khatoon (IV)* v. *Home Secretary,* (1980) 1 SCC 82, para. 6.
[150] *Id.*
[151] *Id.,* para. 7.
[152] *M. N. Hoskot* v. *State of Maharashtra, supra* n. 148, para. 15.

little succor to persons who need it the most. In *Khatri* v *State of Bihar*[154] Bhagwati J. observed that the Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. In the instant case, the court deplored the action of the Judicial Magistrate who failed to discharge his obligations and contended himself by merely observing that no legal representation had been asked for by the blinded prisoners and hence none was provided. The 'demand rule' is clearly inapplicable in case of right to free legal aid. A person does not waive his right merely on account of his failure to demand for the same. It is an obligation on the State to provide him with the same unless he expressly desires not to avail such service. Explaining the consequences of an unrepresented defense, Bhagwati J., observed

> The result was that the appellants remained unrepresented by a lawyer and the trial ultimately resulted in their conviction. This was clearly a violation of the fundamental right of the appellants under Article 21 and the trial must accordingly be held to be vitiated on account of a fatal constitutional infirmity, and the conviction and sentence recorded against the appellants must be set aside.[155]

Are all accused persons entitled to the constitutional right to free legal aid? In *Suk Das* v. *Union Territory*[156] Bhagwati J., observed that 'of course, the right to free legal aid *does not* call for universal application.' There may be cases involving offences, such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services may not be provided by the State.[157] It is

[154] AIR 1981 SC 928. See generally *Ranjan Dwivedi* v. *Union of India,* AIR 1983 SC 623.
[155] *Suk Das* v. *Union Territory,* AIR 1986 SC 991, para. 6.
[156] AIR 1986 SC 991.
[157] *Hussianara Khatoon* v. *State of Bihar,* AIR 1979 SC 1360, para. 5.

submitted that law calls for a far stronger foundation if a constitutional right is to be denied to a person. 'Social justice' as a reason for denying the right to free legal aid to persons charged with certain kinds of offences is vague formulation to say the least. Is such a classification, a just and fair one? Would such a classification stand the test of reasonableness? Should the law recognize greater rights for a murderer that for a person who commits fraud? Should law regard a rapist as more benevolent than a pedophile? Is offence against law prohibiting prostitution more heinous that an offence against law prohibiting the use of drugs? If one were to regard the classification suggested by Bhagwati J. as valid, one must answer all of these questions in the affirmative. Any such classification is indeed suspect.

We would submit that all persons, without exception are entitled to their constitutional right to free legal aid. lSlot only precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial j unless counsel is provided for him.[158] We would submit that the rationale of ensuring fair trial cannot be buried even if the offence is heinous or a felony. The nature of the offence committed cannot be a basis for denying an accused the right to fair trial. Fairness in trial is a constitutional aspiration that cannot be lost merely because the offence involved is a heinous one.

5. EPILOGUE: BREAKING THE BARRIERS

The relationship between access to justice and the success of democracy is direct and if one may add, *proportional.* Right to access to justice is a complex whole, on the efficacious implementation of which rests the edifice of a true democracy. The effectiveness of the right reflects the strength of our social contract. An exhaustive enumeration of the principles and components that constitute the facets of the right to access to justice is difficult, if not impossible. The Endeavour of this paper was to highlight the components that may be regarded as the core,

Gideon v. *Wainwright,* 9 L Ed 2d *at* 799.

the *fundamentals* of the right to access to justice. Evidently, the need of the hour is to democratize these fundamentals so as to ensure their effective implementation. The high rhetoric of justice philosophy in the Constitution and in statutes means little without the possibility of its effective implementation.

A broader reading of the nature of justice administration in India suggests that the same remains supremely prejudiced in favour of the accused. Not surprising, therefore, that all aspects of fair trial that I have discussed in section III of the paper relate to an accused. The victim is an equal stakeholder in the process of criminal justice administration. Undue emphasis on the rights of the accused with little or no concern for that of the victim is bound to create an imbalanced order of justice, the repercussion of which will undoubtedly be severe. The victim's claim for the fairness needs recognition and energetic implementation. Participation of the state in the administration of criminal justice does not obviate the necessity of upholding the victim's rights. The bankruptcy of legal jurisprudence in failing to protect the victim may cost the system dear. The caveat was put to words, decades back, when Brenan J. observed *'[NJothing rankles more in the human heart than a brooding sense of injustice.'* The 'brooding sense of injustice' that Brenan J. spoke of is potent and sufficiently incisive to test the legitimacy of justice administration. The onus of evolving standards of 'fairness' beyond that of the accused now lies on the legislature and the courts. Fairness needs a novel meaning; one that is fair to the victim too. But even beyond realigning the principles of justice administration with that of the interests of the victim, justice administration requires drastic changes. We would suggest the following as a modest blue print for administering meaningful access to justice.

1. Implement the mandate of art. 32(3) of the Indian Constitution.[159]

Article 32(3), Constitution of India: Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

2. Implement the mandate of art. 348(1) and 348(2) of the Indian Constitution. In other words, recognize and promote the use of regional languages in any court of law, especially at the appellate forums.

3. Establish circuit benches of the Supreme Court at regional centres. An apex court established far away at the heart of the capital does not necessarily promote the sensitivity required to judicially address issues of regional or local concern.

4. Recognize the right to victims to intervene in cases where the prosecution fails to act in an impartial and fair manner.

5. Implement measures that can ensure speedy trial. As suggested earlier, the significance of ensuring speedy trial is not limited to the interest of the accused alone. Even the victim has a reasonable stake in ensuring that a trial is completed without undue delay. The introduction of 'fast track' courts is undoubtedly a step in the positive direction.

6. Constitute a compensation fund that can provide financial succor to victims of crime without the necessity of litigating for the same in other civil forums.

7. Recognize the right to free legal aid for all accused persons irrespective of the nature of offences. The jurisprudence developed by the Court in creating exceptions to the right does not stand the test of reasonableness.

8. Recognize the duty of lawyers to provide free legal aid as a statutory mandate.

THE Ph.D. - AN EXAMINER'S PERSPECTIVE

*Jill Cottrell**

1. INTRODUCTION

In some disciplines it is standard for aspiring academics to do a Ph.D. but in law it is less common. Many people in India, as in the UK, who do Ph.D.s are quite mature, perhaps after a number of years in the teaching profession. Many people - including the present author - begin doctoral degrees but never finish them. And a significant number find the experience a frustrating one, while some actually fail to obtain the degree or are required to resubmit their thesis or dissertation[1] although they have worked hard. On the other hand, readers of many theses also feel a sense of dissatisfaction and frustration. This author - despite never having finished her own dissertation - has been a supervisor of half a dozen doctoral students, and an examiner for about 10, of which around half have been from Indian universities. And in around half the cases the author has recommended that the candidate should be required to resubmit the thesis. She has reflected on this experience, and feels that it may be worth exploring, for the benefit perhaps of future supervisors and candidates, why candidates fail, why even successful Ph.D. theses are often so disappointing, and what can be done to improve the situation.[2]

* Honorary Associate Professor, University of Hong Kong, Hong Kong.
[1] In the UK and many Commonwealth countries the major written work for a doctoral degree is known as a thesis, but for degrees at a lower level (for example a master's degree by research) the written product is often called a dissertation. The standard US practice seems to be to use the word dissertation generally.

[2] This paper has been written when rather remote from the normal sorts of material one might use for a paper like this (other than those on the internet and access to lexis in electronic format). My raw material has been largely my own reports on theses, and teaching materials I have written and have available in electronic form. I should also say that I have tried to draw examples from Indian

2. WHY DO STUDENTS FAIL OR FAIL TO DO WELL?

This question itself has at least two levels, of course. *First,* what is it about a thesis that may lead to failure? *Secondly,* what is it about the student, the topic, the approach that has led to a failing thesis? One might label these two levels respectively the problem with the product and the problem with the process. In fact there is a clear interrelationship between the two: the product is imperfect because of the process.

2.1 The problems with the product

The examiner sees the product - indeed may never see the student at all. I have never been present at a viva forNan Indian student whose thesis I have examined, though I am asked to supply suitable questions to be asked. It is on the product that the student almost entirely stands or falls. The student and supervisor therefore need to think carefully about how the thesis will appear to, that rather remote, examiner. It is certainly not good enough to say - as one of my own students has said to me 'I can complete it after the viva'! That may be too late.

2.1.1 Absence of a thesis

In the sciences and empirical social sciences a researcher is expected to have a hypothesis - in the natural sciences a possible relationship that is to be tested by the research. Not all research in law has a hypothesis, but it is sometimes said that every thesis should have a thesis. Some topics lend themselves very readily to be expressed in terms of a thesis: 'That Public Interest Litigation at the High Court level is less principled than at the Supreme Court level' for example, while others are perhaps better expressed in terms of the question to be asked. It is easier to express a topic with an empirical element as a thesis, but all should be able to express in terms of a question or issue (or at the most in terms of two or three ciosely related questions or issues). Many theses

theses - since the editors wanted the relevance to India to be clear;, this should ndt be taken as implying that the problems to which I advert are peculiar to India!

reveal how lacking in such a focus they are as early as the abstract or the opening lines of an introduction. A thesis that says 'This thesis explores—' or 'The writer will discuss—' almost certainly will turn out to be unfocussed and descriptive. Unfortunately, something has gone wrong in such a case at an early stage, perhaps several years before. I now try - not always with success I have to say - to get students at a fairly early stage of the process to articulate what they are doing in no more than two sentences. I ask 'What question are you asking?' If they find it difficult to articulate this, I will try 'What is the point of your thesis/dissertation?'

2.1.2 Inadequate digestion

This is an extract from a report I wrote as an external examiner for a thesis:

> A problem, which recurs in several chapters, is what in my experience is the most common problem with postgraduate theses: the fact that what has been read is inadequately 'digested'. From a combination of lack of confidence in their own judgment and use of language, a desire to show how much they have read, and a lack of a clear focus or thesis, it is very common to find that much of a thesis consists of a series of summaries, with or without excessive use of quotation. This author manifests something of this problem. — [T]here are various quotations and summaries from authors in the footnotes. If this material is worth using it should really be in the text, and in what I have called the digested form - using the points made as part of the structure of the author's own thesis. By digested I do NOT mean summarised: I mean fully worked through, understood and used to support the author's analysis and argument. Such digestion has not occurred when the author deals with the points made by one author, and then another, or with one case and then another, or one country and then another.

As this paragraph suggests, this sort of unsatisfactory approe (which one may term that of serial summaries or as inadequ digestion) may <be used with articles, or with cases. In anotl report I wrote:

> Like many thesis writers, I regret to say, the author handles cases very poorly. It is simply not good enough to summarise the facts and the holding of case after case. A thesis is not a digest of cases. The cases should be serving the argument of the author. They should be mentioned for a purpose. — The author obviously feels s/he has found a lot of cases on the topic, and though they do not say anything very useful, does not want to waste them! But one must be tough and only use material that adds to your argument. If you want to use all the 'trivial' cases you somehow have to tabulate them and analyse them in a different way: e.g. that a certain percentage turn on a certain approach, or that a majority of the judges take a particular attitude. There are different ways of using cases that do not simply involve reporting what judges say. Indeed - that is the least interesting and least scholarly use of cases, one might say.

And I added in another report:

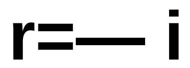
> This means that differences from different writers are not identified, brought out and discussed, that there is sometimes repetition, and, most seriously, that the author is not making her own argument and making use of the material found in other writers, but subordinating his/her writing to that of others; most of the thesis becomes a literature review.

2.1.3 Case handling

As I indicated earlier, I find that many thesis authors use ca very badly. The particular report from which I quoted on this p< identified a tendency to summarise the facts of case after *a*

Oddly enough, a candidate very often did not say what the holding in the case was. One had the feeling that the cases were being paraded to demonstrate the magnitude of the social issue rather than in order to analyse the way the courts dealt with them. Any attempt to analyse them from the perspective of doctrine was impaired by the fact that the cases were presented in no particular order. A case from the 1970s might be juxtaposed to one from the 1990s.

A related fault is to quote judge after judge with the result that a page of the thesis viewed from a distance would look rather like this:



In other words, there was more quotation than text! There would be no harm if this happened once, but if it happens again and again there is a clear indication of a problem. That is the absence of any real analysis of the cases or the judicial (or other) statements. I have in mind specific theses where I have pencilled in repeatedly remarks such as: 'So?' 'Comment' 'What is the point?' - because the author has not made it clear why the cases are summarised or the judge quoted. I usually tell students that they should not quote unless the passage they want to use is either (i) particularly authoritative or perhaps a classic, (ii) especially witty or elegant or (iii) they absolutely can find no other way of saying what the authdr said, because it is so neat and appropriate.

Essentially, what I am saying is that students all too often fail in what might be considered the core intellectual skills of the common law system: the analysis of cases, and statutes. One looks to a discussion of cases for an inquiry into the reasoning of the courts, into the relationship between one holding and another, for the identification of trends of reasoning, for a critique. Even if a thesis shows that courts have reached apparently inconsistent decisions, the intellectual task is incomplete unless the nub of the differences is identified, and views expressed and supported by example and argument as to what the correct approach should be, and perhaps why there have been disagreements. Without such analytical element the thesis will be dismissed as 'descriptive'.

2.1.4 Plagiarism

Plagiarism is more common than one might think. In a recent session the author organized for her students at which the editors of the two main Hong Kong academic law journals exchanged experiences, each said that he had had to reject articles submitted for publication because they were plagiarised in whole or in part. In one instance a staff member of a Hong Kong university had been dismissed as a consequence of being caught plagiarizing. It is not always weak students who plagiarise: I have encountered plagiarized passages in otherwise quite good theses. This suggests perhaps that sometimes students do not fully understand what is involved in plagiarism. The Internet - notwithstanding the comments I make elsewhere in this paper about the valuable resources that it may offer - does present enormously tempting opportunities to students. Reports suggest that it has resulted in tremendous increases in plagiarism.

In fact there is a very close relationship between plagiarism and the inadequate digestion problem. There is a sort of continuum:

Copying actual words with no acknowledgement

X

Paraphrasing with no acknowledgement

Copying actual words with inadequate acknowledgement

X

Taking ideas with no acknowledgement

Taking ideas, using own words with acknowledgement

All these practices in varying degrees are ways of using other people's work without fully making use of it. Although different degrees of honesty or dishonesty are involved, they all tend to show excessive dependence on other writers, and inadequate focus or thesis in the author's own work. They are all to some extent lazy ways of working. But at the root is most likely to be some fundamental problem about the nature of the project. Of course the writer of a thesis must be reading the work of others - that is part of the intellectual task involved in writing a thesis, and in no other way will the discipline progress. But the full-scale plagiariser (one end of the scale), and the serial summariser (other end of the scale) have a similar problem: they do not have something they want to say, but are using the work of others as a prop, not as a tool. The discipline does not progress this way either. In fact although we naturally think of the top left box as reflecting the most serious offence ('do not copy' was after all something we were taught in primary school) certain sorts of copying can be more intellectually demanding than summarising: I have for example seen an undergraduate essay that consisted almost entirely of sentences copied from published authors. But successive sentences did not come from the same author. The whole was a skilful stitching together of material from others that showed that the student did understand, and was really making something almost new! We still failed the student.

Students sometimes fail to realise that all the first four stages on the continuum are plagiarism. And the last stage often is plagiarism when an author writes a paragraph and ends with a citation to the source - but not making it clear that the whole of the paragraph is actually derived from the source. To the reader it may be unclear whether just the last paragraph is derived from the source. This sort of behaviour is often lacking in the *mens rea* of plagiarism; there is no intention to deceive, and the author simply has not learned how to cite in such a way that the relationship between the text and the sources is made clear. I recognise that with some students excessive copying is probably the result of lack of confidence in the student's own linguistic abilities. But copying - whatever the reason - does make it very difficult to say anything new, which is what a Ph.D. is supposed to do.

2.1.5 History and background

Students who embark on the writing of a thesis of perhaps 1,00,000 words conteriiplate with nothing less than alarm in most cases what seems a vast number of notional blank pages to fill. Sometimes it seems easier to begin by writing about the known and then proceedings to the unknown. The known is likely to be the background of the country on which they are writing -something that is an especial refuge of overseas students who find that their supervisors perhaps know little of their country. Another page filling technique is the history of the topic. Most of us will have read theses where nothing new is said until about page 250 of the 500 pages of which the thesis consists - the first 249 pages consisting of derived history or background, derived in the sense that it does not represent original research but is taken from existing and familiar literature. Many students are probably surprised to find how much they have filled up by this technique! And if they belong to the school that thinks that if you write 1,00,000 words you must surely pass, or that class of students who are unable to cross out any word of their immortal prose, that rather turgid stuff is likely to remain there unless the supervisor is ruthless.

2.1.6 Comparative law

Comparative material is another area in which students often resort to serial summarisation. The impression is often of something of a hotchpotch of material from several jurisdictions, with little actual comparison. In country A they do that; in country B they do this; in country C they do the other; end of chapter. Often the material from different countries does not relate to similar issues, so comparison is actually impossible. But even when comparison would be possible, the reader is left to do the intellectual work of making the comparison and drawing the conclusions, while the students have done the rather underlining task of summarising the material. The examiner occasionally feels that she should be getting the Ph.D. rather than the student!

Just as with cases, authors often fail to say what the point is of the material they are using. What does it really tell us to see that in country A they deal with consumer credit in a particular way and in country B they,do it differently, unless we understand the nature of consumer debt in the two countries, the political system and something of the history? Yet, all too often the comparative material is presented in a way that is totally abstracted from context: historical, political or social.

2.1.7 Sloppy referencing

To quote again from one of my own reports:

> Complete publication details are not given for some items. I suspect this is because they were not given in the works from which the author derived the citations; this is no excuse - one should make efforts

> to find the full citation even if another author has been sloppy. It has become much easier with the advent of the Internet, when one can look up the Library of Congress or the British Library on line - these will contain almost every book published in English. Another possibility is the combined catalogue of UK universities, COP AC (www.copac.ac.uk), which is a good source for Indian purposes since it includes libraries like SOAS, Oxford and Cambridge, which have good Indian collections.[3]

The reader will note that this paragraph contains two criticisms. First, the student has not given full details for many of the items included in the footnotes/bibliography. The second criticism is actually not so much a question of sloppy referencing as lazy researching. The implication is that the author has not actually read the material that is being cited, but has derived the citation from an existing secondary source. It is simply not good enough in most instances for a person engaged in advanced research at a doctorate level to rely on others for accounts of the primary material of the thesis. This is so partly because the author deprives him or herself of the opportunity of actually finding something new to say, but also because other people make mistakes, and not just mistakes about the form of citation. Insistence on correct citation practice should bring out the reality - and act as an incentive to the author to go to the original source. The author who has not seen the original should say 'as cited by—' or 'as quoted by—' the author where the information was found.

2.1.8 Poor presentation

Sloppy referencing slides over into sloppy presentation. Even authors who give full citations do not always make sure that these

[3] COPAC's website explains: 'COPAC is a union catalogue; giving *FREE* access to the merged online catalogues of members of the Consortium of University Research Libraries (CURL). There are 27 members of CURL, of which 26 members are currently contributing records to COPAC, including **the** British Library & National Library of Scotland'.

all appear in the bibliography. It is very common to find items in footnotes that are not in the bibliography (or table of cases), and *vice versa*.

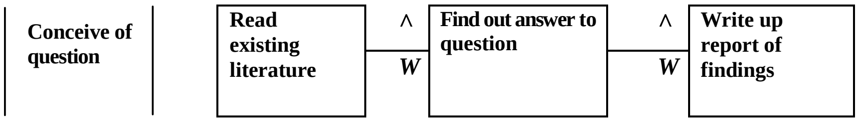
Proofreading seems to be a dying art! Perhaps people assume that the spell check facility eliminates the necessity for this. Unfortunately, even when one does one's own typing this is not so. The spell checker will not detect if one types 'wood' instead of 'word', and while Word will detect 'wold' if you meant 'would', WordPerfect will not - 'wold' being a perfectly good English word which for some reason the Word dictionary is not familiar with! Another complication comes with US and UK spelling - not that I would feel strongly about this, but one would look for consistency. All too many students seem unaware that the default setting of these standard word processors is US spelling, but that it is possible to change them to use UK spelling as standard. Indeed, Word purports to recognise Indian spelling as well (though I find it gags at that very Indian-English law-word 'undertrial'). Students should take the trouble to master the relevant possibilities of their word processor.[4] Students who do not do their own typing should be aware of the almost endless possibilities for non-lawyers to misread legal terms, among other things, not to mention obscure names, or for tired typists to type total nonsense.

