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HUMAN RIGHTS: THE ESSENCE OF CONSTITUTIONAL GOVERNANCE - INTERNATIONAL SCENARIO*

[LECTURE I]

Justice J. S. Verma

1. INTRODUCTION

I am greatly privileged and deeply honored to be invited to deliver this memorial lecture. I have many reasons for this feeling. Late Shri Dashrathmal Singhvi was an illustrious son of Rajasthan who was associated with Shri Jainarain Vyas in the movement for responsible government as a freedom fighter and then in the building of nascent free India. His contribution as a social reformer, patriot and votary of secularism and national integration is commendable. This contribution was in addition to his role as a leading member of the legal profession. His illustrious son, Dr. L.M. Singhvi, is continuing the unfinished task of his eminent father. I and Dr. L.M. Singhvi have known each other for long, even before I came to Rajasthan as Chief Justice in 1986. Since then, we have come closer. Paying homage to, and associating with the memory of his revered father Shri D.M. Singhvi is, for me, a matter of personal satisfaction. Even though I did not have the privilege of meeting Shri D.M. Singhvi, having known his son Dr. L.M. Singhvi for so long and also having lived in Rajasthan for some years, I feel an affinity with Shri D.M. Singhvi.

The theme for this memorial lecture suggested by Dr. L.M. Singhvi is apposite and contextual. It relates with the late Shri D.M. Singhvi and with the locale - Rajasthan. Shri D.M. Singhvi

* Dashrathmal Singhvi Memorial Lecture - 2002, delivered on November 16, 2002 at Jodhpur. Presided over by Hon'ble Justice K.G. Balakrishnan, Judge, Supreme Court of India.

" Former Chairman, Human Rights Commission (NHRC) and Chief Justice of India.

was deeply involved in promoting the cause of civil rights and public law. He was a social reformer and defender of the rights of the disadvantaged in society, a votary of secularism, national integration and responsible government. These continue to remain important human rights issues and depend for their achievement on good governance. I am sure the theme would be dear to his heart. Another good reason is my association as Chief Justice in Rajasthan with such issues. It was here that the foundation laid earlier in Madhya Pradesh was strengthened for my subsequent effort in the Supreme Court to pursue with greater vigour serious human rights issues through the judicial process, which came to be branded as judicial activism. The effort is continuing now in the National Human Rights Commission. Some instances will suffice. A custodial death at Ajmer, taken up as a PIL led me to make an order of the kind which I later reiterated in *Nilabati Behara* v. *State ofOrissa,* [AIR 1993 SC 1960], spelling out in detail the principle of constitutional tort and the public law remedy for enforcement of the right wherein sovereign immunity is no defence. Pollution of river *Bandi* at *Pali [Agarwal Textile Industries, Sumerpur Road, Pali* v. *State of Rajasthan,* decided on October 14, 1987, at Jodhpur], by discharge of trade effluents of the industry was restrained by judicial intervention. The discrimination of Dalits in entry into the *Nathdwara Temple [Suryanarain Chowdhary* v. *State of Rajasthan,* AIR 1989 Raj. 99] was checked by direction given to the state government to ensure enforcement of their right to equality. Gender justice was promoted in *Jani Bai's case [Jani Bai* v. *State of Rajasthan,* AIR 1989 Raj. 115] by liberal construction of a statute to prevent gender discrimination resulting from a literal construction. These human rights issues were addressed judicially enlarging the ambit of judicial review in constitutional governance. The theme is, therefore, appropriate and contextual.

2. WHAT ARE HUMAN RIGHTS?

It is not necessary to delve into the philosophic foundations of human rights except to remember that the function of philosophy is to deepen the understanding of truth. Fidelity to human rights law is deepened by appreciating the underlying moral justifications to

it. Understanding the nature of *'right'* involved can help to appreciate the degree of protection available, the nature of derogation permissible and the priorities *'inter se*\ in case of a possible conflict between them. Louis Henkin says *'human rights are the idea of our time'*. Ronald Dworkin regarded *'rights as trumps'* that set limits on state action whenever it encroaches on the individual's protected sphere. No state can now claim that it does not stand for human rights. Basic human rights are non-derogable and non-negotiable. The common theme emerging from the various theories is that *'a minimum absolute or core postulate of any just and universal system of rights must include some recognition of the value of individual freedom or autonomy'*.