2.2 Problems with the process

The process of writing a thesis in law is often very different from that involved in the physical or natural sciences. In the latter a student may well be part of a team, and the individual research project will form part of a greater project, while other students will be working on related projects - so biology students might be working on different aspects of the physiology of the same species, or on the same aspects of different species. There may well be a clearly established set of procedures being used and the whole process is less lonely and less open ended. Both the research process and the writing up process are more structured. From many

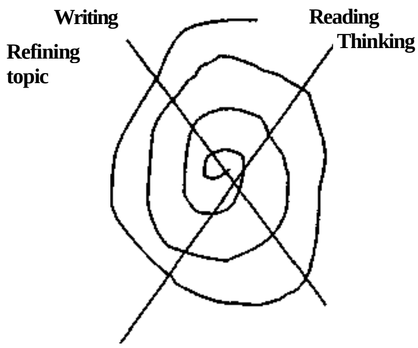
[4] Other under-utilised possibilities include automatically updating cross-references to footnotes or sections - certainly possible in both Word and WordPerfect.

books on 'how to research' one gets the impression that the research process is linear:



This might be the way in which some pieces of research are conducted - for example a biologist might want to know how a particular animal reacts to a particular stimulus. She might read the existing literature and find that there is some information about the question but there is room for a new piece of equipment to be used. So she will devise a new experiment using the new equipment. She will carry out the tests, record the results, compare these results with those obtained by other writers, and write a report of her results and a conclusion.

Even with scientific research the linear model is something of an over-simplification. In the case of law it is a caricature. It has been suggested that in many areas of intellectual endeavour, research looks less like a line and more like a spiral[5]:



In other words, research is a reiterative process: you keep going through the same processes, though in slightly different contexts. You think - read - think again - find something out - think again - read some more.... and so on.

In the case of legal research this is even truer. There is very often no real distinction between reading and finding out. The text is the raw material.

[5] 1 am afraid this is plagiarised! It comes from a book the citation to which is **not** currently available to me.

For the same reason if we are talking about the structure of a thesis or dissertation, the structure that is assumed in many scientific or social scientific theses does not fit law. A piece of writing in the sciences might be structured like this:

- Introduction - asking the question, posing a hypothesis
- Literature review
- Method - how the research was carried out
- Results
- Discussion
- Conclusion.

It is not possible to have a template approach to writing a thesis in or about Law! The organisation must fit the topic, and it is shaped and reshaped as the work proceeds. And the writing is part of the process, not a separate product.

But far too many students begin their research work with a very fixed and concrete notion of what the structure of the final product is to look like. There is not a sufficiently sophisticated notion of the relationship between the structure of the research process and the structure of the ultimate written product. Here are two examples based on real theses, but with the topic changed:

One student wrote about 'human rights and the live performing arts'. The chapters were:

1. Human rights and the arts
2. The importance of human rights
3. Human rights and theatre
4. Human rights and dance
5. Human rights and the circus
6. Conclusion and recommendations.

This is a bit of a caricature of the original topic - but I hope it conveys my own problems with it. Maybe one might collect material under these headings, but it makes little sense to write about them under the same headings, because the same issues crop up again and again. The material needed to be 'cut' another way - as though it were sliced horizontally rather than vertically.

Another example of the same phenomenon was this topic: 'women, the law and the workplace'. The thesis was structured:

1. Women's problems in the workplace
2. The role of women's organisations in protecting women in the workplace
3. Women, law and the nursing profession
4. Women, law and the teaching profession
5. Women, law and the secretarial profession
6. Empirical attitudes to women and law in the workplace
7. Possible legislative changes
8. Conclusions and Recommendation

Again - far too many similarities arise in these different contexts for it to make any sense to discuss the issues in these pigeonholes. Still less did it make sense to separate out empirical material from the discussion of the legal position. Another example was that of one of my own students who determinedly resisted all my efforts to persuade him or her to 'cut' the topic of environmental impact assessment differently. S/he conceived of it as involving issues such as: Criminal law and EIA, Administrative law and EIA, Civil law and EIA, and that is the way it appeared in the final product, despite my own urging that the interesting points were issues not raised by this approach at all.

Some of these problems could be avoided by a more analytical and thoughtful approach to conceiving of the project in the first place. If a student was able to say why he or she wanted to explore the question of human rights and the performing arts or women in the workplace the issues ought to dominate rather than the situations: whether women in the teaching profession know more about their rights than those in the secretarial is more interesting than simply looking at each separately, for example. So the student might conceive of the research project as asking 'whether there are factors in the structure and educational qualifications in particular professions that lead to different legal structures and enforcement of law?' This would have a built in comparative question and though the student might collect information about women teachers separately from women secretaries or nurses this would not lead to the writing up being compartmentalised in the same way.

The graven-in-stone problem can arise in connection with the language used as well as the structural issues. Many supervisors will have had the experience of trying to persuade a student that a whole paragraph needs to be fundamentally rewritten - and being greeted with the response: 'which words should I change'?

3. PREPARATION - WHAT HAS STUDENT DONE BEFORE?

At the risk of being thought provocative, let me venture to suggest that most graduate students cannot read and cannot write. My assertion is not, of course, related to simple literacy. We are talking about law students, and the dismal fact is that after a first law degree most students are not skilled at reading statutes ands reading cases. Whatever we try to do to them, we all know that most students (and quite a lot of practising lawyers as well) shy I away from careful reading of statutes or cases. And while legal practice may hone the skills of a small number of practitioners, most of them make their way by relying on a small number of statutes, which provide their daily bread. So mature students may be good at a small number of statutes, but this is not necessarily generalised. Many students have not written much as undergraduate students, although these days more is expected by way of continuous assessment. On the other hand, increased pressures on teaching resources also mean that students are more likely to have written a number of short pieces, or even to have been partially examined by multiple choice tests, rather than have much experience of writing extended pieces of legal analysis or argumentation.

Many students will have read little by the way of scholarly literature. They may have read a few articles, and probably no book other than a textbook. They have few skills of analysing this type of literature - whether in the field of law or any other. They may have done literature as a first degree or perhaps history, and this may have taught them something of textual analysis, evaluation of (non-forensic) evidence and so on. But many others will not have done either.

3.1 Comparative law

Students often feel compelled to include comparative material, but seem to have little idea why. One fears that the choice of material is dictated by the following factors: the country where one is studying obviously offers the most accessible material; in the case of students studying away from home they naturally want to make their own country's situation the or a main focus. Then they come across articles, which touch on the law of other countries as well. Everything goes into the pot. There is a considerable literature on comparative law as a sub-discipline.[6] There the author would find discussion of types of comparison: comparing foreign systems **with** one's own to detect similarities and differences; taking a problem and looking at how different systems approach it in a systematic way; investigating the causes of differences; comparing different stages of legal systems; searching for a general pattern of evolution to take a few examples. Then there are questions one should **ask** before embarking on comparison: Why would you compare? **What**[5] would you compare? How would you compare? Who can **compare** (do you know enough about the other system, do you have **the** language skills etc)? And even: What is comparison? For **the** whys, you would find suggestions such as: To understand **one's** own system; to learn some perspective, or even humility **about** one's own legal system (is the common law necessarily as superior to other systems as we have been brought up to believe, **for** example) to help to construe or interpret one's own rules; to **help** improve the law; to move towards unified or at least harmonised laws. There is discussion of different types of comparison: **one**

[6] E.g. Bogdan, M, *Comparative. Law* (Kluwer, 1994), De Cruz, **Peter,** *Comparative Law in a Changing World (2nd*. ed., Cavendish, 1999), Grossftld, B., *The Strength and Weakness of Comparative Law* (English translation by Tony Weir, Oxford, 1990), Zweigert, K & KOtz, H, *Introduction to Comparative*

might carry out studies of legislative style, decision making techniques, role of judges and lawyers in different systems, legal philosophies, the institutions of the law or the substantive rules. Most student authors do the last. But then questions of what jurisdictions to compare, and what one can useful learn from the comparisons become very important. Two distinguished authors have suggested that one should study the functional equivalents in different systems; this would mean: one can only compare things that serve same function; one must eradicate preconceptions from one's own system; one must accept wide range of sources and be prepared to look at "non-law" institutions.[7]

3.2 Note taking and retrieving

There is an intimate connection between the reading, the note taking, the retrieval and the writing. What is not properly recorded will not be retrieved. What is not properly placed in an intellectual scheme of things will very probably not be recorded. No researcher should read something without having some sense of why the reading process is taking place. There is now some very expensive bibliographic software that helps people to store all the information they need on their computers - it will prompt the reader to fill m all publication details, provide a space for notes and keywords. Of course this is just as useful as the researcher is punctilious in completing it. And it needs access to a computer while reading if everything is not to be done twice - once in hand and once by computer. The software will help prepare the footnotes - so sloppy referencing ought to be a thing of the past for such privileged users.

3.3 Knowledge of the Internet

India is at the forefront of the IT revolution in many ways. We all know that Bangalore is the Silicon Valley of Asia, and that many of the world's programmers are trained in India. I have not been to India (to my regret) for some years, but my experience in other developing countries suggests that Internet cafe facilities must be

[7] Zweigert & K6tz, *Introduction to Comparative Law.*

available in most towns at very reasonable cost. Yet recent theses I have examined show little knowledge of Internet resources. Indian students are able to get access to cases and other material from any jurisdictions. Though this is very often not edited material - so cases will not have headnotes, for example - and may neither be complete nor up to date, there is far less excuse than there used to be for half hearted efforts to deal with foreign law. Normally, one would expect students to be more *aufait* with these techniques, if not the material they contain, than their supervisors. But perhaps students use the Internet for e-mails (and may be even less salubrious forms of entertainment) rather than for intellectual purposes. So supervisors should make the effort to acquaint themselves with the wealth of material the Internet offers, as well as the shortcomings and drawbacks of the medium. As a beginning they might try using the Australasian Legal Information Institute website (http://www.austlii.edu.au), and other sources mentioned in the footnote below.[8] And for useful cautions about what one may find on the Internet, there are various websites belonging to US universities that help with evaluating web-based material, and to compare Internet material with more traditional resources,[9] while the Internet Detective is a UK resource which helps the reader to evaluate internet resources.[10]

3.4 The writing process

The 'serial summary' problem to which I referred earlier may well be a result of poor reading and writing practices as well as lack of confidence and so on. In earlier days students sat in libraries and

[8] Other useful sites are the UK Social Science Information Gateway SOSIG which includes law - see http://www.sosig.ac.uk/law/ and many university and other sites that have lists of links to legal materials. Good examples include the University of Warwick http://www2.warwick.ac.uk/services/library/subjects/' lawofficialpublications/law/gateway/- particularly tailored to the Warwick Law School's interests and approaches.

[9]E.g. University of California at Berkeley http://www.lib.berkeley.edu/ TeachingLib/Guides/Internet/Evaluate.html; Cornell University: http:// www.library.cornell.edu/okuref/research/webcrit.html; Widener University http://www2.widener.edu/Wolfgram-MemoriaI-Library/webevaluation/examples.htm

[10] http://www.sosig.ac.uk/desire/internet-detective.html

read and took notes. Now they very often take photocopies rather than notes![11] Research in law should be a reiterative process: the researcher reads as he or she writes. So each item read contributes to the thought process as well as to the writing process. Unlike a statistic or an experimental result in the sciences or empirical social sciences, an article, a case or a provision of a statute is not just a piece of data to be slotted into the final written product, but should itself be thought about and may well lead to refinements of the research focus, or to fresh ideas for material. But it will only work like this if the material is read almost as soon as it is collected.

However, it is all too clear from many theses that the student does not really think about the place of each item in the intellectual scheme of things, but as something to be filed away and then brought out as the writing process takes place. One imagines the student sitting with a pile of photocopies and writing a summary of each article and then putting the article away in a box sighing 'ten down, 20 to go'! Alternatively, some authors may produce a summary of an item read, and file that away, producing the summary when the writing up is being done. This of course was perfectly possible in the pre-photocopier days - but less likely because the slow process of writing by hand tended to lead one to think before noting and to producing shorter summaries. Now many a student will go to the library with his or her laptop and type summaries straight into the computer. This is less likely in India perhaps - and until recently even the mass photocopying was less likely in most developing countries.

Although one can identify these styles of material collecting, keeping and retrieving as contributing to the problem, at bottom it is ah intellectual issue: the author is simply not confronting the nature of the research process. Indeed, the impression is that the exercise is viewed as far too mechanical, and a question of showing that the author has read enough cases or articles, rather

[1'] At this point I cannot refrain from repeating a story told me many years ago by a colleague in the UK: of a student who said 'Professor X - that article you told us to read is very difficult. I have photocopied it three times and I still don't't' understand it!'.

than either knowing or caring very much how the material ought to be used.

3.5 Tackling plagiarism

Plagiarism too is something that needs to be planned against from the beginning. Some plagiarism seems genuinely to stem from bad note-taking practices. I have tended to be incredulous when students have argued that they did not know whether a passage in their notes was their own or someone else's. But failure to keep reference writing abreast of the whole writing process can produce such a result. I remain sceptical in many instances - is it credible that a student who is writing in English as a second language fails to realise that a passage is not his or her own? But then maybe the student fails to realise the difference between accurate and inaccurate English. Indian research students will generally write better English than those from some other countries, so the mistake would be more credible. This type of problem arises from the failure to keep proper notes of sources.

But there are instances when students genuinely do not understand what is wrong with certain sorts of improper academic practice. The University of Teesside in the UK has been running courses for law students who, it is reported, have said things like 'I didn't think that was plagiarism'. The message seems to be that simply telling students that they must not plagiarise is relatively ineffectual; they need to be presented with concrete examples, and to be taught how to avoid the trap.

3.6 Attitude problems

Sometimes the problem may be the attitude of the supervisor of course! But very often problems in completing a research degree, or in completing it well, lie in the motivation and approach of the individual student. I have suggested the following reasons to students under the heading 'how not to complete':

[12] 'Plagiarism: The Teesside Experience' on http://www.ukcle.ac.uk/resources/ teesside.html-ihe website of the UK Centre for Legal Education.

Overestimating what is required

Any research degree is a big undertaking but some students may, especially when it comes to the 'writing up stage' be almost paralysed with apprehension at the looming task. For this reason it may be best to require students to write little and often rather than saving up everything until a 'writing stage'.

Underestimating what is required

A student who has enjoyed writing an extended essay at undergraduate level or a dissertation for an LL.M. may not realise how much more substantial an undertaking a doctorate is. Into this category of student also fall those who think that all that matters is writing enough words.

Inadequate support

By this I mean not having the support of friends and family for what is a lonely experience. Some institutions are better than others at providing a supportive environment among the graduate student community.

Taking a job before you have finished

Success may be obtaining a job - but that success may spell the end of the research degree process. For this reason a more structured type of research degree programme may help students to finish before they run out of money and have to seek employment. This type of factor lies behind many changes in research degree structures - where funding agencies have been asking for results, and no longer tolerate situations in which students can take five or years to finish degrees.

Trying to make the research encapsulate your life's philosophy

A student who is very enthusiastic may run into problems that the more hard-nosed candidate who knows that he or she wants the degree in order to get a job may not face: the topic may be so important to the candidate that it takes over his or her life, and gets completely out of hand

Reluctance to let go

There may be students whom the research and writing process suck in so firmly that they are reluctant to leave the intellectual womb. For some a research degree is a sort of refuge from other less palatable possibilities.

Not wanting it enough

For some the research degree may be something they have rather drifted into without a clear idea of why they want to do it. Maybe they have had difficulties in finding employment. Sometimes it is a requirement of a university that teachers do doctorates, though the individual may not yet be ready for this degree of commitment to one large project. Sometimes the student may be motivated by the chance to travel overseas, or this may be the only chance the individual will ever have to research in a good library and unencumbered by reaching responsibilities.

4. RESTRUCTURING THE **Ph.D.?**

What is the Ph.D. for? Perhaps what universities think the degree is for and what students think it is for are different things! Perhaps what universities think and what the rest of the community thinks are different too. The Carnegie Foundation has what might be described as the most idealistic and purist view:

> Taken broadly, we believe the answer is to educate and prepare those to whom we can entrust the vigor, quality, and integrity of the field. This person is a scholar first and foremost, in the fullest sense of the term. Such a leader has developed the habits of mind and ability to do three things well: creatively generate new knowledge, critically conserve valuable and useful ideas, and responsibly transform those understandings through writing, teaching, and application. We call such a person a 'steward of the discipline'.[13]

Most supervisors, operating as they do in a university environment, would probably empathise with this conception of the Ph.D. Yet how often does the reality meet this ideal? Far too many Ph.D.s in law, even those which are successful in the sense that the degree is awarded without too much in the way of rewriting, contain depressingly large quantities of rehashed secondary material, and far too little in the way of new insights, fresh ideas. A particular weakness of much legal scholarship seems to be a failure to engage with the existing secondary literature. Student writing especially may use secondary writing as a source of facts and too often as a short cut to primary material, as mentioned earlier. But far too often it does not tackle the ideas of other writers - engaging in the sort of dialogue, which is the way, a discipline progresses.

It will have become clear in the previous part of this paper that I am contemplating some introduction of formal teaching to the Ph.D. or other research degree programme. In fact this is not a new idea. Many readers will be familiar with the US system under which students do not do a Ph.D. but an SJD or a JSD (depending on the University[14]): this involves a year of course work (perhaps the same as might be taken for an LL.M. programme) followed by the writing of a thesis. Even in Ph.D. programmes in other

[13] From web page on the Carnegie Initiative on the Doctorate http://www.carnegiefoundation.org/CID/stewards.htm visited December 10, 2003.

[14] Both mean the same: *scientiae juris doctor* or doctor of the science of law (Latin not being rigid in its word order).

disciplines in the USA students are required to take courses in th discipline and to pass examination before being allowed to emb on their thesis.[15] The SJD idea has been picked up by seve Australian universities and also by the University of Hong Koi Interestingly the last university is now applying the principles research degrees generally: all research degree students will required to take certain courses in research methodology, and ai in the general area of their research. This is not always welcome the students. They tend to think that they are there just to writf thesis, and to resist taking substantive courses that are not direc related to 'their' topic - and it is not always possible to ident; courses that are directly relevant. Perhaps we need to do more inculcate into students the notion of their role as stewards of t discipline, in the Carnegie Foundation phrase.

Even if the step is not taken to restructure the degree, the who process of research needs to be seriously considered. There a books on 'legal research' but many of them seem to assume th this is something done by practitioners and that research means ju finding cases and statutes. [6] The whole process needs to be thoug about with care by student and supervisor - from the initi formulation of a field of research, to the last comma in tl bibliography. There are now a number of courses taught f< research postgraduates in law. Some are rather brief such as th for taught postgraduate programmes at Warwick where a sho thesis is part of the course.[17] Others are more elaborate.[Ift] My ow

[15] Ironically there has been some discussion in the US about whether th doctorate in non-law areas should be reformed to be more like the Jl (essentially a taught degree open to graduates only). The older members of th legal fraternity like myself will recall that in the late 1960s the LL.B. wa renamed the JD (Juris Doctor) because students felt at a disadvantage a compared with their contemporaries in other fields who went on from a fin degree to postgraduate research and obtained a doctorate and entere employment at an advantage.

This point is made from my own experience of this genre of literature but i also commented on by Manderson, Desmond and Mohr, Richard, Fron Oxymoron to Intersection: An Epidemiology of Legal Research, (2002) 6 *Lav Text Culture* 159 (from Australian experience). '

http://www2.warwick.ac.uk/fac/soc/Iaw/pg/lawdev/prereg/writing/

course at the University of Hong Kong has contained the following elements:

- Classes on topics such as:

    - > identifying a topic
    - > different types of legal research
    - > how to read - thoughtfully
    - > being comparative
    - > empirical research
    - > a sharing session - when students who have recently completed or are working on research degrees share their experiences
    - > citing sources
    - > how not to plagiarise

- Demonstrations on the use of:
    - > the internet
    - > lexis and westlaw
    - > other databases for legal research

- Exercises - a range of possible exercises such as:
    - > tracing the history of a case (for non-common law graduates)
    - > using the computer database for Hong Kong statutes (for non-Hong Kong graduates)
    - > researching a topic on lexis or westlaw - or both and comparing the two databases
    - > researching a topic on the internet (free websites - using mainly Austlii)
    - > finding journal articles on a particular topic
    - > analysing a journal article - unpacking the argument and the writing techniques used
    - > a book review

[18] The growing rend towards secretiveness and possessiveness on the Internet means that some courses the teaching materials of which used to be readily available have now become password protected and available only to students. However, some US courses may be identifiable via the jurist site:

- A final exercise for assessment purposes: a pathfinder - an annotated bibliographical guide to researching a particular topic.

5. CONCLUSION

There is much that can be done to improve the quality of the research degree product, and also the nature of the experience, to the benefit of the individual students and the discipline. Various universities have approached the problems in different ways. Columbia University Law School, in New York, for example, requires that doctoral work be published either before it is submitted or after it has been accepted but the degree will not be awarded until the work has been published. This means taking seriously the notion that doctoral work should be publishable, something, which is not achieved by many law theses. It has been observed that 'Alas, postgraduate research programs in law rarely offer students the kind of guided program able to provide them with the knowledge and skills which contemporary legal scholarship demands.'[19] This article has raised just some of the problems, and suggested a modest beginning to facing some of them.

ESTIMATION, ANALYSIS AND PROJECTION OF INDIA'S GDP

A TIME SERIES MODEL

U. R Daga,* Rituparna Das" and Bhishma Maheshwari

1. INTRODUCTION

Gross domestic product or GDP, tells us the country's current aggregate production of goods and services. It is often considered the best measure of how well the economy is performing. GDP summarizes the aggregate of all economic activities in a given period of time. In any economy, however, goods and services produced are not homogenous. It is not possible to add, for example, 10 barrels of petroleum with 10 million matric tons of wheat. So, as a trick, quantities and volumes of all respective goods and services are multiplied by their prices and then summed up. This gives the money value of GDP. Prices however include indirect business taxes (IBT) i.e. sales taxes and excise duties. So this GDP is not a true measure of the productive activities in the economy. In order to get a true measure of GDP we deduct IBT from GDP. This is called GDP at factor cost. For all practical purposes the government uses data on GDP at factor cost. The government of India has started Economic Reform program following the guidelines of IMF and World Bank with a number of ends keeping in view, one of which is that this program would boost up the annual growth of GDP through liberalizing trade. The philosophy of comparative advantage tells that free trade can increase the GDP of the trading countries.

Professor, National Law University, Jodhpur. Faculty,
National Law University, Jodhpur. Post-graduate Student,
National Law University, Jodhpur.

2. RESEARCH QUESTIONS

1. Whether GDP data of India is stationary/non stationary?
2. What is the form of GDP trend equation?
3. Which sector(s) of the economy is(are) responsible for such shape?
4. Did economic reforms have any impact on GDP?
5. Is the estimated GDP trend able to predict future value of GDP?

3. OBJECTIVES OF THE STUDY

Following are the quadruple objectives of the study

1. Examine the trend of GDP in order to see whether there is any difference in the trend between the periods from 1981-82 to 1990-91 and from 1991-92 to 2001-2002, i.e. two decades before and after the commencement of liberalization program.
2. Examine the nature of such difference, if it exists
3. Find the causes of such difference
4. Produce a model of forecasting GDP.

4. WHAT IS TREND?

Trend is the general tendency of the variable under consideration to take increasing or decreasing values over a long period of time.]
Trend is also called 'secular trend'. It exists in time series data on]
any economic or business variable if there is a smooth, long run 1
and general tendency of the variable take increasing or decreasing values over the given period. Trend is the long run component of time series data. If the variable does not show the tendency to take increasing or decreasing values then it is deemed to have no trend.
Trend analysis is a time series analysis. Time series analysis is used to detect patterns of change in statistical information over regular intervals of time. These patterns are used to project the future and help to arrive at an estimate for the future. Thus, time series analysis helps projection of the future value of variable through curve fitting.

5. WHAT IS STATIONARITY OF TIME SERIES DATA AND WHAT ARE ITS CONSEQUENCES?

Any time series data has an underlying stochastic process. A stochastic process is called stationary if its mean and variance are constant over time and the covariance between the values at two different periods depends only on the lag between those periods and not on the time of calculation of covariance.

There are two key concepts in time series analysis:

1. Trend stationary process (TSP): If in the regression $Y_t = a + bt + u_t$, error term u_t is stationary then $Y_t = a + bt + u_t$ represents a TSP.
2. Difference stationary process (DSP): If Y_t is generated as $Y_t - Y_t\text{-i} = c + u_t$, where c is a constant and u_t is stationary then the process is called a DSP.

The consequence of a non-stationary time series data is that it .makes least square estimators inconsistent and diagnostic statistics like *t* and *F* statistics do not have their standard limiting distributions. As a consequence the regression of an explanatory variable may appear significantly different from zero though it is not truly a determinant of the dependent variable.

6.WHAT IS THE LINK BETWEEN STATIONARITY AND TREND ESTIMATION?

The practical significance of TSP lies in long run forecasting. Forecasting made from TSP is reliable. Forecasting made from a DSP is unlike a TSP, not reliable (Gujarati 1995).

7. EXAMINING AND ENSURING STATIONARITY

Nowadays test of stationarity is done by EViews software, which draws the correlogram and also runs the unit root tests. With help of EViews software we check whether GDP of India is a TSP or a DSP.

8.CHOICE OF METHOD TO ESTIMATE/MEASURE TREND

There are four methods to estimate trend - a. Graphic Method, b. Semi Average Method, c. Method of Curve Fitting and d. Method of Moving Average. Out of these four methods we have chosen the third method because of three reasons. Firstly it is characterized by the maximum degree of objectivity compared to fist, secondly the data on GDP fulfills all preconditions for a good curve fitting and thirdly the nature of data on GDP during the aforesaid periods is such that there is no need for the fourth method, because it is annual data and does not seem to contain cyclical component. The data takes the form of a smooth exponential curve when plotted on a two dimensional graph against time.

9. COLLECTION OF SAMPLE

Government of India publishes every year the data on economic variables in Economic Survey. We have taken the time series data on GDP and individual GDP components of the five sectors of the Indian economy (a) Agriculture, Forestry and Logging, Fishing, Mining and Quarrying; (b) Manufacturing, Construction, Electricity, Gas and Water Supply; (c) Trade, Transport^ Storage and Communication; (d) Financing, Insurance, Real Estate and Business Services; and (e) Public Administration and Defence and other services at 1993-94 prices from Economic Survey 2002-03. The data are secondary and the sample period from 1981-82 to 2001-2002 is divided into two sub-sample periods as per the first objective of the study.

10. NATURE OF STUDY

We use these data and feed them into the Microsoft Excel's 'Data Analysis' package. Any computer loaded with Microsoft Excel Software is useful for this purpose. So this is a doctrinaire study. It does not involve field survey. It includes an empirical element in the sense that it studies real life data on GDP.

11. DEPENDENT AND INDEPENDENT VARIABLES

Trend analysis of any economic variable involves one independent variable, time and one dependent variable, the economic variable under consideration. After rinding the trend, if one further wants to analyze the causes of the trend then such analysis calls for involvement of a number of independent variable. Precisely the same is this study. First we estimate trend of GDP over the two sample periods. We find that GDP trend has taken a turn right after the onset of the liberalization program. We try to find the cause of the turn and examine the impact of every individual sector on the trend. So here we include four independent variables - the GDP components or contributions to GDP of four sectors of the economy. Finally we have included an independent dummy variable in order to segregate the individual trends of pre and post liberalization-commencement periods. So there are one dependent variable GDP and six independent variables - four sectoral GDPs, a time variable and a dummy variable

12. STEPS OF DATA ANALYSIS

Following are the steps in estimation and analysis of GDP trends during the two sample periods:

1. Plotting the annual GNP value against the corresponding year and draw a line diagram by connecting all the plotted points. Ascertain the nature of temporal movement of the value of the GDP variable over the sub-sample periods.
2. We have to check whether GDP is a non-stationary process. So we have to run unit root test. If GDP is found non-stationary, then we have to see whether GDP is a TSP after estimating trend.

3. Propose an exponential trend relationship between GDP as the dependent variable and time and a dummy variable for trade liberalization as independent variables and check that the data satisfies the prescribed criteria

for running regression of GDP on time and the dummy variable for the entire sample period. We run above multiple variable regression using 'Regression' package of the Microsoft Excel Software. We examine the goodness of fit in terms of adjusted R^2 and't'values at 95% level of significance. We drop the variable whose coefficient has a calculated absolute 't' value less than the table value.

4. On satisfying the conditions for a regression exercise we accept the model for regression purpose.

5. After estimating the model we calculate the residuals and run unit root test for 1st difference. Thus we check whether GDP is a TSP.

6. We make the estimation of GDP within the sample for all the years and plot them on graph to find the difference between the estimated line and the actual line with an intension of improvement if there is any wide difference. We estimate a 95% confidence level interval for forecasting GDP.

7. In order to detect which sector of the economy is responsible for the turn of GDP right after liberalization we examine the correlations between GDP and each sector's contribution to GDP separately for pre and post liberalization-commencement periods. We ascertain which sector contributes maximum and which sector contributes minimum to the movement of GDP over the sample period, for, this information would be of use to economic planners.

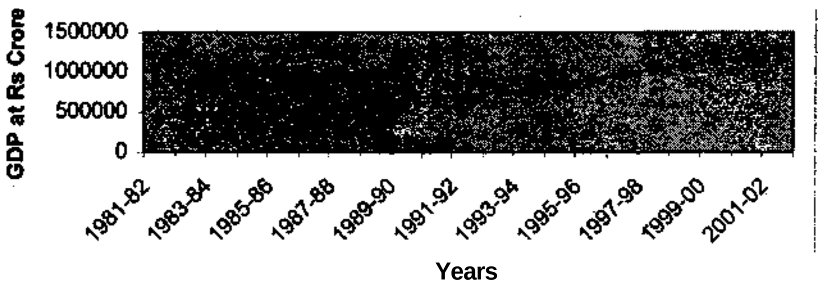
All the above steps are performed in the appendix.

13. CONCLUSION

GDP of India is a stationary process. The trend equation proves a good fit after we drop the dummy variable. It gives a result contrary to the belief that economic reform causes a boost in the GDP. It gives however an adjusted R^2 as high as 99.7%. All the 't' values are found highly significant. While plotted on graph, the estimated GDP line just coincides with the actual line. So this estimation can be used for the purpose of GDP forecasting. This model has tracked well the path of past movements in the value of the variable. The sector comprising Trade, Transport, Storage and Communication is found to contribute the maximum and the sector comprising Financing, Insurance, Real Estate and Business Services is found to contribute the minimum to the GDP trend under study.

14. Appendix

Figure 1



Step 1

We plot Table I in Figure 1

Table 1 GDP froml981-81 **to 2001-02** a > **^93-94 prices**

Yea	GDP at Factor cost (Rs
1981-82	Crores)
1982-83	425073
1983-84	438079
1984-84	471742
	492077
1985-86	513990
1986-87	536257
1987-88	556778
1988-89	615098
1989-90	656331
^990-91	692871
1991-92	701863
1992-93	737792
1993-94	781345
1994-95	838031
1995-96	899563
1996-97	970083
1997-98	1016594
1998-99	1082748
1999-00	1148442
2000-01	1198685
2001-02	1265429 -

Source: *Economic Survey 2002-03*, Government of India, Delhi

The data given above is plotted on the graph. The 'X' axis has been taken as Years from 1981-82 to 2001-02, whereas, 'Y' axis has been taken as GDP. By seeing the line we come to the conclusion that GDP of India is showing an increasing trend with time. From the graph we can also infer that, as there are no fluctuations in the line, so.there is no cyclical variation in the data. The data taken is annual, so there is no element of seasonal variation in the data. This proves that the given data is fit for regression analysis, provided, the following preconditions are satisfied: a. stationarity, b. appropriateness of nonlinear relationship, b. absence of autocorrelation in error terms, c. homoscadasticity of error terms and d. absence of multicollinearity between independent variables. If the series is not stationary we have to see whether it is trend stationary or difference stationary.

Step 2

We have to see whether GDP is a stationary series. After running alternative Dicky-Fuller unit root test for GDP at level without any lagged difference and without any intercept, we find that computed |T| value is above all Mackinnon critical values. So we reject the hypothesis that GDP data is non-stationary. The results are given in the end of the appendix. Now we have to see whether GDP is a TSP after estimating trend.

Step 3

The first proposed equation is
logY= a + bX + cD + u,
where log Y = log natural of GDP, a = intercept coefficient, b = coefficient of time variable and c = coefficient of dummy variable, for the period 1981-82 the dummy variable will be '0' and for the rest of the period it will be ' 1' in order to capture the effect of liberalization on GDP, u = error
Assumptions:

1. No multicollinearity: There is no significant correlation between time variable and dummy variable.
2. No autocorrelation: There does not exist any correlation between u_t and u_t-i.
3. Homoscadasticity: Every u is independently normally distributed with zero mean and uniform variance. This is checked by running regression of estimated u on X. A high adjusted R^2 and significant t values ascertain heteroscadasticity and viec versa.

In order to check condition (i) we calculate the correlation coefficient between the dummy variable and time. We get the value of the correlation coefficient as high as 86.6%. So we drop the dummy variable and decide that GDP grows by its own in the post liberalization period. Uchikawal999 supports this conclusion.

Step 4

The modified data is in Table 2 followed by the multiple regression output

Table 2

logY	Year	X
5.6285	1981-82	1
5.6416	1982-83	2
5.6737	1983-84	3
5.692	1984-85	4
5.711	1985-86	5
5.7294	1986-87	6
5.7457	1987-88	7
5.7889	1988-89	8
5.8171	1989-90	9
5.8407	1990-91	10
5.8463	1991-92	11
5.8679	1992-93	12
5.8928	1993-94	13
5.9233	1994-95	14
5.954	1995-96	15
5.9868	1996-97	16
6.0071	1997-98	17
6.0345	1998-99	18
6.0601	1999-2000	19
6.0787	2000-01	20
6.1022	2001-02	21

We run regression of log Y on X only. The summary output is as follows:

SUMMARY OUTPUT			
Regression Statistics			
Multiple R	0.99838		
R Square	0.99676		
Adjusted R Square	O.99659		
Standard Error	0.00878		
Observations	21		
ANOVA	df	SS	MS
Regression	1	0.45115	0.45115
Residual	19	0.00146	7.7E-05
Total	20	0.45261	
	Coefficients	Standard Error	t Stat
Intercept X	5.59194	0.00397	1407.36
Variable 1	0.02421	0.00032	76.4935

We find all t values are highly significant.
Before going to accept the model for forecasting we check conditions (ii) and (iii).
For condition (ii) we see Correlation coefficient between e_t and e_t-i = -0.01943 and correlation coefficient between e_t and e_t-2 = 0.054776, which are negligible. Hence we decide that the problem of autocorrelation does not exist.
And for condition (iii) we run regression of estimated u on X and get the following

SUMMARY OUTPUT

Regression Statistics

Multiple R	0.160100108
R Square	0.025632045
Adjusted R Square	0.025650479
Standard Error	14466.03088
Observations	21

	Coefficients	Standard Error	tStat
Intercept X	-3550.42381	6545.969363	-0.5423832
Variable 1	368.5623377	521.3195663	0.70697967!

From the above results, we can see that Adjusted R square coming as 0.025650479, which is very small. It shows that there no relation between the time and residuals and hence the problei of heteroscadasticity does not exist.

Step 5

We have to check whether estimated residuals from abo\ constitute a stationary series. The estimated residuals are u_t* give in

Table 3

u_t*
11906
1228
9849
3706
-2376
-9709
-20485
4744
10989
10535
-19587
-25015
-25189
-14736
-2088
16745
8607
16979
21579
7226
5671

We run the unit root test of u_t* for 1^{st} difference and find that computed |t| exceed Mackinnon critical values of 1%, 5% and 10%. So we conclude that GDP of India is a trend stationary process. The result of the test is given in the end of the appendix.

Step 6

Now, without hesitation we accept the model log Y = a + bX + u for the purpose of forecasting. The model comes out to be: log Y = 5.591917834 + 0.024208073 X

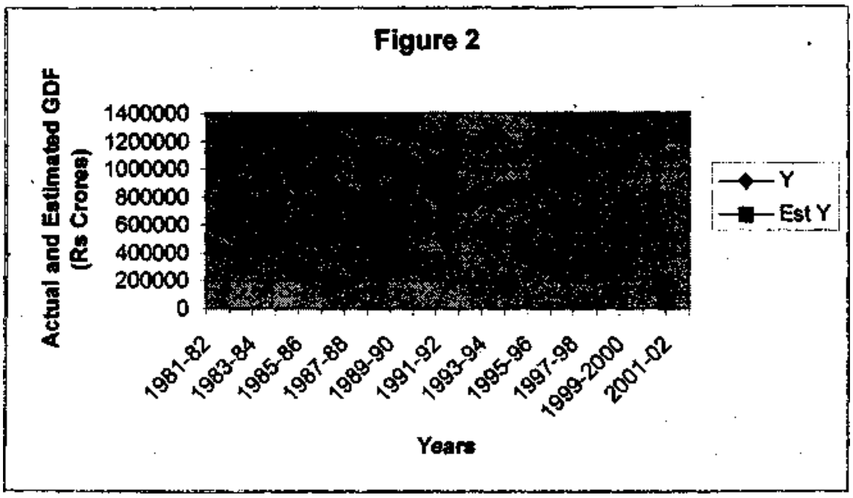
Estimated Y = $10^{(55919,7834\ +\ 0024208073\ X)}$

We get the table 4 using the above model:

Table 4

Year	Y	Estimated Y
1981-82	425073	413167
1982-83	438079	436851
1983-84	471742	461893
1984-85	492077	488371
1985-86	513990	516366
1986-87	536257	545966
1987-88	556778	577263
1988-89	615098	610354
1989-90	656331	645342
1990-91	692871	682336
1991-92	701863	721450
1992-93	737792	762807
1993-94	781345	806534
1994-95	838031	852767
1995-96	899563	901651
1996-97	970083	953338
1997-98	101659	1007987
1998-99	108274	1065769
1999-2000	114844	1126863
2000-01	119868	1191459
2001-02	126542	1259758

Plotting table 2 in figure 2 shows that actual and estimated trends



almost coincide.

So, the point estimation of GDP for 2002-03 is 1259759. The estimated interval is 1259759 ± 2(14664.67) or (1230429.4, 1289088) at 95% confidence interval. The actual figure lies in the estimated interval.

Nest we project the GDP figures for next years beyond the sample period on the basis of our model. We find the following table 5 and figure 3:

Figuer 3 Projected GDP at factor cost

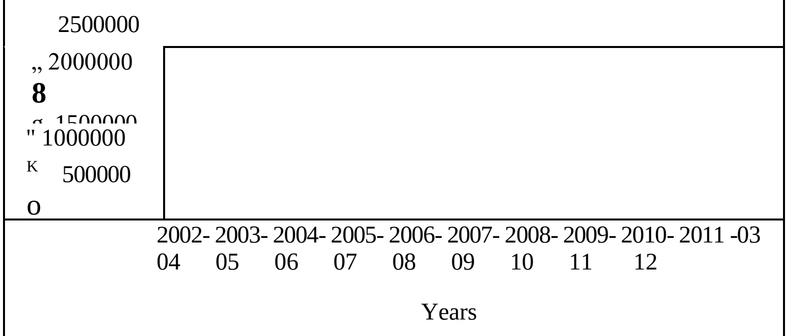


Table 5

Year	Projected GDP
2002-03	1259759
2003-04	1331973
2004-05	1408327
2005-06	1489058
2006-07	1574417
2007-08	1664668
2008-09	1760094
2009-10	1860989
2010-11	1967669
2011-12	2080463

This graph shows that our model has well captured the historical behavior of the variable.