Incorporation of a Bill of Rights in some early national constitutions indicates that the concept is not of recent origin after the Second World War but has been recognized for long. The Virginia Bill of Rights (1776) proclaimed:

> All men are by nature equally free and independent and have certain inherent rights, of which, when they enter a state of society they cannot by any compact deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness.

The American Declaration of Independence further said:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

The French Declaration [1789] said:

> Men are born and remain free and equal in rights—the purpose of all political association is the conservation of the natural and inalienable rights of

man: these rights are liberty, property, security and resistance to oppression.

The basic premise to remember is that human rights are not the gift or bounty of any political sovereign through legislation or any edict, but are rights inherent in human existence. The purpose of any law dealing with these rights is merely to recognize them, to regulate their exercise and to provide for their enforcement, and the ancillary matters. Non-derogation of some basic rights in a civilized society is based on this premise. Human rights are considered to be universal, indivisible and interdependent.

Jack Donnelly argues that internationally recognized human rights have become a new international *'standard of civilization'*. After the Second World War a body of international human rights law reaffirming the morally appealing idea of adherence to shared standards of justice to qualify for membership of the international community developed. It has become a factor of political legitimacy. These standards of civilized behaviour link national and international legitimacy. The visible rise of universal human rights culture depicts moral progress and is an effective response to major threats to human dignity posed by modern market trends and development projects. Viewing development with the *'rights'* perspective for sustainable development appears to be gaining ground. We are all equally human seems to be more acceptable now, with the current slogans: *'All human rights for air* and *'the world is one family'*. To us Indians, it is nothing new. We have for long believed: *'Sarve Bhavantu Sukhinah'* [Peace and Happiness for All], and *'Vasudhaiv Kutumbakam'* [World is One Family]. With this background we may proceed to examine in some detail the meaning of human rights.

'Human rights' in practice have been redefined to encompass every aspect of dignified human existence, which makes every human being an equal member of the human family. Human dignity is the quintessence of human rights. It is the wide comprehension of this aspect and appreciation of the amplitude of dignity of the individual which must define the true scope of human rights. *'All human rights for alV* and *'the world is one*

family are concepts which have depended on the expanded meaning of human rights assuring full human dignity to every member of the human race in the global village. Globalization of human rights by making it universally acceptable, eradicating the global inequities is the clarion call of the human rights movement. It cannot be doubted that any humiliation of a human being is an affront to his human dignity, and, thus, a violation of his human rights. Mahatma Gandhi said:

> It has always been a mystery to me how men can feel themselves honoured by the humiliation of their fellow beings.

To achieve this end must be the agenda of the human rights movement in the new millennium. At the threshold of the new century, the world leaders gathered in New York for the World Summit to consider the challenges faced in the new century, and they set out their aims in their Millennium Declaration. By the year 2015, all 189 United Nations member states have pledged to:

- Eradicate extreme poverty and hunger.
- Achieve universal primary education.
- Promote gender equality and empower women,
- Reduce child mortality.
- Improve maternal health.
- Combat HIV/AIDS, maleria and other diseases,
- Ensure environmental sustainability.
- Develop a global partnership for development.

The UN Secretary General, Kofi Annan in his UN Day (24 October, 2000) message referred to the Declaration and said:

> — They pledged themselves to free their peoples - from the scourge of war, from abject and dehumanizing poverty, and from the threat of living on a polluted planet with few natural resources left. They undertook to promote democracy and the rule of law; to protect children and other vulnerable people; and to meet the special needs of Africa. And

> they promised to make the United Nations itself more effective, as an instrument for pursuing all those aims.
>
> These pledges give us cause for hope. But they will change nothing if they are not followed by action—.

Kofi Annan also emphasized that the biggest responsibility falls not only on the leaders but also on the *people.* The goal is yet too far, but the course has been charted. To achieve this end must be the agenda of the human rights movement in the new millennium. Equal respect for the dignity of every individual in the human family is the goal of the human rights movement.