Step 7

We check which sector contributes the maximum/minimum to the above shape of GDP line. We check correlation between GDP and each sector's GDP separately for pre and post liberalization periods. We get following two matrices:

Pre liberalization Period Correlation Coefficient Matrix

Sectors	**a**	**b**	**c**	**d**	**e**	**GDP**
A	1					
B	0.963554	1				
C	0.944304	0.993814	1			
D	0.954695	0.997821	0.998476	1		
E	0.943014	0.993354	0.999083	0.998394	1	
GDP	0.97374	0.998143	0.99376	0.997277	0.993249	1

(a. Agriculture, Forestry and Logging, Fishing, Mining and Quarrying; b. Manufacturing, Construction, Electricity, Gas and Water Supply; c. Trade, Transport, Storage and Communication; and d. Financing, Insurance, Real Estate and Business Services; e. Public Administration and Defence and other services)

Post liberalization Period Correlation Coefficient Matrix

	a	b	**c**	d	E	**GDP**
A	1					
B	0.975037	1				
C	0.965765	0.991862	1			
D	-0.29099	-0.30126	-0.2663	1		
E	0.928737	0.961251	0.986338	-0.20592	1	
GDP	0.975981	0.994378	0.998573	-0.2739	0.982284	1

Comparison of above matrices shows that sector c has contributed maximum and sector d has contributed minimum in terms of change in the magnitude of correlation coefficient of the respective sectors with GDP from pre to post liberalization period. The actual data of GDP and it's sectoral components taken from Economic Survey 2002-03 is

Year	a	b	c	d	e	GDP
1981-82	177341	9302$	78387	28336	47979	4250
1982-83	177300	95$5	82001	31272	51811	4380

1983–84	193508	103992	86013	34391	53838	4717
1984–85	196353	110474	90426	37320	57504	4920
1985–86	198353	115689	97555	41126	61267	5140
1986–87	198740	122847	103327	45768	65575	5362
1987–88	196735	131417	108742	49598	70286	5567
1988–89	227095	142738	115229	55251	74785	6151
1989–90	231389	157979	123740	62204	81020	6563
1990–91	242012	169703	129786	66990	84380	6929
1991–92	239253	167967	133080	75027	86536	7019
1992–93	252205	175175	140487	794030	90494	7378
1993–94	262059	185070	150500	90084	93632	7813
1994–95	276049	204092	166131	95085	96674	8380
1995–96	275153	229098	188167	102847	104298	8996
1996–97	299461	246848	202936	109995	110843	9700
1997–98	295050	256121	218822	122784	123817	1016
1998–99	312485	265956	235757	131892	136658	1082
1999–2000	314253	279130	255817	145863	153379	1148
2000–01	313806	298689	273380	150910	161900	1198
2001–02	330272	309291	297213	157701	170952	1265

Result of alternative Dicky-Fuller unit root test for GDP at level without any lagged difference and without any intercept

Level test ADF Test Statistic	15.22617	1% Critical Value*	-2.6889
		5% Critical Value	-1.9592
		10% Critical Value	-1.6246

*MacKinnon critical values for rejection of hypothesis of a unit root.

Augmented Dickey-Fuller Test Equation
Dependent Variable: D(GDP)
Method: Least Squares
Date: 02/13/04 Time: 07:44
Sample(adjusted): 1981-82 to 2001-02, Annual figures
Included observations: 20 after adjusting endpoints

Variable	Coefficient	Std. Error	t-Statistic	Prob.
GDP(-l)	0.057179	0.003755	15.22617	0.0000

R-squared	0.558632	Mean dependent var	42017.80
Adjusted R-squared	0.558632	S.D. dependent var	19621.74
SJE. of regression	13035.80	Akaike info criterion	21.83749
Sum squared resid	3.23E+09	Schwarz criterion	21.88728
Log likelihood	-217.3749	Durbin-Watson stat	1.811311

This shows that the variable is stationary.

15. References

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IMPACT ASSESSMENT ON ADVERTISEMENT

Archi Mathur andH.K. Bedi*

1. INTRODUCTION

Advertising is the most effective means of communicating our ideas, products or services to a large number of people. In fact, it is defined by Philip Kotler as any paid form of non-personal presentation of ideas, goods and services by an identified sponsor.[1] Dr. Jones defined advertising as a sort of machine-made, mass production method of selling which supplements the voice and personality of the individual salesman; such as in manufacturing, the machine supplements the hands of the craftsman.[2] Furthermore, advertising can be defined as the dissemination of information concerning an idea, product or service to compel action in accordance with the intent of the advertiser.[3]

But the consumers of today are wiser than the marketers. When Vance Packard published "The Hidden Persuader' almost half a century ago, consumers were deeply shocked, and not a little intrigued, by the mendacious machinations of marketing types.[4]

Assistant Lecturer, Department of Management Studies, National Law University, Jodhpur.

Professor & Dean, Faculty of Management Studies, National Law University, Jodhpur.

[1] Kotler Philips, *Marketing Management*, (11* edn., Prentice-Hall of India, New Delhi),p.590.

[2] Varma, MM and Agarwal, R.K:, *Advertising Management* (King Books* Delhi), p. 1.10

[3] *Advertising Age*, July 28, 1932, p. 1

Brown Stephen, Marketing to Generation: Opinion, Forethought, *Ha$. Bus.Rev.* June 2003, p. 16.

But nowadays, they are conscious of the marketing concept.[5] They know that the customer is always right and is the King. The customers are also aware about the hidden agenda behind the advertising. Some of the positive implications of advertising as felt by the consumers are:

1. *Advertising Creates Awareness:* Creating awareness is absolutely essential in today's volatile marketplace. Firstly, the organization would want to make its target customers aware or informed about the product before it is launched in the market. Secondly, it would also want to convert the non-users of the product into users of the product by making them aware about the features of the product. Thirdly, if the product has undergone some quality up gradation or some new features have been added, then also the company would want to make the consumers aware about the product. Fourthly, the advertisers who maintain or expand their advertising over a longer period of time will result in creating more awareness; thereby increasing their sales than those who cut back or cancel their advertising. A survey of more than 3000 companies found that advertisers who maintain or expand advertising over a five-year period see that their sales increase by an average of 100 per cent. And companies that cut advertising decreased their average sales by 45 percent.[6] Fifthly, people spend money to make purchases and if the company doesn't make them aware of their product, then they will spend their money somewhere else.[7] Hence advertising is essential to survival and growth of the organization. Sixthly, in order to minimize the falling customer awareness, advertising is a very essential means of communication. Seventhly, as the market is constantly

Marketing Concept can be defined as a phenomenon of starting the business with the determination of consumer wants and ending the business with the satisfaction of those wants; as cited in Ramaswarriy V S and Namakumari S, *Marketing Management: Planning, Implementation & Control; Global Perspective, Indian Context*, (3rd edn., Macmillan India Limited, New Delhi, 2002), p.7.

[6] http://www.prisma-digital.com/cable/10_reason_ad.html, 05. 01. 2004.

[7] *Ibid*, 05.01.2004.

changing and evolving, new families, new prospects and people with different lifestyles emerge. This is because people earn more money resulting in change in lifestyle and buying habits. Those customers who perceived the products to be high priced or that segment which the organization didn't find lucrative might become the prime customers or prime segment. Advertising is required to create awareness amongst such people. *E.g.* Safal Frozen vegetables, which inform the consumers that certain vegetables like carrot, cauliflower, pea, ladyfinger, etc., which are available only in a particular season, are also available all through the year. This is done by packing and freezing them in packets, which would keep their freshness intact. These packets are made available all through the year without deteriorating their quality. Therefore, the purpose of such advertisements is informing as well as making the consumers aware or satisfying their urge to have off-season vegetables. Another example, which can be cited, is that of Smith & Jones Ginger Garlic Paste. For workingwomen, it is a lot of hassle to get up early in the morning and make the required pastes for preparing the meal. This product relieves them of this hassle. To make the workingwomen aware of this product, advertising is a must. Recently, Philip Morris has stepped into India on its own with its well-known Marlboro brand of cigarettes. The product is to be distributed in India without the direct involvement of Godfrey Phillips India (GPI). The company further wants to emphasize that the Marlboros available in India will all be imported from Switzerland.[8] This is a case of making the consumers aware about the cigarette Marlboro; which can be successfully done either by advertising or proper retailing.[9]

Advertising Reminds The Consumer About The Existing Product: Reminding the customer is the first step to a

[8] Narula Manoj, Marketing: Going Direct, *Business India,* November 24 -December 7, 2003, p. 119.

Retailers can be defined as those marketing intermediaries who sell to the household or the ultimate consumer; Ramaswamy V S and Namakumari S, *op.cit.,* p.390.

repeat purchase if alternative products are available in the market. In the world of hyper competition[10], where large number of alternative products are available in the market, there is a possibility that the company might loose out its market share in dearth of advertising. This is because firstly, lots of advertisements are shot at the minds of the consumer. And the consumer might feel the obsolescence of Jhe product if he doesn't receive proper advertising. Secondly, sometimes people postpone their buying decisions in order to compare the price, quality and service. Therefore the advertising should reach them throughout their buying process. The advertisers name should be fresh in their minds when they finally decide to buy." This is because we are bombarded with tons of messages (an estimated 2700) daily. An experiment proved the need for constancy in advertising by running an advertisement once a week for thirteen weeks. After that period, 63 percent of the people surveyed remembered the advertisement. One month later, 32 percent recalled it. Two weeks after that, 21 percent remembered it. That means 79 percent forgot the advertisement.[12] Therefore, continuous advertising reminds the consumer about the existing product. Thirdly, advertising keeps regular customers intact and counterbalances the advertising of the competitors; otherwise the organization looses them to the more aggressive competitors.[13] Fourthly, it is also much more

[10] Hypercompetion, as defined by Richard D'Aveni, is a state where the frequency, boldness, and aggressiveness of dynamic movement by the players accelerate to create a condition of constant disequilibria and change. Market stability is threatened by short product life cycles, short product design cycles, new technologies, frequent entry by unexpected outsiders, repositioning by incumbents, and tactical redefinitions of market boundaries as diverse industries merge. In other words, environments escalate toward higher and higher levels of uncertainty, dynamism, heterogeneity of the players and hostility; as cited in Wheelan Thomas L. and Hunger David J., *Strategic Management And Business Policy: Entering 21S' Century Global Society*, (6* edn., Addison-Wesley, 1998, p.69-70.

[1] http://www.prisma-digital.com/cableyiO_reason_ad.html, 05.01.2004.

[12] Murray Fallen, http://www.weav.bc.ca/weavnews/article.htm79, 05.01.2004.

[13] http://www.prisma-digital.com/cable/10_reason_ad.html, 05.01.2004.

economical to sell to old customers than to new ones because they have already used the product and are satisfied with it. So if they don't hear about the product, they tend to forget it in the long run. The National Retail Merchants Association states: 'Mobility and non-loyalty are rampant. Stores promote to get former customers to return and to seek new ones.'[1] Hence reminding the customers about the existing product is enabling the organization to hold on to their old customers. Fifthly, continual advertising results in trust in your company.[15] E.g. the advertisement of Harpic Toilet Cleaner reminds the consumers that a product is available in the market, which would keep their toilets germ-free. Another advertisement is that of Mortein Mosquito Coil which reminds the consumers that a product is available in the market which would keep their home free from mosquitoes and malaria.

Advertising Promotes the New Product: Any new product, which comes into, the market, has to be promoted by its organization. It has to be positioned[16] firmly in the minds of the consumer. This is because in this era of hyper competition, the market is flooded with lots of products, which are quite similar. Therefore it becomes very difficult for the new entrant to create a place for itself in the minds of the consumer. Advertising tries to remove this drawback for the new entrant by promoting it. For example, Hyundai Company promoting its new product Santro Xing. Similarly, Reliance promoting its entry in the cellular phone industry. Another example is that of Rs.350 crores Gokuldas group, which has decided to venture into the field of lingerie market with its product Enamor.[17] This group

[14] http://www.kezw.com/advertise/toplO.html, 07.01.2004.

[15] http://www.wxvt.com/eight_reasons_to_advertise.htm, 07.01.2004

[16] Positioning is the act of designing the company's offering and image to occupy a distinctive place in the mind of the target market; Kotler Philips, *op. cit.,* p.308.

[1] Saraf Anu, 'Marketing: Fitting In', *Business India,* September 1 - 14, 2003, p.84.

has decided to invest heavily on print advertising in order to promote its new product.

Advertising Retains Product Leadership: Normally, in this era of excessive competition, it becomes difficult for any firm to stay at the number one position for long. Firstly, this can be because of fluctuating tastes and preferences of the consumers, availability of larger number of rival products or substitute products in the market or even changing needs of the customers. Therefore, advertising to some extent, can help the product to retain its leadership in the market; if not increase in the market share. Secondly, it can help the organization to have an edge over its competitors. Thirdly, it is also responsible for the return of the former customers. Fourthly, advertising strengthens the identity of the organization. This is because when the company quits advertising, it changes the reputation, reliability and confidence the customers have in them.[18] For example Lux soap was not advertised for long on the television. As television is the most important medium of communication, the dearth of Lux advertisements on television raised doubts in the minds of the consumers i.e. whether the product is available in the market, or whether some quality degradation has taken place, etc. As a result of this, the competitive products started gaining an advantage and the Lux soap slipped down the position, which it was holding for long. But now, again with Lux advertisements back on the television, the product has started doing fairly well for itself. Fifthly, advertising even stabilizes the company's brand[19] in the minds of the consumer. As a result, their preference for the brand increases and higher brand preferences result into higher margins, thereby resulting into positive image of the firm. If the competitors

"Murray Fallen, http://www.weav.bc.ca/weavnews/article.htm79, 05.01.2004

The American Marketing Association defines a brand as: a name, term, sign, symbol, or design, or a combination of them, intended to identify the goods or services of one seller or group of sellers and to differentiate from those of competitors; as cited in Kotler Philips, *op. cit.*, p.418.

cut back on advertising, then the opportunity comes along with the firm.

5. *Advertising Repositions the product:* Repositioning can be defined as a process wherein the product is provided with some new features or it is associated with some new uses and, through promotion, is again positioned in the minds of the consumer in a different way than earlier for existing as well as new target segments. In other words, advertising relaunches the product in a way, which is different from the existing one. This helps in either strengthening the position of the product in the market place, or increasing the types of customers purchasing as well as consuming the product. E.g. Britannia Industries have completely transformed their presentation of the product as not merely biscuits and cakes but as product, which have a punch line: "Eat Healthy, Think Better". Britannia has brought wide range of bakery products aiming at each and every individual, irrespective of the age. Through advertising, their aim is to launch the product in a different way than others i.e. the product has a very high nutritious value apart from the taste.

6. *Advertising Develops Prospective Buyers And acts as a Market Drive:* Many a times after seeing an advertisement, the non-users of the product become the users of the product because advertising creates not only awareness but also symmetry of market - situation. Firstly, they might either not be using the product at all or might be using the product of the competitors. And only after seeing the advertisement have switched over to the company's product. E.g. Humorous advertising is a way to convert the non-users of the product into users of the product. Similarly, some additional features have been incorporated in the product, which are not present in the competitor's products, etc. Secondly, nowadays the customers are not of 'closed mind' with a brand loyalty. They are more open minded to receive information. Moreover, advertising also

Ramaswamy V S and Namakumari S, *op. cit.,* p.310.

reaches the customers continuously. Hence, it is the most effective means of communicating continuously to attract the new customers.

2. METHODOLOGY

The primary data was collected through survey method. Hundred respondents were taken; fifty male respondents and fifty female respondents. Each question was judged by the respondents on a scale of one to five. Strongly disagree, disagree, neutral, agree and strongly disagree were weighed as one two three, four and five respectively. The analysis will be done by using statistical tools like correlation and regression analysis. Age Group is taken as an independent variable while creating awareness, reminding the consumers about the existing product, promoting the new product, retaining product leadership, repositioning the product and developing prospective buyers are taken as dependent variables. The aim of the article is to identify the importance of advertising with respect to increase in age. Thereby, enabling the marketers to project the right advertisement for the right age group.

According to L.R. Conner, "If two or more quantities vary in sympathy so that movements in one tend to be accompanied by corresponding movements in the other(s), then they are said to be correlated,"[21] i.e. if two quantities vary in such a way that movements in one are accompanied by movements in the other, these quantities are correlated. The degree of relationship between the variables under consideration is measured through the correlation analysis. The measure of correlation is called as correlation coefficient or correlation index. It summarizes in one figure the direction and degree of correlation. Thus, correlation is a statistical device, which helps us in analyzing the co variation of two or more variables. The computation concerning the degree of closeness is based on the regression equation. The study of correlation is of immense use because:[22]

[21] Gupta S.P., *Statistical Methods* (Sultan Chand & Sons, New Delhi, 2002), p.378.
[22] Gupta S.P.,o/7.cu. p.379.

1. Most of the variables show some kind of relationship. E.g. there is a relationship between price and supply etc. With the help of correlation analysis, we can measure in one figure the degree of relationship existing between the variables.

2. Once we know the two variables are closely related, we can estimate the value of one variable given the value of another.

Whether correlation is positive (direct) or negative (inverse), would depend upon the direction of change of the variables. If both the variables are varying in the same direction i.e. if one is increasing, the other on an average is also increasing. Similarly, if one variable is decreasing, the other, on an average is also decreasing. Such a correlation is said to be a positive correlation. On the other hand, if the two variables are varying in opposite directions, i.e. if one variable is increasing, the other is decreasing or vice-versa, then the correlation is said to be negative.[23]

Regression analysis on the other hand is the measure of the average relationship between two or more variables in terms of the original units of the data. According to Ya-Lun Chou, "Regression analysis attempts to establish the 'nature of the relationship' between variables- that is, to study the functional relationship between the variables and thereby provide' a mechanism for prediction, or forecasting."[24]

Regression analysis provides estimates of values of the dependent variable from values of the independent variable. The device used to accomplish this estimation procedure is the regression line. The regression line describes the average relationship existing between X and Y variables, i.e., it displays mean values of x for given values of Y. The equation of this line, known as the regression equation, provides

Ibid, p. 3S1.
Ibid.,pA36.

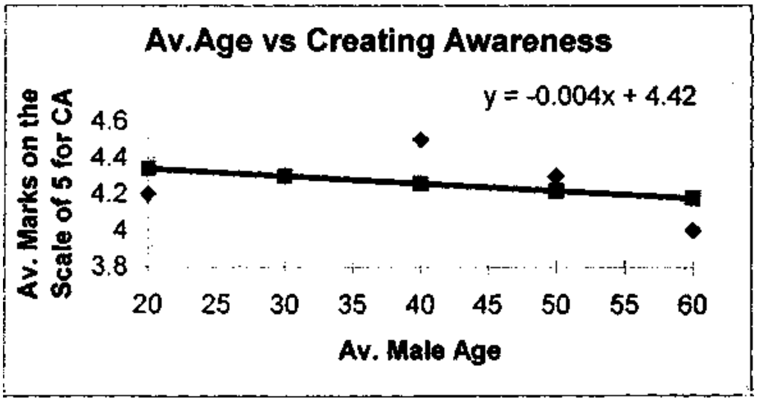
estimates of the dependent variable when values of the independent variable are inserted into the equation. •ye

3. THE FINDINGS AND INTERPRETATION

3. 1. Advertising Creates Awareness:
Males:

Age Group	Creating Awareness	
20	4.2	
30	4.3	
40	4.5	
50	4.3	-0.34816
60	4	

Correlation Analysis



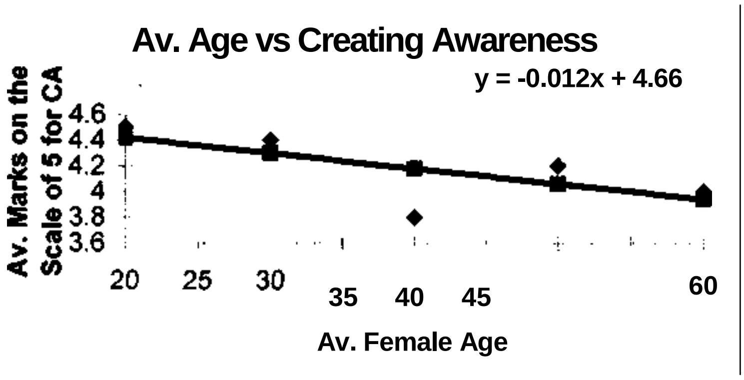
Regression Analysis
CA= Creating Analysis

Ibid.,pA37.