Amartya Sen's concept of *'Development as Freedom*[1] is the recognition of the aim to secure the freedom, well-being and dignity of all people everywhere. The seven freedoms essential are:

- Freedom from discrimination - by gender, race, ethnicity, national origin or religion.
- Freedom from want - to enjoy a decent standard of living.
- Freedom to develop and realize one's human potential.
- Freedom from fear - of threats to personal security, from torture, arbitrary arrest and other violent acts.
- Freedom from injustice and violations of the rule of law.
- Freedom of thought and speech and to participate in decision-making and form associations.
- Freedom for decent work - without exploitation.

Inclusive democracy is necessary, wherein there is fair representation of all sections of the community in governance and the rule is not by majority alone. Corruption free governance also is a right of the people because it is directly related to development, which is the benchmark of progress of the nation. Human rights has a comprehensive meaning to include all aspects of human dignity and all measures needed for full human development, all of which depend on good governance.

The Preamble to the Charter of the United Nations [1946] states that ' *We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our life time has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights* —'. Article 1 of the UN Charter states that promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion is one of the purposes of the United Nations. Article 56 of the Charter further states that all members pledge themselves to take joint and separate action in cooperation of the United Nations for the above purpose. Thus, human rights are a legitimate concern of the international family. Signatories to the UN Charter undertake the responsibility of promoting human rights individually and collectively.

The UN Charter was followed by the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Its Preamble proclaims that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Since then a plethora of human rights instruments have been adopted which seek to address issues relating to specific themes or sections of people, namely, .the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Prevention and Punishment of the Crime of Genocide etc.

Mahatma Gandhi in a letter to Julian Huxley in 1947 had emphasised the correlation of rights and duties and said:

> I learned from my illiterate but wise mother that all rights to be deserved and preserved come from duty well done. Thus the very right to live accrues to us

> when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define duties of man and woman and correlate every right to some corresponding duty to be first performed —.

The Inter Action Council comprising of eminent persons (including Dr. L.M. Singhvi) has proposed to the UN a draft: *'A Universal Declaration of Human Responsibilities'* dated 1 September 1997. The basic premise of the draft is: *'human aspirations for progress can only be realized by agreed values and standards applying to all people and institutions at all times'; 'to aim at the greatest amount of freedom possible, but also to develop the fullest sense of responsibility that will allow that freedom itself to grow,"* and *'freedom without acceptance of responsibility can destroy the freedom itself, whereas when rights and responsibilities are balanced then freedom is enhanced and a better world can be created."* The Preamble in the proposed draft referring to Mahatma Gandhi reaffirms faith in recognition of the inherent dignity and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world which implies obligations or responsibilities. It advocates teaching and promotion of awareness and acceptance of these responsibilities throughout the world. The Articles in the draft are classified as: Fundamental Principles of Humanity; Non Violence and Respect for Life; Justice and Solidarity; Truthfulness and Tolerance; and Mutual Respect and Partnership. The meaning of *'Human Rights'* requires a wide comprehension.

It is, therefore, obvious that the proper synthesis of the human rights philosophy with that of human responsibilities is essential for effective realization of the rights of the human family.

In a civilised society, in case of conflict, individual interest must always give way to public interest. This requirement in difficult times needs balancing of the two interests to the extent of irreconcilable difference. Article 4 of the ICCPR enables the State Parties to take measures derogating from the obligations under the Covenant to the *'extent strictly required by the exigencies of the*

situation' during public emergency which threatens the life of the nation, provided that such measures are not inconsistent with the other obligations under international law and do not involve discrimination on prohibited grounds. However, certain civil liberties are deemed so important that even in times of public emergency their derogation is not permitted. Article 4(2) of ICCPR makes non-derogable the right to life (art. 6), prohibition against torture (art. 7), prohibition against ex-post-facto laws (art. 15), and freedom of thought, conscience and religion (art. 18), to name some. Similarly Indian Constitution makes non-derogable the right to life (art. 21) and protection against ex-post-facto laws and testimonial compulsion (art. 20) which cannot be suspended even during emergency.