Females:

Age Group	Creating Awareness	
20	4.5	
30	4.4	
40	3.8	
50	4.2	
60	4	**-0.66259**

Correlation Analysis



Regression Analysis
CA = Creating Awareness

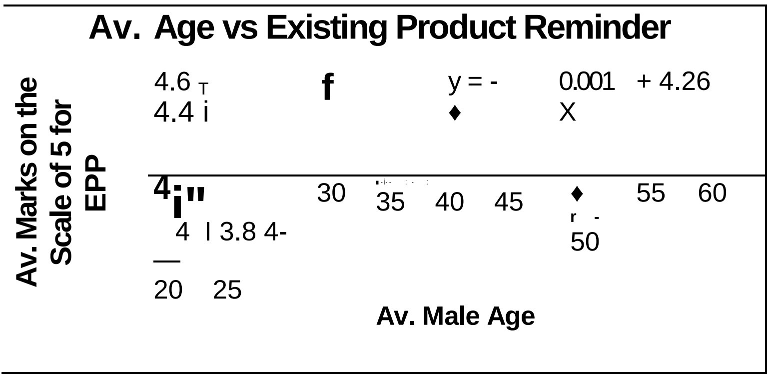
As seen from the figure, advertising creates more awareness amongst the younger generation. As the age increases, the degree of creating awareness decreases. This is true with both males and females. This is because of the fact that firstly, the exposure of the younger generation is less to the world as compared to the older generation and therefore there is a greater degree of enthusiasm in them to know more and more. Moreover, their self-concepts tend to be unstable, so their mind is far more flexible in gathering product information. Secondly, as compared to the older generation having the basic necessities already with them, the younger generation has to start their career away from their home. So they have to make important decisions about setting up households by purchasing all the basic necessities of life like furniture, household equipments, car} etc. This would require a greater knowledge about th availability of products in the market and advertising is very good tool for creating awareness. This is furthe supported by the fact that people have many things i common with others merely because they are about th same age. Consumers who grew up at the same time shar many cultural memories and belong to the same ag cohort[26][27]

3.2 Advertising Reminds The Consumer About The Existing Product:

Males:

Age Group	Reminding about existing product	
20	4.1	
30	4.3	
40	4.5	
50	4	
60	4.2	-0.08

Correlation Analysis



Regression Analysis
EPP = Existing Product Reminder

[26] Age Cohort can be defined as a group of people of similar ages who have undergone similar experiences. As cited in http://classes.uleth.ca/200203/mgt3210y/Age%20subculture.ppt, 06.02.2004.

[27] Http://cwx.prenhall.com/bookbind/pubbooks/solomon_ca/chapterl5/deluxe.html, 05.02.2004.

Females:

Age group	Reminding about existing product	
20	4.2	
30	4.6	
40	4.5	
50	4.1	
60	4.3	-0.22875

Correlation Analysis

Av. Age vs Existing Product Reminder

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£ 20 25 30 35 40 45 50 55 60

Av. Female age

Regression Analysis
EPP = Existing Product Reminder

The analysis shows that there is a negative correlation between increasing age and reminding the consumer about the existing product. Advertising reminds the younger generation about the existing product more than the older generation. This is because the younger generation is very busy with their day-to-day activities like job responsibility, family responsibility, stabilizing their career, etc. Therefore, they tend to forget the availability of the substitute products in the market in their busy schedule. Here, advertising plays a very important role in reminding the consumers about the existing product. More so, the young, unmarried people usually have few financial burdens and have a good discretionary income for spending. The same goes for the young married people without children. In the case of people in the higher age group, advertising has a lesser degree of impact on reminding them about the existing product. This is because they are very much settled in their life and are satisfied with what they possess. The degree of family responsibility also increases as the working people lay more emphasis on the education of their children and settling them. Even with retired people, they are more interested in the activities of their grandchildren and in other social activities that they seem little interested in the availability of products in the market. Therefore, we can say that the human beings, at different stages of their life cycle will behave differently towards the product. This concept is called as life cycle psychology^[8] and advertisers have to be careful about it while preparing an advertisement.

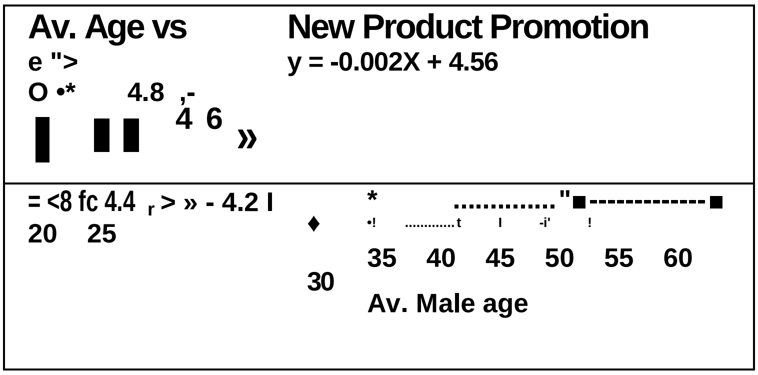
3.3 Advertising Promotes the new Product:

Males:

Age Group	Promotes New Product	
20	4.7	
30	4.3	
40	4.4	
50	4.5	
60	4.5	-0.2132

Correlation Analysis

[28] Life cycle psychology is a branch of psychology that tries to relate the place where an individual is in course of his/her life with the kind of issues that the person is facing and with the kind of resources s/he will have available to face those issues. And, eventually, the kind of disturbance s/he could develop in case s/he fails to cope successfully with those issues. As cited in http://web4health.info/en/answers/life-cycles.htm, 05.02.2004.

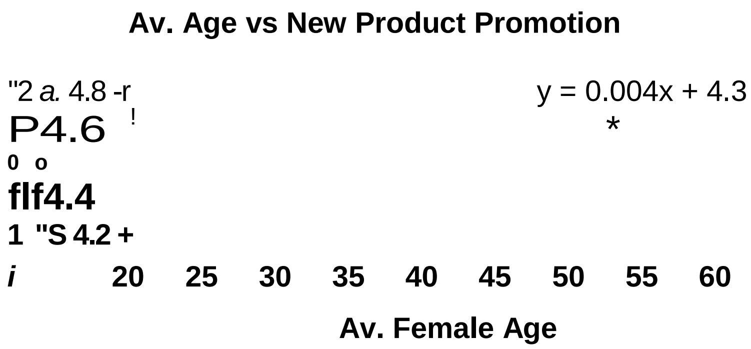


Regression Analysis
NPP = New Product Promotion

Females:

Age Group	Promotes New Product	
20	4.4	
30	4.3	
40	4.5	
50	4.7	
60	4.4	0.417029

Correlation Analysis



Regression Analysis
NPP = New Product Promotion

There has been a contradictory finding in this context among the males and females. The regression analysis shows that as the age increases, the degree of promoting the new product through advertising decreases in males. And it also shows that as the age increases, the degree of promoting the new product through advertising increases in females.

Males: The older people are absorbed in their duties (job work), as the person at higher post will require having more responsibilities. He doesn't have the time for new product news in case of convenience goods[29] and shopping goods . Specialty goods[31] might have a consideration but they are purchased rarely. On the other hand, if the person is retired, he has a fixed pension, which could not be spent on shopping goods or specialty goods. He doesn't feel the need to change the existing products available in the home. Instead, he would want to keep the money secure with him

Convenience goods can be defined as those products, which the consumers would like to purchase with the least possible effort. These products are purchased frequently and their unit price is low. This is because there is a recurring need of these items and the consumer would desire to get it at an easily accessible place. There is not much of a planning behind this kind of a purchase. E.g. toothpaste, biscuits, chocolates, etc., opinion cited in Consumer Buying Behaviour, Study Material in Marketing Management, Narsee Monjee Institute of Management Studies, Mumbai, 2000,0^25.

[30] Shopping goods can be defined as those goods, which are not purchased so frequently. E.g. furniture, electrical appliances, etc. There is an element of planning behind the purchase. The buyer is ready to make one or two shopping trips to buy these items since these purchases involve considerable expenditure. The customer would certainly like to compare the prices, quality, patterns, etc., in a number of stores before finalizing the purchase. Opinion cited in Consumer Buying Behaviour, Study Material in Marketing Management, Narsee Monjee Institute of Management Studies, Mumbai, 2000, p.25.

[31] Specialty goods can be defined as the high priced goods, e.g. luxury cars, premium watches, ornaments, etc. These purchases involve substantial investments and the periodicity of purchase is less frequent than that of shopping goods. Specialty goods are not purchased out of instant decisions. The various aspects of the purchase - the cost perspective, the utility consideration, the prestige value, the alternatives available, the experience of others who have purchased the product - are analyzed before reaching on to the purchase decision. . Opinion cited in Consumer Buying Behaviour, Study Material in Marketing Management, Narsee Monjee Institute of Management Studies, Mumbai, 2000, p.25.

for medication or for making the life secure. But the younger generation, especially teens, earns money but have few financial obligations. Therefore, we can say that the behavior of the consumers at different stages of their life varies with respect to values and attitudes, consumption pattern and media behavior.

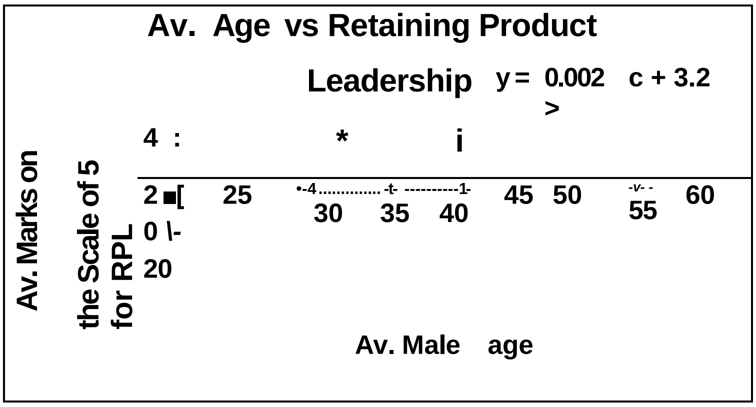
Females: On the other hand, degree of new product promotion through advertising increases with the increase in the age of women. This is because mostly the items used in the house are being operated or used by women. They are constantly on the lookout for a product, which gives them maximum comfort. Secondly, if they are working women or retired, they have the money behind them to satisfy their urge. Similarly, even if they are not working women, they pursue their husband to purchase the product for them. This is because as they watch the television much more than their male counterpart, they have the ability as well as the time to decipher about the quality as well as better usage of the product from a variety of products. The children also will go to their mothers to buy new things. More so, the grandmothers are much more accessible than the mothers.

3.3 Advertising Retains Product Leadership:

Males:

Age Group	Retains Product Leadership	
20	3	
30	3.4	
40	3.6	
50	3.2	
60	3.2	0.138675

Correlation Analysis

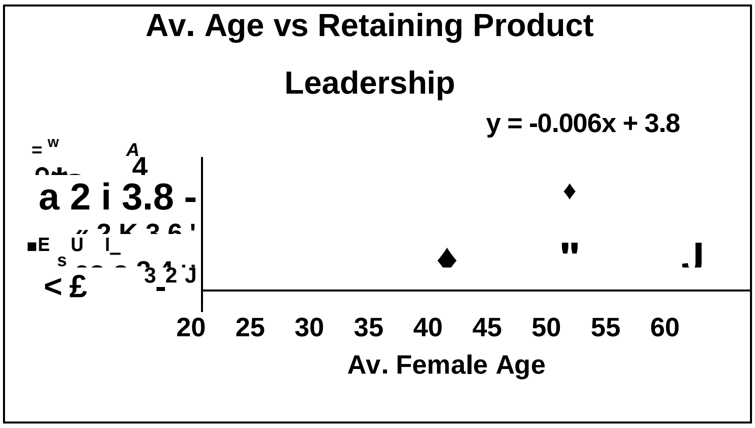


Regression Analysis
RPL = Retaining Product Leadership

Females:

Age Group	Retains Product Leadership	
20	3.7	
30	3.6	
40	3.4	
50	3.8	
60	3.3	-0.4575

Correlation Analysis



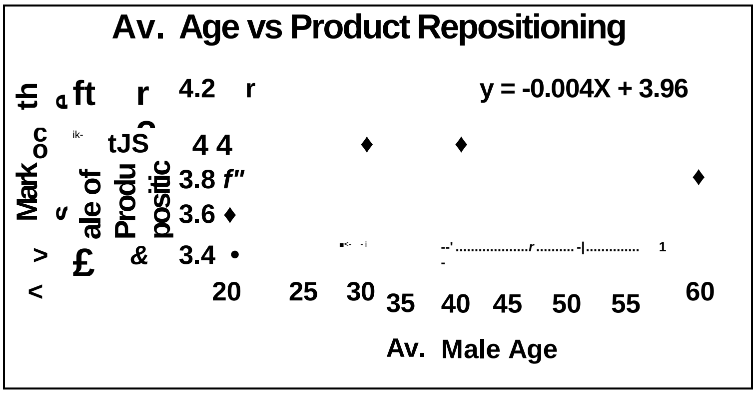
Regression Analysis
RPL = Retaining Product Leadership

Advertising reassures people that they have made the right buy. The correlation analysis tells us that there is a positive correlation between increasing age and retaining product leadership through advertising in males, i.e. with the increase in age, the degree of retaining product leadership through advertising increases in males. Young minds tend to deviate more and search for more alternatives in relation to the old people. As mentioned earlier, males have a lesser tendency to watch advertisements than females. They are much more comfortable with whatever they have as far as investments for products are concerned. Therefore, there is a greater probability of retaining the same products because of satisfaction. But on the other hand, a negative correlation exists between increasing age of females and retaining product leadership through advertising. The regression analysis also shows that as the age of the female increases, there is a decline in retaining product leadership through advertising. The females are more prone to watch advertisements on television, as they are inseparable part of the serials, which the females watch. So, the females are bombarded with lots of advertisements about different products and they are compelled to see them because of their lust for serials. Here they come to know about the other substitute products. As the age increases, their say in the household matters also increases, purchasing capacity (working women or housewife) increases and they would want the best for their family.

3.4 Advertising Repositions Product:

Males:

Age Group	Repositions Product	*Correlation Analysis*
20	3.6	
30	4.1	
40	4	
50	3.7	
60	3.6	-0.26968

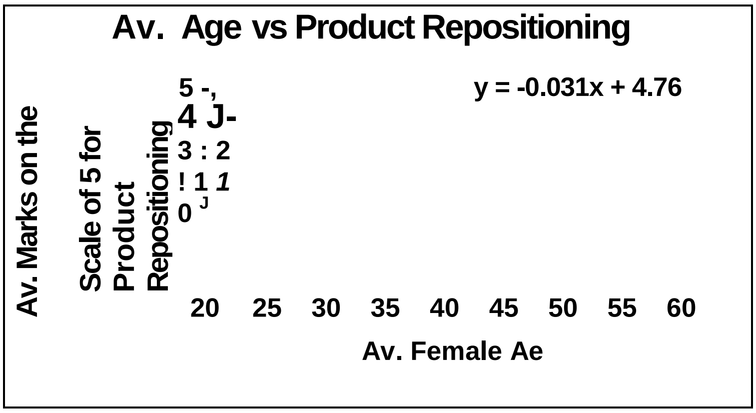


Regression Analysis

Females:

Age Group	Repositions Product	
20 '	3.9	
30	4.1	
40	3.6	
50	3.2	
60	2.8	-0.9313

Correlation Analysis



Regression Analysis

With the increase in age, the tendency to perceive the product in a different way becomes difficult. This is the reason why with the increase in age, the degree of repositioning the product decreases in males as well as females. As a person becomes older, his perception[32] of a thing over a longer period of time cannot be changed in a minute's time. The way they have perceived a product has an everlasting impression on their mind. So, it is difficult to change the prevailing image in their mind. Danigelis and Cutlers view that people become increasingly conservative with increasing age[33] support this. Furthermore, Visser and Krosnick are of the view that people become increasingly rigid in their attitude with increasing age[34]. Therefore, it is easier for the marketer to shift the person towards a substitute or rival product, but changing the perception about the same product is somewhat difficult (though not impossible) at such an age.

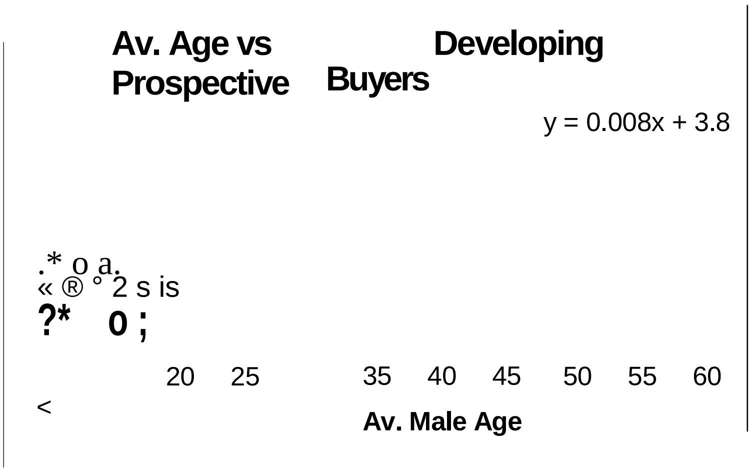
3.5 Advertising Develops Prospective Buyers:

Males:

Age Group	Develops prospective Buyers	
20	3.6	
30	4.3	
40	4.5	
50	4.1	
.60	4.1	0.377964

Correlation Analysis

[32] Perception is the process of selecting, organizing and interpreting or attaching meaning to events happening in environment, as cited in Nair, Suja R, *Consumer Behaviour in Indian perspective,* (1st edn. Himalaya Publishing House, New Delhi, 2001), p.39.
[33] http://www.psych.utah.edu/psvh3230/lectures/attitudes.pdf, 06.02.2004
[34] *Ibid,* 06.02.2004

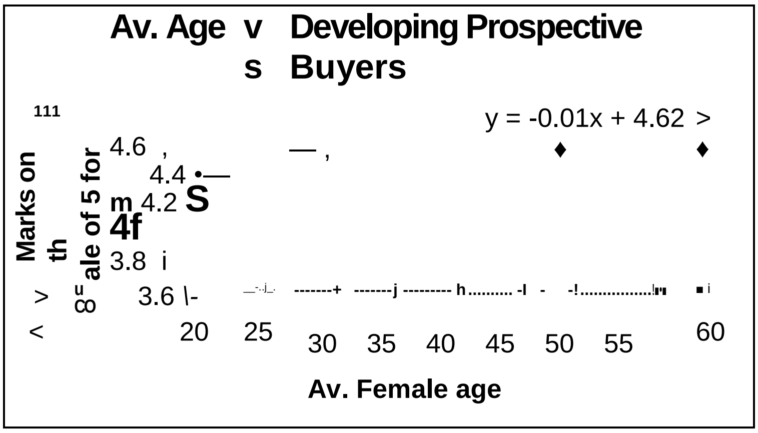


Regression Analysis
DPB = Developing Prospective Buyers

Females:

Age group	Develops Prospective Buyers	
20	4.4	
30	4.2	
40	4.3	
50	4.4	
60	3.8	-0.635

Correlation Analysis



Regression Analysis
DPB -Developing Prospective Buyers

As far as the rival and substitute products are concerned, the analysis regarding advertising promoting the new product and advertising retaining product leadership stands. But when a new product is introduced in the market, which is not competing with the existing products, then there is a slight change in the statistics. When such a product is introduced in the market, it has altogether different implications. Males are more prone to trying out new things than females. They have an experiential shopping motivations[35] i.e. trying out new products, tasting, a feel of the new store atmosphere and getting attracted by demonstrations. Females will buy only those things, which are of utility value to them. A new product, which might be attractive but not having a utility value, will not be purchased by females but will be purchased by males. Dr. Maggie Geuens explains this phenomenon by stating that the women have web - thinking and males have funnel thinking.[36] This is the reason that with the increase in age, there is a greater degree of developing prospective buyers through advertising amongst males and lesser degree of developing prospective buyers through advertising amongst females. 4. CONCLUSION

In order to facilitate the right kind of advertisement for the right age group of the audience, the study suggests that the marketers should know that the impact of advertising is more on the younger generation than the older generation. The housewives or the working/retired women then follow it. Further more, it is suggested that the tendency to shift from the existing product to another product is more in the younger generation and females. But in case of males, this tendency diminishes as the age increases. Thirdly, advertisement for repositioning of the product is difficult to succeed in case of older generation than the younger generation as normally, they are rigid in their attitudes and it is very difficult to change them. All these things would enable the marketer to prepare the right kind of advertisement for the right age group.

fetew.ugent.be/MarEco/Site_NL/vakken/maggieH3 .pdf, 08.02.2004.
Ibid, 08.02.2004.

REINFORCING DISASTER MITIGATION BY FORTIFYING HUMAN SECURITY: A LIVELIHOODS APPROACH*

Prabhir Vishnu

1. INTRODUCTION

A nation's growth is dependent on its human security. Its stock (healthy well-nourished and productive people with adequal availability of food, supply of water and provision of safe shelter; defines the nation's human security. India has shown tremendou growth in human security in the past two decades with massiv strides being taken in reduction of poverty. -These strides an characterized by increased literacy and improved fooc consumption and access to health services. Spurred by ar accelerated growth of economic capital, more and more people are experiencing the benefits that the present has to offer. This economic progress was made possible in spite of the series of disasters, minor and major, man-made and natural that has struck the country in the past decade.

Gujarat is an example of how one of the most disaster prone pockets in the sub-continent can also be one of the most productive and quickly urbanizing regions of India, and grows at a steady and fast rate and contributes significantly to the growth of the nation. Continuous occurrence of disasters (1998 Kandia Cyclone, 2000 Ahmedabad Floods, 2001 Bhuj earthquake, continuous droughts

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* Disaster Mitigation Institute, Ahmedabad.

etc) in spite of its devastating impacts has not impeded the growth of the state.

Society is composed of small units that join to form complex network. The smallest unit of a society is an individual. Individuals combine to form a household. Households combine to form a community and so on. Every single unit has minimum requirements of food, water and shelter that has to be satisfied for a productive life. It has a limited number of stomachs to be fed, need for water and bodies to shelter. Whenever the food, water and shelter available reduces to less than what is required for the unit its existence becomes difficult. The productivity of the unit suffers. At every level the unit resorts to methods for managing this shortfall and inadequacy. These coping mechanisms more often than not entail erosion of assets and ruin of economic, social and human capital. These steps meet short-term needs at the expense of a long-term security. These self-debilitating techniques are not initiated by choice but by the lack of it. One group that is living with near complete lack of choice is slum dwellers in India's fast growing urban pockets.

The security and development within country has been, until now, unequal with a significant number of under-represented sections being excluded from the benefits, like the slum dwellers in Bhuj. Gujarat's rural poor come to its cities from villages in search of work. With the soaring land prices rendering them unable to provide for themselves a decent shelter, they are driven into hazard prone areas to form slums. Estimates of 1996 shows that 18.1 percent of the urban population in Gujarat lived in slums. They live in dismal surroundings and unhygienic conditions to earn their livelihood. The influx of immigrants creates excessive strains on an already stretched urban infrastructure. The physical environment and. social conditions of the slums steadily deteriorate, and so does their quality of life.

In urban areas, everyone has to buy food, as opposed to a rural setting where one can cultivate crops for subsistence. The water and power supply to slums is mostly illegal which means they have to pay more than others. The illegal status of their settlements forces them to live with a constant fear of eviction. In normal times their livelihoods are under constant threat, their daily food intake is in an imbalance, they have limited access to safe water and face the threat of eviction from their homes.

What happens to the livelihoods of the urban poor when a disaster strikes? Their economic and social conditions render them defenseless from the onslaught of disasters and their sustained after effects. Source, support and sustenance of their work are affected adversely. They suffer loss of income and assets. Handcarts, sewing machines and wheelbarrows are damaged and buried under fallen roofs and walls. Shelters, which double as workplaces for the poor, are destroyed. Economic links are damaged and local markets are destroyed. Worse, in the relief process their long-term needs are ignored. These sections were not able to withstand the impacts of disasters or recover like the better-endowed sections of the society. More often than not, without outside support this section of victims is unable to regenerate their livelihoods to secure their lives again.

Work, which provides income, is the life providing oxygen to the urban poor. They have come to cities to work and earn. Work feeds them. Work keeps them clean and quenches their thirst. Work provides them with a roof. Work brings them security for the future. Their need for outside help for food, water and shelter, though important, is limited to the short term. They also know better than relief agencies that no help can continue forever. This 'sustainability of help' is what regeneration and protection of livelihoods can offer to disaster-affected and disaster-prone urban poor.

2. Disaster Mitigation Institute and Human security

Disaster Mitigation Institute (DMI) is a community based action research, action planning and action advocacy organization that bridges the gap between policy, practice, and research from the community to the national level. Established after the 1987-89 repeat droughts in Gujarat, it has four programs: livelihood security; food security; shelter security; and water security. Its activities are organized around its activity centers: Livelihood Relief Fund (LRF); Emergency Food Security Network (EFSN); Water Security Program (WSP); Emergency Health Unit (EHU); Organizational Resources (OR); Learning Resources (LR) and Action Research and Review Services (ARRS). DMI's mission is to reduce the vulnerability of poor communities by increasing mitigation efforts through learning and action.

DMI's LRF was created as an activity center after the cyclone that hit the western port of Kandla situated on the western coast of Gujarat in June 1998. Since then, LRF has grown steadily to reach out to victims of the Kandla Cyclone, 2000 drought, Bhuj earthquake in 2001 and the communal riots that rocked Ahmedabad in 2002. It has given livelihood support to more than 9500 victims of the earthquake in the three districts of Kutch, Patan and Surendranagar in Gujarat.

LRF in partnership with international aid agencies such as American Jewish World Service (AJWS), Action Aid and European Union (EU) has reached out to the disaster victims and worked for providing them long-term needs. In Bhuj, LRF focused its attention in slums that were ignored even a year after the earthquake and in-spite of abundance of relief material.

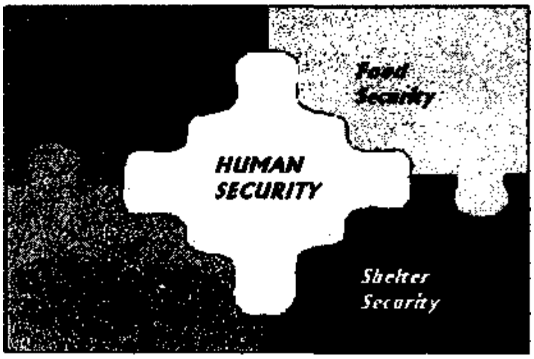


Fig (i):DMI's model

DMI accepts the wisdom that disasters are no longer a temporary dip in the development graph but a threat to the process itself. For mitigating disasters, DMI has four critical human security programs: livelihood security; food security; shelter security, and water security. DMI's conceptual model of human security is shown in the Fig (1).

Livelihood security is consciously placed in a prominent position, as it is linked to food, shelter and water security. This model has come out of DMI's ongoing experience with regenerating livelihoods of the urban poor victims of floods, droughts, earthquakes and so on. Beneficiaries of LRF and their families are consuming more and nutritious food. They are ready and capable of investing in disaster-proofing their shelters. They can buy enough water for their daily needs. In short, they are sure of a secure future. Livelihood security, DMI has seen, is the hub around which human security of the urban poor revolves. LRF is the primary factor that links and aids DMI in achieving human security for the urban poor.

3. Livelihood Risk Reduction: The links

Within days of the earthquake that struck Bhuj on January 26, 2001, a DMI team arrived in Bhuj. After the initial days, DMI realized that there was no shortage of relief material or rescue teams. For following months the DMI team focused on coordination of relief work to aid efficient distribution of the abundant relief supplies and manpower.

A year after the earthquake, in the course of organizing a community rating of the relief performance of Disaster Emergency Committee (DEC) agencies after the earthquake, it was revealed to DMI that thousands of people in the slums, involved mainly in the unorganized sector, were ignored. In spite of being the most vulnerable and needy, their needs were not taken care of due to the illegal status of their homes. This was instrumental in an increase in involvement of DMI in Bhuj. With the objective of reaching out to this large section of the affected and neglected slum communities in Bhuj, Bhuj Reconstruction Project (BRP) was set up in January 2002. BRP works in 18 slums in Bhuj which are home to around 32,-O00 people.

The findings provided in this paper are results of a research study on the slum-dwellers in Bhuj, supported by the Prevention Consortium through one of its Applied Research Grant scheme focusing on disaster risk reduction in South Asia. The Asian

Disaster Preparedness Center (ADPC), Bangkok the nodal agency in the region provided constructive support and technical inputs to the process.

The approach was both quantitative and qualitative, and the interest is to make generalizations concerning the whole group of slum-dwellers in Bhuj. The initial list of issues was prioritized in consultation with members of the community. After the entire questionnaire was designed, the slum-dwellers were again consulted and their inputs incorporated. A team of slum-dwellers also conducted the actual survey. A set of case studies provided the qualitative perspective to the findings.

The livelihoods in Bhuj can be classified into four different groups: small businessmen, small-scale vendors, laborers and home-based workers. Several different professions can be categorized under these sections. Among this sample, stratified sampling was done according to the type of livelihood and gender.

A partial list is given below:

Small businessmen: pan shop, tea stall, garage, barbershop, etc.
Small-scale vendors: vegetable hand lorry, chocolate and biscuit selling, etc.
Home-based workers: stitching work, embroidery, milk producing, cowherds, etc
Laborers: masonry, carpentry, scrap collection, etc

The results of the study have unearthed useful findings of significance, linking protection of livelihood as a prime mover for achieving security for their future. They perceive provision of food, water and shelter as a source of protection and support of their income earning activity. Better food meant better nourishment that reflected in their productivity. Regularity and proximity of supply of good water meant less time spent on fetching it from a distance or waiting for it. This means more time for work. Safer shelter meant safer place to work, safer place for keeping raw materials and safety of their families when they are away.

How can livelihoods of urban poor, that provide the maximum perception of security to them, be protected? The study unearthed three crucial aspects that influence recovery of livelihoods of the urban poor in Bhuj after a disaster. These aspects if protected or augmented should lead to an efficient shielding of their livelihoods. The data is fresh and the perspective provided is from the community and inside out. These are:

1. Human capital and livelihood recovery is linked
2. Need based relief is linked to faster recovery.
3. Women recover faster.

3.1 Human capital and livelihood recovery is linked:

One of the keys to reducing risks to livelihoods of the poor is to build the skills and capacities. There is a marked difference in recovery patterns of the literate and illiterate among the slum dwellers. The average income of the illiterates has shrunk from Rs 1789 before the disaster to Rs 1377 after. On the other hand, there is insignificant difference in average income of the literate. The average income is almost same (Rs 1605 before to Rs 1600 after).

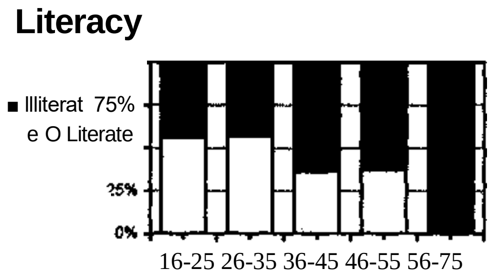
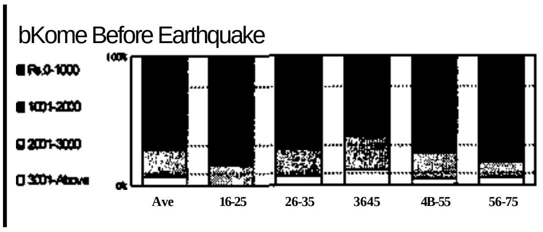


Fig (2) literacy across age groups

Another interesting finding that supports this strategy is the recovery across age groups. The younger groups also had majority of the literates from the sample. The respondents were divided into five age groups as 16-25, 26-35, 36-45,46-55 and 56-75. Here, the recovery of the younger two groups was better than the other three groups.

Age/Income:		
16-25:	Rs.	1319
26-35:	Rs.	1710
36-45:	Rs.	2075
46-55:	Rs.	1632
56-75:	Rs.	1364



Age/Income:		
16-25:	Rs.	1563
26-35:	Rs.	1639
36-45:	Rs.	1542
46-55:	Rs.	1313
56-75:	Rs.	1119

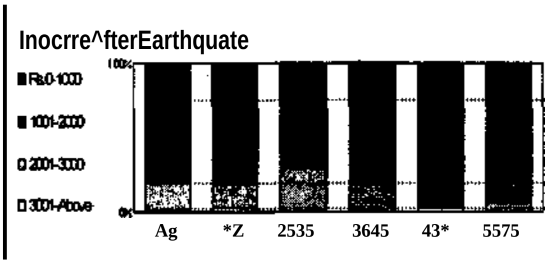


Fig (3) Recovery across age groups

This is evidence of the significant role that literacy plays in recovery after disasters. What is even more striking is that even in the poorest category of the society, literacy (not only in school going terms) helps in making the right decisions, understanding markets, awareness of rights, etc. The literate are able to better link up with the changing and emerging market and align their livelihoods to benefit from it. The illiterate are not able to do so.

The educational level of the slum dwellers is quite low. Less than 35 per cent of the sample had gained some level of education. Out of these, barely 26 percent had completed the primary school, 8 percent the secondary school, less than 2 percent entered the high secondary school. A majority of them does not pursue education due to lack of resources and the need to earn to live.

3.2 A need-based relief is linked to faster recovery:

In Sanskrit, there is a saying: *'Bhinna Ruchir Lokah'.* This means different people have different tastes. Different people have different needs. In a society as diverse as that in India, it would be insensitive and inappropriate to straightjacket all relief work. The economic status of the slum dwellers in Bhuj was not uniform to maintain a common approach to relief and rehabilitation. The damage too was of different intensities. In addition, the population of the slums was composed of composite groups that included Banias, Patels, Lohanas, Rajputs, Brahmins, SC/ST, Muslims, Ahirs, Jains and migratory people. Each group had customs specific to the traditions and the demands of the people also varied correspondingly. The extent of damage also varies from person tc person.

Though there has been a surplus of livelihood support provided after the disaster there is still scope for improvement in linking relief with needs. Most respondents felt that there is an increase ir competition and reduction in demand (fig (4)) is due to the indiscriminate relief supplies that flooded the city. A large numbei of hand carts are distributed in a small area, sewing machines are given to five people in a single lane. The average customers per daj when calculated per day when calculated from the responses hac shrunk from 15 per day to around 10 per day.

There is a crucial link with market, age and literacy. Of the respondents in the more literate 26 to 35 age groups, more than 6f percent said that there was adequate market demand. However, ir the 56 to 75 age groups, only 31.2 percent thought that the demanc for in their trade was adequate.

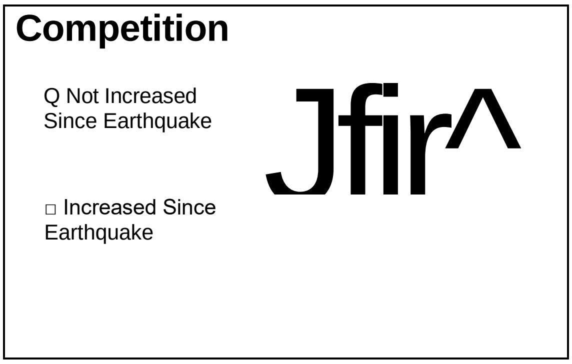


Fig (4) Increase in competition

To obviate thii duplication and *i* need-supply mis match, LRF ensure; that all relief is need based and tailor made. Thus, there i: no standard relie: package. beneficiaries demanc *s me base. Cnteru for relief provision However, it is balanced by their demonstrated interest and capacity to use that relief for recovery and further development of th<

affected. Therefore, the beneficiary becomes as much as a partner in recovery as an outside intervening agency.

Each beneficiary is given personal attention and his needs and aspirations are considered separately. The beneficiary is given what he or she asks for. The volunteers of the area regularly meet the beneficiaries and ensure that they are using the material appropriately. This is not policing but an informal support mechanism.

3.3 Women recover better:

The study showed startling numbers with the average income of women to have increased post disaster. The number of women who earned nothing is less now than before and this section has contributed to the increase in average income.

The average- income of women had increased from Rs 1202 before the earthquake to Rs 1221 after, while the corresponding incomes of men had reduced from Rs 1976 to Rs 1674.

A related finding here is the increase in average income of the home-based category compared to small vendors, small businesses and laborers. This is again due to the movement of women, who constituted a majority of home-based workers (73.2 percent) from the zero-income category to the next highest slab. Another implication here is that the livelihoods that require less capital have recovered better compared to others.

The women in the slums in Bhuj told that multiple job profiles make it extremely difficult for them to earn. When the work is combined with household and child-care, the time left for their income earning activities is reduced. However, usually it is the household work and the child-care practices that suffer. Women also earn less than men. Though this is partly due to their lack of awareness, lack of assets, lower level of education and training and lack of credit is a major hindrance to their ability to earn. The women find it most difficult to restart income and earnings.

However, they do better than men if given the chance.

The income generation activities of the women are generally spatially restricted at or to the locations near the place of residence. The study showed that there is a significant impact of the earthquake on the location of their work (Fig (5)). Twenty percent more women now have to work outside their community as compared to, before the earthquake.

This has affected the women in many ways. Earlier they lived close to their source of employment and customers (within the Walled City)[1].

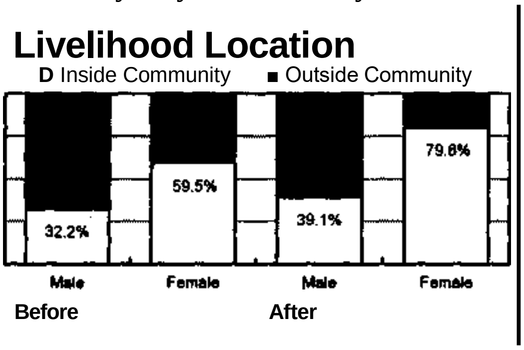


Fig (5) Change in work location

The location and quality of land allocated to the poor community thus affects women as much as, if not more, than men. In the course of the study, most women said that they wish to have home-based work. They wish to remain closer to their work and home both. Relocation to places that are more distant from their former places of work may make working for wages or money uneconomical for women.

4. EXISTING VULNERABILITY OF THE POOR IS COMPOUNDED BY DISASTERS

Existing vulnerability of the poor is compounded by disasters. Among the respondents, more than 80 percent of the respondents felt that they were not able to invest in any saving mechanism.This number

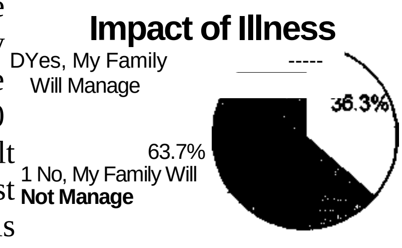


Fig (6) Vulnerability intact

[1] The central area in the city that has the maximum market activity, and was also badly destroyed

has increased to 85 percent with the laborers showing no capacity to save. The average saving amount also has reduced from Rs 519.2 to Rs 203.5 per month.

Not surprisingly, more than 87 percent said that their extra costs were not covered. One of the most important questions that asked them if their family would survive if he/she fell ill. An overwhelming number, 63 percent, replied in negative. Refer fig (6).

5 FORTIFYING HUMAN SECURITY: THE LIVELIHOOD APPROACH

Poverty, defined in simple terms, is a deficiency of lack of security, which includes livelihood, food, water and shelter security. Disasters regularly attack the security or asset base of the poor and increase its rate of erosion. The poorer households in urban areas are affected more as their security is not protected or fortified even before the disaster. Without protection, their security and assets repeatedly gets erased and discarded when a disaster strikes, consequently, weakening their human security.

Livelihood is the crucial link to creation of human security and livelihood risk reduction is a definite way to protect it from the onslaught of disasters. If livelihoods are stabilized then the security of individuals will be better fortified from future disasters. Even before the earthquake, their livelihoods are under constant threat, daily food intake is in an imbalance, and they have limited access to health facilities and safe water. Post disaster recovery in Bhuj showed clear differences in recovery patterns with those with protected livelihoods clearly at an advantage. (Shown in the graph below)

Recovery with protected livelihoods

^Recovery lacking protected livelihoods

Thus, livelihood risk is a major concern for those who promote human security. Security, whether food, water or shelter are interlinked with livelihoods. Investment in reducing risks to livelihoods will deliver benefits on the other three. Better livelihood opportunities reflect on the type of food that is bought. In many slums of Bhuj, drinking water is bought. Municipal supplies are non-existent due to the illegal nature of the tenure. The poor are known to take rational decisions in the face of disasters. They are ready to invest in disaster-proofing techniques that will make their houses safer. However, every step they take towards security is hinged on their income.