The Human Rights Committee of the United Nations which oversees the implementation of the rights contained in ICCPR interpreted art. 4 for the guidance of the State Parties. It has said that the measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature only during a public emergency which threatens the life of the nation. Emphasis is laid on the maintenance of the '*principles of legality and rule of law'* at times when they are most needed. The obligation to limit any derogation required by the exigency of the situation reflects the principle of proportionality which is common to derogation and limitation of power. It has been expressly said that in the provisions not listed in art. 4(2) there are elements that cannot be made subject to lawful derogation such as persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. *The guiding factor is the respect for the inherent dignity of the human person which is non-derogable in any situation.* The principles of legality and the rule of law inherent in the Covenant as a whole is reaffirmed. The presumption of innocence of the accused and the fundamental requirements of fair trial must be respected even during a state of emergency.

A conspectus of the universally recognised principles of international law as also those in our Constitution indicates the guarantee of protection of civil rights and liberties which are

essential for the respect of the inherent dignity of the human person even during national emergency. Derogation when permitted is only to the extent necessary in the exigency of the situation based on the principle of necessity and proportionality. Provision is also made to prevent misuse of the larger powers meant to be exercised only for the avowed purpose of promoting and protecting national interest.

The UN Security Council Resolution 1373 of September 28,2001, is quite often misconstrued to canvass support for anti-terrorism laws subsequent to September 11, 2001, terrorist attacks in the United States. The Resolution calls upon the States, *inter alia,* to take *'appropriate measures in conformity with the relevant provisions of national and international law, including standards of human rights'*. The General Assembly in its Resolution 22/158 of December 12, 2000, while considering *'Measures to Eliminate International Terrorism'* and while strongly condemning all forms of terrorism as criminal and unjust, reiterated its call to all States *'to adopt every measure in accordance with the Charter of the UN and the relevant provisions of the international laws, including international standards of human rights.'* This mew has been subsequently reiterated in later resolutions of the UN.

Such is the significance of human rights even in difficult situations wherein certain basic human rights remain non-derogable.

The core values of our constitutional philosophy indicated in the Preamble to the Constitution are *'dignity of the individual'* and *'unity and integrity of the nation'*. The two, obviously, co-exist, and are not incompatible. The message is clear. Every attempt must be made to strike a balance between the two in all state actions including legislation, its interpretation and implementation. This is the demand of the rule of law in the republican democracy. The Constitution of India by amendment of art. 359 expressly makes non-derogable art. 20 (protection against ex post facto penal law, double jeopardy and testimonial compulsion) and art. 21 (protection of life and personal liberty) even during national emergency. The Constitution of India respecting these basic human

rights requires combating terrorism under the rule of law within the constitutional mandate.

The Constitution of India guarantees the Fundamental Rights in Part-Ill which include the right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights and the right to constitutional remedies. Article 32 is the constitutional remedy in the form of original jurisdiction of the Supreme Court of India for the enforcement of these Fundamental Rights. This is the protection of individuals against invasion of their human rights. Part-IV of the Constitution contains Directive Principles of State Policy which are the principles fundamental in governance, to be observed by the State in the formulation of its policies. These include the duty of the State to secure a social order for the promotion of the welfare of the people, distributive justice, right to work, to education and social security, provision for just and humane conditions of work, promotion of interests of the weaker sections, duty to raise the level of nutrition and the standards of living and to improve public health, protection and improvement of environment, ecology and wild life etc. In addition, the Fundamental Duties of every citizen covering a wide spectrum to strengthen the guarantee of Fundamental Rights is in art. 51A (Part IV-A) of the Constitution. In addition to art. 32 empowering the Supreme Court to enforce the Fundamental Rights, the High Court is empowered by art. 226 for the same purpose to exercise its writ jurisdiction. The primary duty of the higher judiciary to protect and enforce human rights is the constitutional mandate. Rule of law is a basic feature of our Constitution, as is judicial review.

The Protection of Human Rights Act, 1993 was enacted to provide for the constitution of a National Human Rights Commission (NHRC); State Human Rights Commissions in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto. *'Human rights'*[1] is defined in sec. 2(1)(d) of the Act to mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. The functions of the Commission

are enumerated in sec. 12 which encompass a wide area to enable the Commission not only to enquire into the violations or negligence in prevention of violation of human rights but also to promote the human rights culture and perform any function necessary for the promotion of human rights.