This study has provided an in-depth knowledge of the livelihood recovery of slum dwellers in 14 earthquake affected slums in Bhuj. The scope and the range of areas covered by this study included the study of different influences of a wide range of factors that come into existence in post disaster scenario. These include a combination of micro factors and impacts that jointly affects the human security of the disaster prone urban slums. On the basis of what goes wrong, action steps can effectively protect livelihoods from disaster risks, and simultaneously speed up recovery has been formulated.

1. Literacy is a crucial link between poverty and disaster risk reduction. When people in a community have the freedom to develop and the capacity to grow in the direction they chose then we say that the society is empowered. The awareness of rights and the confidence in their ability to manage crisis in their stride is the greatest contribution that literacy can provide to poor people affected by sudden disruptions to their lives. Programs for skill and versatility development must be developed for those whose occupations and livelihoods remain unprotected, uncompensated and vulnerable in low-income areas of cities. Spread of education across low-income and at risk population can reduce recovery time and efforts. The demographic profile, geography and diversity >of the people demand a need based capital building.

2. When livelihood tools are given, market links should not be missed out. When incomes are generated, sustainability beyond

project life should be thought of. When livelihood needs are supported, the measures should be down-top, inside out, sustainable, with links to the market, timely and in suitable scale. Impact of relief on local markets of the poor among the victims has to be better understood. Relief and rehabilitation should not strain the local livelihoods.

3. Fortification of human security has to be undertaken in consultation, communication and co-operation between the different micro and macro agencies, in the process expanding partnerships and synergy for effective and efficient implementation. There is a need to develop a symbiotic relationship between the community and outside actors. The target community should be the agents of preparedness and focal points of information dissemination to the community. Once this is achieved, the community feels sense of ownership of the process, which helps the two partners (community and the intervening agency) to maintain a direct and transparent relationship.

4. Relief, gender issues and development have to be linked. Access to low interest credit and insurance to women can raise their asset base and improve their coping mechanisms in the short and long term. Increase in livelihood opportunities with matching access to infrastructural resources for the women in urban slums must be a priority. Special work and business areas for the poor women must be developed now within the framework of the town-plan for reconstruction of Bhuj.

5. Any relief that reaches cities should reach slums. Rehabilitation and mitigation that reaches towns should include low income-habitats. Relief agencies should take effort to find out what the beneficiaries wants and take account of their skills prior to any disaster and support and augment them accordingly. It would be unjust and unnecessary to give less or more.

Donors need to (a) to augment the benefits of their existing institutional investments such as LRF; (b) support up-scaling and wide-scaling the reach and impact of their investments; and (c) support experimental activities through venture funds. There are many reasons in favour of an initiative like LRF to be capitalized. It has achieved much in terms of smooth recovery of poor livelihoods and protecting them from future disasters. LRF has a strong database of urban livelihoods and developed indicators that govern their recovery and sustainability in the face of disasters. The LRF process is institutionalized and ready for replication elsewhere.

5 CONCLUSION:

Livelihood security is an important agenda item if we are interested in security of development, cities, and the poor among vulnerable citizens. Reducing risks to their livelihoods is an effective and innovative measure to (a) speed up recovery and (b) mitigate disaster risks. Providing better living and working conditions for the slum dwellers and better chances for livelihood and education should be a priority for most urban rehabilitation agenda actions.[2] The slum dwellers have to be empowered to exercise their rights and realize opportunities in the rehabilitation, relocation and poverty alleviation schemes. Any risk reduction measure when reaching the grassroots of the community it works for has to simultaneously be able to empower them. Every step that is taken in the selected area should be in consultation with the community that the intervening agency seeks to serve.

The convergence of the urban developmental initiatives taken by various governmental and non-governmental agencies on livelihood regeneration and protection has been forthcoming but far from adequate. More needs to be done, and as soon as possible.

Disasters repeatedly undermine human security of the poor. This is a major concern for not only India, but for the entire South Asian region. An individual, a family and the community can be secure

The Gujarat Town Planning and UrBan Development Act define what a development plan in a city shall provide. The town-planning scheme has provided reservation of 10 percent land for the socially and economically backward classes. Another important provision that the administration has on offer is the Slum Rejuvenation Fund that relates to keeping 10 percent of the municipal budget for schemes, which may benefit the weaker sections.

only when the environment and future is conducive for a productive life. Investment in protection of livelihoods can in fact fortify the human security of the urban poor. The poorest in the society can benefit from the advantages of security only when they are insulated from the debilitating impacts of the threat-hazard-disaster continuum. The risk to livelihood has to be mitigated for sustaining human security.

It works and it is effective.

Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford, New York, 2001). Pp. xxx + 237. Price Rs. 375.

Even after the de-colonization, there are a number of countries in the world that still use and apply the system known as the common law in their legal regimes. In these countries statutes enacted by their respective democratic Legislature are, to a great extent, construed according to uniform system of rules, presumptions, principles, and canons evolved over centuries by common law judges. The former legal regimes collectively are described as 'common law world' while the latter one, premised on the 'interpretative criteria', is called 'common law statutes'.

The book under review[1] basically deals with the interpretative techniques of 'common law statutes' in the 'common law world', drafting techniques and the judicial techniques for unraveling the legislative intent.

However, Francis Bennion, who, in his earlier publication argued that the common law rules, presumptions, principles and canons, which are over centuries produced by the judges case by case and which can be termed as the 'interpretative criteria', need to, for modern use, be reduced to order and who attempted to put them in order, in his book under review, perceives that construing common law statute, for a variety of reasons, has been found difficult as an analytical concept. One of the reasons, that also constitutes the subject-matter of the book under review, is the 'insufficient

Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford, New York, 2001). [2] Francis Bennion, *Statutory Interpretation* (Butterworths, London, 1997).

attention', considering its importance, given to 'interpretation of (common law) statutes' by 'those' who are 'in charge of legal education'. 'Often they have paid the subject no attention whatsoever' and 'when they have paid it any attention', the author says, 'they have often done so in a mistaken way'. And he feels that it is 'serious matter for democratic societies wishing to live under the rule of law'. Substantiating and elaborating his concern for such an 'inadequate attention' and effects thereof in a legal regime, the author observes that appearance of lawyers who have not been taught statutory interpretation before judges, who labor under the same handicap of ignorance, results in 'incoherence' and 'chaos'. The author, as elsewhere has demonstrated, also feels that it is wrong to teach law students, as has been done in almost all the law schools, that interpretative criteria solely consist of the literal rule, the mischief rule and the golden rule, and that courts simply choose between them. The book under review also addresses itself briefly to the issue. With a view to acquiring the skill of threading the windings of the legislative labyrinth, which is spun in many common law countries honestly wishing to observe and preserve the rule of law, the book under review presents the 'global or common law method' of statutory interpretation that requires the interpreter to take into account innumerable circumambient strands of law, values, culture and previous court decisions.

With this perspective in mind the book under review is designed to give tips to its readers to thread the maze constituted by the body of law. It delves, *inter alia,* into a few basic concepts pertaining to interpretation of law, grammatical and strained meanings of law, contradictory enactments and updating construction, drafting techniques, transitional provisions, rules of interpretation, interpretative presumptions, techniques of law management, the jurisprudential basis of the common law method of statutory interpretation.[3]

The author asserts, and rightly so, that legislation is what the Legislator says it is; the legal meaning of legislation is what the court says it is. He, with equal assertion, also feels that successful

[3] *Ibid.,* chap. 1 & 2.

handling or management of legislation by a law practitioner requires mastery of certain essential concepts. A prominent among the suggested ones are: (i) an enactment must be given an informed construction, that one which takes account of its context, its legislative history, and court rulings on it, (ii) where these facets of informed construction differ, what matters more is the legal rather than the literal meaning of an enactment, and the legal meaning of an enactment is the one that corresponds to the legislator's intention, (iii) the legal meaning, to be acted upon, must be real, that is substantial and not merely conjectural or fanciful, (iv) an existing court decision on the legal meaning of an enactment does not necessarily represent the law as it may latter be held incorrect, (v) although the rival advocates put forward opposing construction, the court may reject both and substitute its own or it may hold that there is no real doubt as to the legal meaning, and (vi) the formulation and resolution of opposing construction of an enactment, and the exercise of judgement or discretion, are aspects of the central function of a legal practitioner who is involved in a particular case, which essentially goes through the mental process of reaching a legal conclusion by applying the relevant law to the relevant facts.

However, the author, with a view to understanding in proper perspective the technique of handling or managing statutes, poses a fundamental question as to the exact role of the interpreter of a particular legislative text. The poseur reads: 'is the interpreter's task to arrive at the literal or grammatical meaning of the text and appiy that every time? Or is it, at least occasionally, to go further and apply a purposive but strained meaning? Or is the remit wider still, sometimes requiring the interpreter to depart altogether from the text, using it merely as a starting point for developing the underlying judicial idea?' The question, which occupies a central place in interpretation of a statute, essentially touches upon the so-called 'literal construction', 'purposive construction', and 'developmental construction' of a statute.[4] In fact this question, in turn, leads a set of questions: What basic approach did the drafter intend the statute user to adopt? Did the drafter intend the user

[4] *Ibid.*, at 37.

always to adopt a literal interpretation, or where necessary depart from this and use a purposive but strained interpretation, or even on occasion arrive at a developmental interpretation departing altogether from the text and using it merely as a starting point? The book under review delves into, with apt illustrations, these questions to derive at home the basic approach in the modern common law world or Global system that legislative drafter nowadays never intends the literal rule to be adopted. The legislator now intends the interpreter to adopt, wherever necessary, a purposive-and-strained construction.[5] A strained interpretation of a statute, according to the author, can be justified for the following reasons: (i) where the consequences of applying a literal construction are so obviously undesirable that Parliament cannot really have intended them, (ii) an error in the text which falsifies Parliament's intention, (iii) a repugnance between the words of the enactment and those of some other relevant enactment, and (iv) changes in external circumstances since the enactment was originally drafted. [6]

With a view to enabling reader of the book under review to know drafting techniques and thereby to clarify the intended legislative meaning, the author, realising that drafting techniques have a profound influence on the 'way' law operates [or should operate] and recalling that different types of Acts are drafted in different ways, also offers a reasonably good explanation, with apt illustrations, of different types of statutory definitions and words used in legal expressions in a statute.[7] A good deal of discussion on different statutory definitions that figures in the book are: 'labeling definition', 'referential definition', 'exclusionary definition', 'enlarging definition', comprehensive definition', and 'weightless definition'. However, he advises the legislator 'to think carefully' and 'to visualize' that 'how the legislative scheme will work out in practice'.[8]

[5] Chapt. 3.
[6] For further analysis and different facets of these reasons, see *ibid*, chapts. 4 & 5.
[7] Chapts. 6-8.
[8] *Ibid.*, at 70.

'Rules', 'principles', 'presumptions', and 'canons' of the 'interpretative criteria'- common law and statutory *rules, principles* derived from legal policy, *presumptions* based on the nature of legislation, and general linguistic *canons* are discussed in the book. Deliberating on these 'interpretative criteria', the author reminds his readers that the 'basic rw/e' of statutory interpretation is that Acts be construed according to the numerous general guides laid down for that purpose by the Act, and that where these [general guides] conflict the problem be resolved by 'weighing and balancing' the relevant interpretative factors-legal policy, constructive interpretation, holistic interpretation of the Act. He also reminds us that people are entitled to a coherent law and that the claims of law as integrity are premised on the two practical principles, namely, (i) the 'principle of integrity in legislation', that asks those who create law by legislation to keep that law coherent in principle, and (ii) the 'principle of integrity in adjudication', which asks those responsible for deciding on the legal meaning of legislation to see and enforce it as coherent.[10]

Author of the book under review, in the last chapter captioned 'techniques of law management'," opines, and rightly so, that 'handling of statutes is not just a matter of interpretation.' He therefore asserts that 'the handler needs to understand the entire nature of an enactment, and the nuts and bolts which hold related enactments together'. And 'officials, lawyers and judges' in his opinion, 'must know how to deploy essential techniques when

[9]Chapts. 9-12.

[10] *Ibid.*, at 170. The author, with approval, quoted from Dworkin, *Law's Empire,* (Oxford, 1998) and further concentrated on the 'principle of integrity in adjudication'.

" 'Law management', according to the author, 'is the essential skill, applied in the context of particular facts, whether actual or hypothetical, and supplemented where necessary by detailed knowledge of the particular area of law in question in a case, of identifying the legal issues involved, formulating the relevant legal rule(s) and, by intellectual manipulation of the materials (witness statements, case reports, legislative enactments etc.), reaching the legal resultant (or arguable legal resultant) of applying the rule(s) to the facts. All this needs to be accompanied by the working out and formulation of explanations and arguments'. [At p. 189].

dealing with legislation, if they are to handle properly'. However, commenting on the current state of affairs, the author further observes that 'Ability effectively to manage the relevant law is central to any lawyer's or law students functioning. It is a complex intellectual skill, to which neither academia nor the legal profession has so far paid full attention. This neglect extends to the development of and refinement of the skill both in practice and by academic research, and its teaching. There is an element of vicious circle here: what is little taught is not much researched. This central intellectual skill is what Americans call 'layering'. It needs, deserves, and is capable of, improvement both in its practice and its teaching.'[1] Referring to, and relying upon, a few well-known writings,[14] the author stresses that direct learning of 'skills' should be made a central component of every stage of legal education and training. To overcome the problem, the author, in the instant chapter, suggests that techniques and ways in which court handles issues should be included in legal education curricula to enrich teaching and techniques of law management.

The book under review not only makes a good reading on understanding common law legislation but also delves into 'global techniques' of interpretation of statutes. It also offers a blue print of law curriculum on interpretation of statutes.

*K. I. Vibhute**

[n] *Ibid., at* 183.
[13] *Ibid.,* at 183-184.
[14] Williams Twining, Legal Skills and Legal Education, 22 *Jr. of the Association of Law Teachers* (1988) 4; *Review of Legal Education: First Consultative Conference,* Discussion Group 3, 9 July 1993, and Lady Marre, *A Time for Change,* Report of the Committee on the Future of the Legal Profession.
* Professor of Law & Director, Center for Criminal Law Studies, National Law University, Jodhpur.

K.C. Agarwal, *Shaping India of Our Dreams* (Knowledge Books Inc., New Delhi, 2003). Pp.xviii+402. Price: Rs.690

Understanding and comprehending Indian polity has always been an endless intellectual exercise both for academia and journalists. Political concerns for both the creeds have always been there in one form or the other, and a minute analysis of the same in the writings of various political philosophers and authors on Indian polity reveals that they have not been any different. Thus, during different phases, even though the society and polity has changed radically, the political and social concerns have remained the same. As also they have remained divided into two schools: one of skeptics and the other of optimists. However, what is important is that whether such expressed political concerns have been able to guide the policy planners in constructive and positive directions?

The book *Shaping India of our Dreams* by K.C. Agarwal is one such attempt to comprehend and present an analysis of the contemporary India and then suggest remedy thereof. As the title suggests, the book seems to have been written with dedication to change India according to the dreams of the suffering common masses. Right in the beginning the author claims that:

> This book is a wake up call for the people of India to enable them to see their country more closely and understand the reasons for its highly ramshackled state of affairs and for the unbound miseries of its people. For identifying causes of people's sufferings and seeking their solutions some investigation into the causes of our failures was imperative. If the causes are identified, it will be

> easy to cure the disease. This is what I have attempted to do through my present work.[1]

Thus, it is quite obvious in the above statements that the author is more interested in curing the diseases; the Indian polity is suffering from. However, it is essential to mention in the beginning of the review that the book has been written with a pessimistic and skeptics perspective. The book suggests that there is nothing in the Indian polity which can be praised or the people can take pride of. The Indian polity is a sham and a fraud upon the people of India and the leaders all along were such short sighted that in the last fifty-five years there has been no progress in any walk of life of the people of India. Such is the kind of feeling one gets after reading the book thoroughly. But the praiseworthy part of the book is that it has expressed concerns that things has to be improved and what are the things that are required to be done to mitigate the miseries of the suffering masses. However, the ways and means how it can be or will be done is missing conspicuously. Nowhere the book suggests the ways and means for achieving the set goals and objectives but everywhere it reminds the readers that what is to be done.

Towards the end of the book the author appeals the readers to join the organization (conceived by him only) called "Crusade India" (the address and other details of which are provided in the book) to shape India of our dreams i.e. to establish supposedly a *'Ram Rajya* A state rid of all sufferings and where justice and equality would prevail and each individual will lead a happy life.

The title of the book no doubt is tempting for a person concerned with changing the system and improving the state of affairs in India. However, after reading the book one gets highly disappointed that what it contains are trifles, superficial and unscientific. The book badly lacks scientific vigor which is *sine quo non* for understanding a political system and prevailing systemic bias to explore the ways and means to adopt and apply

[1] K.C. Agrawal, *Shaping India of our Dream* (Knowledge Books Inc., New Delhi, 2003). As mentioned in the foreword by author in the book.

rectification measures. Overall the book is a systematic presentation of the prevailing scenario in the country which most of us i.e. Indians read daily in various newspapers and keep watching on news channels. Hence, one misses the theoretical punch, and often finds the book lost in a maze of descriptive empirical material, much of which covers familiar ground. However, a thorough and micro-level analysis of the book and its contents are obvious to understand the dynamics of Indian polity and the ever-growing concerns for the same.

This is not for the first time that some one has written a book of this sort, rather interpreting Indian polity and suggesting measures for good governance has continued since independence. However, the trend for such articles and books were quite prominent during the sixties and seventies when political scientists and scholars in other fields wrote a number of books analyzing the various sectors of the Indian political system and governance in India. The most remarkable ones are by Rajni Kothari[2], Atul Kohli[3], Rudolph and Rudolph[4], Paul R. Brass, Bhawani Sen Gupta[5], N.S. Saksena[6], Rabin Mukherji[7] to name but a few.

The most recent one is by Rabin Mukherji who writes that democracy is a failure and "Shefocracy" (an acronym which stands for shelter, health, education, food and clothing to the people) is the solution. Here also the title suggests something and the book

[2] Rajni Kothari, *Growing Amensia* (Ajanta Publications, New Delhi, 1994). See also his *State against Democracy: The Search for Humane Governance* (Ajanta Publishers, New Delhi, 1988).

[3] Atul Kohli, *Democracy and Discontent: India's Growing Crisis of Governability* (Cambridge University Press, 1991).

[4] Lloyd I Rudolph and Susanne Hoeber Rudolph, *In Pursuit of Lakshmi: The Political Economy of the Indian State* (University of Chicago Press, New Delhi, 1987).

[5] Bhabani Sen Gupta, *India: Problems of Governance* (Center for Policy Research, Konark Publishers Pvt. Ltd., New Delhi, 1996)

[6] N.S. Saksena, *India: Towards Anarchy, 1967-1992* (Abhinav Publications, New Delhi, 1993). See also his *Law and Disorder in India* (Abhinav Publications, New Delhi, 1987) for authentic analyses and reporting of the steadily growing crisis of governance in India since 1970s.

[7] Rabin Mikherji, *Democracy, A Failure, Shefocracy-The Solution* (Indian Research Press, New Delhi, 2001).

contains something else. As mentioned in the book, it was sent for nomination for 'the noble prize for peace'. Writing on functioning of democracy, the book presents a blue-print for the change over from a 'worst form of government' to a 'better form of government' i.e. Shefocracy. The book overall talks more about the electoral reforms and reforms in the parliamentary system than about the ways and means through which the governance can be improved in the country thereby ensuring 'Shefocracy'.

The book under review is also of the same kind but differ in the sense that rather than suggesting reforms in parliamentary democracy alone the author proposes radical changes in the system. The author proposes to create "City Centers" which if realized would be like a model State for the world community where almost everything would be available which a human being needs for his day-to-day happy life, which would also take care of most of the problems that many of the developing polity are facing today. However, since there are not many recent general treatises on contemporary Indian politics; the ones that exist and continue to be used have become dated and call for major revisions. This book could well fill the gap in spite of containing major methodological flaws. While it would be a misnomer to call it a book on political economy—it is rather a book on the politics of economic development—and while its handling of the Indian state is rather limited, confining itself to the performances of the Indian state along different policy arenas, it does manage to cover a vast ground and provides the reader a broad panorama of how the polity has 'fared' in the face of growing challenges and the reality of less than satisfactory performance when it comes to the conditions of the people.