Ever since its constitution in 1993, the NHRC has been discharging a role complementary to that of the Supreme Court of India by performing those tasks which by their very nature the NHRC can perform better e.g. monitoring any situation or functioning of an institution. The complementarity between these institutions has considerably improved the mechanism for the protection of human rights in the country, which is primarily a state responsibility.

The interpretation of the fundamental rights, particularly, art. 14 (right to equality) and art. 21 (right to life) by the Supreme Court, *inter alia,* by reading the requirements of Directive Principles into them, together with the impact of the *Vishaka* judgment *[Vishaka* v. *State of Rajasthan,* AIR 1997 SC 3011] enabling provisions in the international instruments being read into these guarantees has considerably enlarged the meaning and scope of human rights in India. The NHRC also has interpreted its functions enumerated in sec. 12 of the Act expansively to include therein monitoring of the functioning of the institutions of governance with a view to ensure better protection of human rights and to prevent their violation. The NHRC visualizes its role as that of a catalyst to improve the quality of governance with the firm belief that good governance in accordance with the Constitution and the rule of law alone can be effective for better protection of human rights. The linkage between the two is direct and clear.

The nature and extent of State's responsibility for the protection of human rights was indicated by the NHRC in its orders made in the case of recent Gujarat communal disturbances. The Commission observed:

> It is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality

and dignity of all of those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights.

3. LINKAGE BETWEEN HUMAN RIGHTS AND HUMAN DEVELOPMENT

Emphasis on human dignity is laid not only in the UN Charter, the UDHR and several other international Covenants but also in the Constitution of India which mentions *'dignity of the individual'* as a core value in its Preamble. The debate on the classification of human rights based on different generations of these rights is purely academic since all of them must co-exist for full development of the human personality. Empowerment of the people through human development is the aim of human rights. The Human Development Index (HDI) is the new measure of development and it is said: 'a *nation's ability to convert knowledge into wealth and social good through the process of innovation is going to determine its future'*. There is now a paradigm shift towards emphasis on intangible intellectual assets as the index of wealth. That is why the 21st century is considered to be the century of knowledge. Economics of knowledge is the methodology of improving governance through human development. Knowledge has, therefore, come to be identified not only as a significant form of wealth but also as power. Acquiring knowledge and making its profitable use to convert it into wealth and social good has to be the goal. Human development must be linked with human rights to achieve this end.

The Human Development Reports in the last decade have analyzed and focused on the new vistas of human rights while integrating

human rights with human development as the true measure of progress. The four essential components of human development paradigm indicated in the Human Development Reports are: Productivity - economic growth with people's participation in income generation; Equity - people's access to equal opportunities; Sustainability - access to opportunities must be not only for the present generations but also for future generations to all forms of capital i.e. physical, human, environmental; and Empowerment - opportunity with developed capabilities of all people to participate in policy and decision making processes that shape and affect their lives.

4. CONCLUSION

It is, therefore, clear that the essence of good governance is the respect for human rights of every individual so that the human resources are augmented by full development of each individual with his empowerment. Human rights and human development share a common vision and serve a common purpose. The dignity of the individual assured in the Constitution along with unity and integrity of the nation emphasizes respect for human rights as the essence of constitutional philosophy embodied in the Preamble to the Constitution. The provisions in the Constitution indicated above, particularly the Directive Principles of State Policy determine the nature of polity in which dignity of the individual is central and the focus of governance. Elaboration of the nature of constitutional governance envisaged and its modalities would follow.