The book opens with 'The Mission' in which the author exposes the countrymen to the macro level problems of the country and provide examples to prove that there is no dearth of potentials in the country still the country has failed and explains that as individuals we have succeeded in other countries but have failed in our own. He has raised many questions for which the 'reasons' he has tried to analyze later in the book. Author gives the message to the countrymen that:

> In view of our enormous resource availability and inherent unbound potential as researched by the author and discussed in this book, our lone motto is to make optimum use of all these and construct our nation into one of the mightiest and most prosperous nations in the world.

With this message author also expresses in an emotional way that when we see the fabulous buildings, shopping malls, roads and recreation avenues of the affluent world or their well dressed and satisfied people, school-going children, fun and frolic, we also feel that our people should also enjoy like them. And author assures the people of the country that one day we will also be like them through hard work. There is no doubt about the fact that each individual aspires for a happy life. How it can be done, he claims unfolds in the following pages. Author seems to be slightly mistaken because in the following pages what he suggests is 'what can be done' but not 'how it can be done'.

The author has structured the book into four sections: first, dealing with 'what we are'; second deals with 'why we are'; third deals with 'what can be done; and the fourth with 'how it can be done'. The first two parts are self-explanatory as it deals with 'what is' and what are the reasons for existing anomalies. The third part is about the suggestion and the measures that can be adopted to deliver good governance in the buzzwords of the last decades. Though the title of the last part speaks about the ways of achieving the set goals in the previous section but this also is only about the things that can be adopted for improving the plight of the people but not as to how they can be achieved. The reason is quite obvious; the author though is an engineer by profession, lacks scientific vigor. He has failed to theorize the trends that he has discovered in the first two sections of the book. It is ironical that whereas he has devoted almost 382 pages for understanding the Indian polity and has almost explored every field of activity, 'has devoted only 15 pages on "How it can be done"-. This itself makes

K.C. Agrawal, *supra* n. 1, p.4.

it obvious the seriousness of the author about the mechanism of the radical change which he envisages.

After reading the book one gets an impression that the title of the book itself, is misleading, rather than 'Shaping India of our Dreams' it should have been 'Polemics of Indian Polity'' or 'failures of the Indian democracy'. This is because through out the book the author is running while trying to discuss about the anomalies of various kinds that the Indian polity is suffering from. He has tried to deliberate upon a variety of things like, food problem, poverty alleviation, environmental pollution and degradation, water related problems and water management, problem related to trade and commerce, defence vs. Development dilemma, drawbacks of nuclearization, rural development, urbanization, problems in the field of agriculture, dwindling economy, industrial failure, corruption at every stages, reforming education, optimizing power generation, tourism, emphasis on R&D and information technology, reforming policy and judiciary, developing northeastern states, resolving Kashmir through unification, and reforming defence services, to name but a few. The vast array of issues that the author tries to raise about in his book exposes the author's basic understanding about research and resolution of problems. Each of the issues raised by the author are a subject of mega research itself and treating them in the way the author has done is making it trifle and undermining the seriousness of the issue under study.

In Aristotelian terms one can divide the book into two parts: first the political actualities and; second the political idealism. So far as political actualities are concerned the book could score some appraisal as it deals at length with the polemics of the Indian political system and different failures of the democracy. The suggestions that are there in the book are too idealistic; it is more so on account of the fact that how the ideals set by the author could be achieved is totally absent. The suggestion are idealistic could be observed in his concept of 'City Centers' through which he is trying to achieve good governance and a life of'idyllic happiness'[9] for the individuals in the 'City Centers'. A glimpse of the same could not be uncalled for, he says:

> The city centers are conceived to provide and opportunity to the village folks to live together and work together to become a force one day. — The concept behind these centres is the development of each village into a full-fledged city by clubbing a few villages together to attain self-reliance. It also aims at remote habitation from the place of work. ~ - Each city center will have residential, commercial and industrial activities at one place and somewhere at the center of the city center. In the periphery will be the farmlands which may also have hillocks, mountains, forests, marshy lands, fallow lands, sand dunes, rivers, canals, ponds and lakes.[10]

Above is the mention of the proposed 'city centre' which sounds a heaven on earth if one reads the detailed provisions of the 'city centres'. This is something on the line of Platonic 'ideal state' or Aristotle's concept of the 'best practicable state' which he envisaged to the size of a Greek City-State. Considering today's population and the complexities of life the author's 'city-centres' also makes provision for almost all things the same way Plato and Aristotle suggested for their ideal state and best practicable state respectively. However, the suggestions of Plato and Aristotle has always remained a part of political philosophy but could never be realized on earth. Since that day the concern for a 'perfect state' has always been there and scholars after scholars have presented their models some in terms of ideals and some in terms of realities. However, the fact remains that even today none of the existing states can be declared as the best model which one can think of

[9] A term which J.J Rousseau uses to explain the life in the 'State of Nature' in his book *'The Social Contract'.* The life in the state of nature according to him is of complete happiness and there is peace and goodwill prevailing. [10] *Supran.* 1, pp.173-175.

imitating. Francis Fukuyama[11] in his masterpiece called *End of History and the Last Man* established that after experimenting with all the forms of government what has come to survive is the 'liberal-democratic model of government'. However, even the liberal-democratic models of governments are also the victim of bad politics and bad governance. India too is no exception to this. India is also a liberal-democratic model based on free capitalism, though it too is surviving but is suffering on many counts and there is increasing emphasis on 'good governance'. Fukuyama's claim that political and economic development always terminates at liberal-capitalist democracy assumes that the non-western world is striving to imitate the western route to modernizations. However, this has not always been the case as most of the post-colonial societies started with imitation of the western model of modernizations but utterly failed as it led to 'westernization on the name of modernization' where former is a cultural concept and the later is a developmental concept. Hence, unfortunately in India also cultural modernization is trying to precede the economic and political modernization. This trend is required to be observed and analyzed to reverse the trend especially in the light of the recent upsurge in the 'knowledge society' of India.

A systematic analysis about the anomalies of Indian political system reveals that the system is underperforming and the common masses are suffering because of the following reasons:

- Widely rampant corruption;
- Criminalization of politics;
- Communalization of politics;
- Politics of opportunism;
- Politics of populism;

[1'] Francis Fukuyama, *The End of History and The Last Man* (Penguin Books, 1992). For him, the end of the East-West conflict confirms that liberal capitalism is now unchallenged as a model of, and end point for, humankind's political and economic development. Like most liberals he sees history as progressive, linear and 'directional', and is convinced that there is a fundamental process at work that dictates a common evolutionary pattern for all human societies—in short, something like a Universal History of Mankind in the direction of liberal democracy.

- Regionalization of political parties and their parochial outlook;
- Indifferent civil-society and;
- Illiteracy and sagging moral values etc.

These are some of the broader trends which many political and social scientists have observed and declared that they are responsible for poor governance in India and also responsible for plight of the people and causing great harm to the system. None of the above trends have been observed in a theoretical way by the author. It is quite obvious that the system is almost crawling at a snail's pace because of the above factors and democracy is nearly a failure. However, on the other hand there are also social scientists who though accept the drawbacks of the system but at the same time they also assert that all is not wrong with the system. Myron Weiner has written in his book that the greatest Indian paradox is that democracy has survived in India in spite of a high level of political violence, abject poverty, criminalization of politics and politicization of almost every aspect of human existence. This is more so when the society is under constant threat more from the 'intellectual criminals' than from the 'anti-social elements'. Democracy as a form of government cannot be rendered a failure because of certain mis-governance and mismanagement.

Author, thus, has failed to observe any such trends and goes on to describe as to what are different wrongs in the system. Now it is quite obvious, a revolution is next to impossible in such a large democracy. It is more so because the shock absorbing capacity of the system is quite huge and the political structure is such that a radical rearrangement of power is next to impossible. Under such circumstances and existing realities what is required is to comprehend the system and locate the loopholes which would help in devising the means to plug the same. Author has diagnosed well the maladies underlying the system but has failed to evolve any theoretical base which would have helped him to conceive of some remedies to help out the concerned people and the policy-makers. For example, once we understand that there is criminalization of politics and many criminals are making into legislatures and union parliament, then only we can analyze its ramifications on the entire system. A through analysis of the same would help the social scientists in devising ways and means to curb this menace which has almost hijacked the whole system. Recent electoral reforms like 'disclosure norms' for contestants to the state and union legislatures are one such measure to eliminate criminals entering into active politics. It may not be too relevant or hundred percent foolproof but of course it can be termed as a viable and well thought out step to get rid of the problem. Similarly, policy-makers came up with a new 'Anti-defection law' to curb the menace of 'politics of opportunism' which has rendered the politics and governance 'a business in government'.

The author of the book has failed to think of any such trends and menace from which our polity is suffering today. Hence, his solutions are also very simplistic and superficial. The approach of the author can neither be termed as 'pragmatic' nor can it be termed as 'idealistic'. Why it cannot be termed as pragmatic has already been explained above because it suggests radical measures which are not possible to adopt in the existing political and social circumstances. It is not idealistic because author is not conceiving of an ideal state or a state in 'idea' like Plato, Aristotle or Karl Marx who conceived of a classless communist society after withering away of the state. Author, moreover has not build up any philosophy for the same anywhere in his book. He begins with a mission to change the society and the state i.e. the existing political structure, to provide maximum happiness to all, not even the 'greatest happiness to greatest number' as Jermy Bentham thought of.

While suggesting the solution as "how it can be done" in the last chapter of the book, author begins:

> Without a rigid and stable foundation one cannot construct a super structure neither without a competent and prudent system of governance can we construct a prosperous nation. Solution to all problems afflicting the nation and implementing the

> ideals discussed in this book call for establishing this kind of governance first.

Thus, in the above passage author calls for establishing a competent and prudent system of governance without understanding the meaning of governance and making it clear as to what exactly he means by it 'more government' or 'less government'. Democracy as a philosophy of governance has been the confusion of the twentieth century and is no different in this century. Sartori rightly pointed out that Democracy could be defined as a high-flown name for something which does not exist. Perhaps no other form of government has contributed to the present deplorable conditions of human being than democracy. Democracy gave people freedom without facilities and rights without means to ensure it. Undoubtedly, Churchill was right when he said that democracy is the worst form of government but there is no other alternative. He must have visualized the outcome of this form of government in the future. Aristotle too was not wrong when he categorized "Democracy" as the perverted form of government and rule by many, but one gets a scant idea of his corresponding form of government "Polity" which he has categorized as the best form of government. The branding of democracy as mobocracy by Aristotle was also appropriate. But where do we go from here for having competent and prudent governance. Let us see how author proposes to do this:

> The basic virtues of good governance are sincerity, devotion and a will to work with integrity and prudence. There must be an unflinching loyalty and determination to achieve the promised goals. —Our findings are only against the system of governance (polity and bureaucracy) not the staff or services. Because they (staff and services) are simply organs of the main body and have to function at the dictates of it.---- Our system is like a tree-polity forming the roots, bureaucracy the stem, offices and staff the branches and people the leaves. Change the roots and the stem-the branches shall change on their own and greener and more vibrant will become the leaves. Our

[12] *Supra* n. l,p. 385.

> crusade is against the system that has led use from poverty to deprivation and destitution and not an individual.[13]

Thus, author suggests that it is polity and governance which is more responsible than the staff and services. This lacks clarity as to what author means to suggest by staff and services. Polity is an all-encompassing concept which includes political, social and economical institutions. Changing the polity means that changing the entire system. Democracy is a polity, a form of governance if one wants to change the polity it means adopting an altogether a new form of government and changing the very nature and characteristics of the state, which is not an easy task. This kind of change is a revolutionary change which happened after French, American and Russian revolutions. Thus, author means to suggest a revolution without letting us know what he would bring in place of bureaucracy.

Author then in the last three pages of the book hurriedly suggests that the entire goal of good governance will be achieved by adopting a Presidential form of Government. He says:

> We have broadly studied the various systems of governments as adopted by different developed countries of the world and consider that a Federal system of governance with a President as the constitutional head, somewhat like the Presidential system of America, would best serve the interests of the people and fulfill our aspirations. The system will necessarily involve the best brains of the country to frame policies, disseminate them amongst the masses and execute the same in the true spirit —This time it will be established on the basis of selection rather than election.[14]

This shows that author is not aware about the ramifications and problems in changing from cabinet system to presidential system and

[13] *Ibid.,* pp. 390-392.
’[4]/iW.,pp.393-394.

how difficult the process would be. Moreover, Indian situations are much different than the American situations. How one can think of such a remedy. This proposal has been debated quite a lot by various scholars in the recent past and the wider consensus that has emerged is on adopting the German model[15] if at all the governing and non-governing elites decide to change to ensure good governance and bring stability in the system and government.

However, while suggesting a new form of government or a new system one needs to be very careful as to how there is going to be a shift from old system to the new one otherwise any suggestion or philosophy would be irrelevant and useless. Therefore, the concern of the author is highly appreciable but the methodology adopted and ways and means suggested by him lacks seriousness and are superficial in nature. Consequently, the school of thought which believes in change through 'piecemeal social engineering' is dominant and sounds more convincing.

The book written in a lucid language is comprehensive enough even for an amateur reader. Democracy in many countries has not been able to deliver the ideals for which it was created because of certain reasons which the rulers of the democratic countries were well aware of but did not dare or intended to venture because of their selfish and vested interest. They were more akin to gratify their own needs first because of the hedonistic nature of man, than to channelize their potentials towards the philanthropic causes.

The endeavor of the author in the book *'Shaping India of Our Dreams'* could be considered as praiseworthy towards understanding the phenomenon of state building through economic development as well as the growth and decline of political institutions. Though the author claims it to be a work of intense research to make India one of the mightiest and most prosperous nations in the world, but he has failed in developing a theoretical framework for the study of state politics. It can at best be regarded as an empiricist's attempt at model building from collected data, rather than an exercise in analytic political theory. The

[15] This model suggests that an old government will cease to exist the moment a confidence motion is passed in favour of a new government. This of course will remove trading in parliamentarians where one party tries to purchase the MPs of the **ruling** party to bring down the government.

task becomes all the more challenging because one has to deal with dynamics of contemporary politics, the full facts about which are not usually known and, as such, its outline tends to be blurred and hazy. What makes the job more baffling is the fact that one has to grapple not with one pattern but with several patterns of State politics which are emerging, if at all, through none too steady pull and swing of politics at the Central and state levels.

India being a transitional society, its politics tends to be in a process of flux and change. As the pace of socio-economic transformation is slow and as the direction of polarization of political forces in its wake is not clearly discernible, the patterns of state politics do not have in every case a determinate outline with steady contours. Thus, to conclude it is worth noting that author has failed to understand that for post-colonial society which is still in the phase of transition not a radical change like 'development of rural areas through city centers' and changing the cabinet system to presidential system would ensure good governance but it is through empowerment of civil-society and accessibility of poorest of the poor to education that good government can be brought about. Author has given inadequate stress on radical reformation in the system of education than he has given on the radical transformation of the whole system. The level of education is closely allied to the potential of the human resource. The role of education in articulating people, in making them ardent defenders of their interests and in converting them into a potential pressure groups are significant areas for political analysis of the politics in Indian polity. Author has missed the most recent trend of India becoming a digital republic. Where electoral democracy is still the basis of political authority and the key to social transformation, an over-emphasis on digital democracy can preclude many of the initiatives towards good governance. The level and pattern of economic development is another crucial variable in the context of State politics. The resource potential, the level of economic growth, pace of industrialization, and crystallization of class consciousness of a state may go a long way in shaping the form and substance of its politics on the one hand and the life of people on the other. There is no denying the fact that the most arresting observation about India has been that her soil is rich and her people poor, but how this poverty can be eliminated and India can maximize her utilization of resources is a point of research which has been partially done and more is required to be done. Any attempt at analyzing Indian polity must take into account both the ongoing trends as well as emerging trends in the backdrop of changing social, economical and political circumstances.

V. P. Bharatiya, *Syed Khalid Rashid's Muslim Law* (Eastern Book Company, Lucknow, 2004). Pp. 394. Price: Rs. 195

Islamic law as it exists today is the result of continuous process of development. According to the classical theory, it consists of the express injunctions of the Koran; of the legislation introduced by the 'practice' *(sunna)* of the Prophet; and the judicial decisions. Landmark decisions bringing about holistic dimension to the Islamic law in the fields relating to divorce, mehar, maintenance, remarriage on motivated conversion, wakf beneficiaries, wakf boards, pre-emption has resulted in the tremendous development of Islamic law.

The new fourth edition of the book titled 'Muslim Law' is organized into fourteen chapters and is written by Syed Khalid Rashid. The book is a compact work and mainly focuses on the principles of Islamic law. Taking into consideration the factors, which have brought about changes in the Islamic world, the author has ventured to present a comprehensive account of the legal scenario of Islamic jurisprudence.

In the first chapter, titled 'The Concept and Background of Muslim Law', the author has discussed the relevance of the study of Islamic law and has attributed it to the fact that it is applicable to some 15 crore Muslims in India, 12 crore in Pakistan and 13 crore in Bangladesh and also to the fact that Muslims in twenty countries of Asia, Africa and Europe, follow Islamic law. The birth of Shia and Sunni sects and the development of Schools of Islamic law have been discussed.

In the second chapter, titled 'Muslim Law as Applied and Interpreted in India', the author has traced the application of Islamic law in India right from early contacts of the Arabs with

India, position of Islamic law during the Sultanate and Mughal periods, Islamic law under the East Indian Company, Shariat Act of 1937, the Dissolution of Muslim Marriage Act, 1939 and the present position. The 3rd chapter, titled 'Marriage (Nikah)', deals with the definition, nature, formalities, legal effects, stipulations in marriage contract, classification and prohibitions to marry in certain cases. The critique on Polygamy in Islam hits hard at the orthodoxy of the Islamic society and firmly points out that polygamy should be put under greater restrictions if it is not banned altogether.

The fourth chapter titled, 'Dower', and the fifth chapter titled 'Divorce *(Talaky,* is exhaustive and informative in the sense that up-to-date case laws decided by Supreme Court and various High Courts, has been discussed elaborately. The sixth chapter and the seventh chapter deals respectively with 'Legitimacy and Parentage *{Jayaj aur Rishta)* and Guardianship *{Valayaf).* In the eighth chapter titled 'Maintenance *(NafaqaY,* me effect of Dissolution of Muslim Marriage Act, 1939 has been very lucidly discussed and explained. Maintenance, women's right to separate property, children etc., have been discussed in detail. The resultant impact of Sees. 125 to 128 of CrPC (2 of 1973) on the Muslim Women (Protection of Rights on Divorce) Act, 1986 have been analytically and critically examined. Although the Islamic law limits the husband's liability to provide for maintenance of divorced wife to the period of *iddat,* it does not contemplate the situation envisaged by Sec. 125 CrPC of 1973.

In the chapters titled, *'Wakf',* 'Gift', 'Pre-emption *(Shufa)',* 'Will *(Wasiyaty* and 'Administration of Estates and Payments of Debts', a sincere attempt has, however been made to exhaustively discuss the entire range of case laws with useful hints.

The fourteenth i.e., last chapter titled 'Inheritance', relating to inheritance both in *Hanafl* & *Shia* Schools of Islamic law has been analytically commented and the chart, relating to the shares in inheritance, shows the details to give the students and practitioners the easy way of grasping it.

The noteworthy feature of the book is the exhaustive analysis of the constitutional aspects of Islamic law principles and latest case laws. Further, notes have elucidated the interactions between the personal law and social ethos. Opinions of academic jurists have also been included. The only drawback of the book is that a comparative study of historical background and growth of Islamic law in India, Pakistan and other important Islamic countries have not been compiled with sources and references which would have benefited the students and lawyers to have an overall picture of historical background and growth of Islamic law.

Mononita Kundu Das

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MPP House 87,1
Cross, I Floor,
Gandhi Nagar,
Bangalore - 560 009
Phone: 080-2260706 Email:
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