The impact of human rights has brought about a profound change on the notions of State sovereignty. Today no nation can say that the way it treats its citizens is purely a domestic concern. Globalisation of human rights with the modern concept of a global village has resulted in the human rights situation anywhere in the world becoming a matter of international concern. The response of the international community to massive human rights violations in the former Yugoslavia (Kosovo, Bosnia etc.), Rwanda, East Timor, Sieraleone and the number of other theaters of conflict are obvious examples of this concern. Submission by States of reports to a

treaty organ (Human Rights Committee, Children's Committee, Women's Committee, Committee on Elimination of Racial Discrimination etc.) about their internal implementation of human rights obligations has now become a familiar requirement. Half a century back such a practice would have appeared inconceivable that sovereign States would periodically submit a report to an international body about their internal matters involving treatment of their citizens by the government, and then the State's participation in a discussion of the report with members of an international body drawn from all over the world. Such is the power of the idea of human rights today. Impact of human rights on constitutional governance is no longer debatable. The impact is clear and visible.

It would be worthwhile examining the scheme of constitutional governance in India with this background.

HUMAN RIGHTS: THE ESSENCE OF CONSTITUTIONAL GOVERNANCE - INDIAN SCENARIO*

[LECTURE II]

Justice J. S. Verma

> The greatest of all the means—for ensuring the stability of Constitutions - but which is nowadays generally neglected - is the education of citizens in the spirit of the Constitution.— Licentiousness may exist in a state as in individual persons—. The education of a citizen in the spirit of his Constitution does not consist in his doing the actions in which—the adherents of democracy might delight. It consists in doing the actions by which—a democracy will be enabled to survive.— The democrat starts by assuming that justice consists in equality: he proceeds to identify equality with the sovereignty of the will of the masses; he ends with the view that 'liberty and equality' consist in 'doing what one likes'.—
>
> This is a mean conception of liberty. To live by the rule of the Constitution ought not to be regarded as slavery, but rather as salvation.
>
> *[Aristotle's Politics* (335-322 B.C.)]

Dashrathmal Singhvi Memorial Lecture - 2002, delivered on November 29, 2002 at Delhi. Presided over by Hon'ble Justice G.B. Pattanaik, Chief Justice of India.

** Former Chairman, Human Rights Commission (NHRC) and Chief Justice of India.

1. LINKAGE OF HUMAN DEVELOPMENT INDEX (HDI) WITH GOVERNANCE

As has been noticed earlier, the Human Development Index (HDI) depends on good governance and it is now the measure of nation's progress and ranking. The crisis of governance in South Asia, according to the Human Development Report (1999) of the Mahbub ul Haq Development Centre, is the cause for its lower HDI. The foreword to the report says:

> The unique feature of this Report is the concept of humane governance that puts people at the Centre of all governance policies, strategies, and actions. The basic precepts of the human development model are to improve the capabilities and expand the opportunities of all people, irrespective of class, caste, gender, and ethnicity. The concept of humane governance takes this model forward by asserting that governance, if it is to promote human development, has to be not just pro-people or people-centered, it has to be owned by people.

The legitimate goal of development is to build human capabilities and enlarge human choices which is the task of good governance. Augmentation of human resources is achieved through human development. An overview of the situation in South Asia identifies the causes of the crises of governance: democracy is fast turning into an empty ritual in many Asian states, crushing burden of taxes on the poor, endemic corruption, illogical priorities in core human development concerns, snapping of link between the governed and the government, between the public and the policy makers. It is emphasised that a new vision and architecture of humane governance, built upon the principles of ownership, decency and accountability, have become imperative and that humane governance must lead to broad-based economic growth and social development.

Amartya Sen has identified illiteracy, malnutrition and lack of health care as the three great unfreedoms while speaking of

'development as freedom'. Rampant poverty is a prevailing curse and misgovernance is adding to the misery. Amartya Sen has also highlighted that famine is unknown in a democracy which emphasises the significance of democratic form of governance for human development and human rights. If there are even now starvation deaths in India, they are not because of lack of food but because of misgovernance in not making available the stored extra food elsewhere to the needy, in spite of available means of transport. These are all issues relating to governance. The linkage between human rights, human development and governance is clear and explicit.

2. NATURE OF POLITY

The nature of polity envisaged by the Constitution of India appears from the objective specified in the Preamble, which contains the basic structure of our Constitution. The mosaic of pluralism and the creed of secularism are distinctive features of the Indian culture which finds reiteration in the Constitution. Justice, liberty, equality and fraternity are promised to be secured to all citizens assuring the dignity of the individual and the unity and integrity of the nation. 'Unity in diversity' is the unique feature of the Indian polity, peculiar in the existing world order. The Constitution has been framed to embody these principles of the Indian polity, respecting human rights and providing the guiding principles of the envisaged governance.

The Directive Principles of State Policy are the principles fundamental in governance of the country (art. 37). The Directive Principles embody the concept of a welfare state. *[Keshavananda Bharati* v. *State of Kerala,* AIR 1973 SC 1461]. The Directive Principles are a supplement to the Fundamental Rights for achieving a welfare state, and this is how the scope and content of the Fundamental Rights, which are justiciable, have been enlarged. These Directive Principles are a mandate to the State indicating the nature of polity envisaged, while the Fundamental Rights in Part-Ill are the guarantee of human rights to the individuals protecting their invasion by the State. The two are to be read together for a

The Directive Principles fundamental in governance of the country (Part-IV-arts. 38 to 50) require the State to secure a social order for the promotion of welfare of the people, to secure distributive justice and right to development with full dignity, right to work, to education and social security, provision for just and humane conditions of work, provision for free and compulsory education for children, promotion of the educational and economic interests of the weaker sections, to raise the level of nutrition and standards of living and to improve public health, and protection of environment, ecology and wild life etc. In short, while the Fundamental Rights in Part-Ill (arts. 14 to 32) guarantee the civil and political rights of the individuals, the Directive Principles in Part-IV mandate the state to constitute a welfare state wherein the economic, social and cultural rights of the people are realised. Parts-Ill and IV of the Constitution correspond to the provisions of the Universal Declaration of Human Rights.

Article 51A in Part IVA was inserted later by amendment to enumerate the Fundamental Duties of citizens. Parts-Ill, IV and IVA together form a compendium and indicate the nature of polity in which every citizen along with the government has a role to play in achieving the desired result. The linkage between human rights and human development and of the two with governance is clearly the scheme of the Constitution of India. It is, therefore, unthinkable that any one of them can be visualized independent of the other two or separately as a different or distinct concept.

3. HUMAN DIGNITY - A CORE VALUE

It is obvious that dignity of the individual being a core value, and the aim of a welfare state through human development being fundamental to governance, the essence of constitutional governance is emphasis on human rights, and that is our constitutional philosophy. The enactment of art. 51A - Fundamental Duties, indicates the emphasis on the participatory role of the people in governance to make it truly representative in character. The bond between Fundamental Rights, Directive Principles and Fundamental Duties has also been judicially

recognized in India by resorting to some Directive Principles and Fundamental Duties to enlarge the content and scope of some Fundamental Rights, namely, right to equality (art. 14) and right to life (art.21).

Our Constitution provides for restriction on the Fundamental Rights only in exceptional situations, and then too, arts. 20 and 21 are expressly made non-derogable by art. 359. The need for any such curb arises when there is a situation in which the normal constitutional governance faces difficulty. Not unoften, these exceptional situations, which give rise to the need to curb human rights in national interest, are themselves the result of misgovemance or aberration in constitutional governance. The need is to remember that the constitutional governance, as envisaged, respects basic human rights and promotes human development in all situations.

4. CONSTITUTIONAL PHILOSOPHY

Good governance promotes economic growth and development. There is need for economic growth model which empowers people and raises HDI level. Even though India has 1/6* of the world population, its GDP is 1.35% of the world GDP which needs to be raised to 4%. China has increased its GDP to 3.2%. The Foreign Direct Investment (FDI) inflow in India is US$ 3.5 billion against US$ 105 billion of China, of which 70% is from Non-Resident Chinese. Indians are very successful in foreign countries which show their high potential. Below par performance within India is attributable only to the crisis in governance. Twenty-five million NRIs generate GDP of US$ 400 billion against India's GDP of US$ 440 billion. NRIs save over US$ 100 billion. The need is to attract FDI to give our economy the needed capital. This can be achieved only through good governance as envisaged by the Constitution. It is worth recalling the factors identified in the Human Development Report (1999) on the crisis of governance in South Asia.

The vast potential in the form of human resources in our country remaining unrealised is the cause of tardy and lop-sided progress

of the nation. Good governance is needed, which is envisaged by our Constitution, to realise the full potential and achieve uniformity in development. This aspect has recently been highlighted even by the US Treasury Secretary, Paul O'Neill, while in India. He said that India is one of the most restrictive economies in the world and bribery and corruption in the country were frightening away businessmen and investors. He also said that *'Good governance means ruling justly, enforcing laws and contracts fairly, respecting human rights and property rights and fighting corruption."* The emphasis laid is that fairness, justice, respect for human rights and corruption-free governance are necessary concomitants of good governance. The US Treasury Secretary mentioned the disturbing trend of lower FDI inflow in India as compared to China, in spite of the democratic polity in India which China lacks; and attributed the contrast to poor governance in India. A three-point formula suggested by him is: 'good governance, economic freedom and investment in people to realise the full potential of human resources'. This is stating the obvious, which needs urgent action.

Failure to realise the full potential of human resources is due to failure to effectively invest in the people by ensuring human development through education and good health. Incidentally, the mandate of the Directive Principles includes free and compulsory education until the age of 14 years (art. 45) and raising the level of nutrition and the standards of living of the people and the improvement of public health (art.47). These continue to remain unfulfilled promises even after half a century, notwithstanding the judicial interpretation of art. 21 to include these aspects in the 'right to life'. These facets are also two unfreedoms named by Amartya Sen.

India on the one hand has amazing examples of high technological developments and on the other, the spread of HIV/AIDS pandemic, child labour and bonded labour, and vast numbers surviving even now on less than $1 a day. These glaring disparities coupled with starvation deaths even now, in spite of surplus food, is attributable to lack of good governance, if not mis-governance. The principles fundamental in governance prescribed in the Directive Principles

indicate the essence of good governance envisaged by the Constitution and the deficiency is, therefore, only in the requirement of conformity to those principles.

The text of the Constitution and the constitutional philosophy are of the good governance. Dr. Rajendra Prasad, at the time of adoption of the Constitution in the Constituent Assembly was prophetic when he said that the worth of the Constitution would depend on the worth of the men who work it. Good governance transcending to the level of humane governance is the vision of the Constitution of India. Policies with country's interest as paramount and their implementation with honesty and integrity lead to good governance. Public service is a public trust requiring all public men to place nation first and above personal gain.

The significant feature of our constitutional governance is the accountability of all public men for which there is need of an effective mechanism for enforcement. The nature of mechanism may vary, depending on the level at which it has to be applied, but the basic principle in a republican democracy of accountability of every public functionary to the people must be adhered to. Our Constitution envisages, as indicated by Dr. Rajendra Prasad, the development of proper conventions in due course to fill the gaps i.e. silence of the Constitution. Good governance also requires that to be done. We have enough human capability and the competence but the need is to capitalize our assets by good governance and effective administration.

It is worth recalling the 'standards in public life' and the seven principles recommended by the Nolan Committee in England, which apply to all aspects of public life, are:

1. *Selflessness:* Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.
2. *Integrity:* Holders of public office should not place themselves under any financial or other

obligation to outside individuals or organisations, that might influence them in the performance of their official duties.

3. *Objectivity:* In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
4. *Accountability:* Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
5. *Openness:* Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
6. *Honesty:* Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
7. *Leadership:* Holders of public office should promote and support these principles by leadership and example.

5. RULE OF LAW IN DIFFICULT TIMES

One of the current issues impacting on governance is of combating terrorism. It has assumed greater significance after the terrorist attacks in USA on September 11, 2001. A steady erosion into the meaning of 'rule of law' appears to be gaining acceptance. It is, therefore, necessary to appreciate the meaning of 'rule of law', a constituent of constitutional governance, even in difficult times.

The UN Secretary General, Kofi Annan, in a recent statement (upon receiving honorary degree at Tilburg University, the Netherlands) on 21 November 2002, recognising the threat of terrorism and the need for combating it firmly, emphasised the

need to adopt the counter-terrorism measures consistent with the Constitution and the laws, which respect human rights. In the current state of threat posed by terrorism, the need to match counter-terrorism measures with the idea of good governance has assumed significance and also raised doubts in the minds of many, of the need to respect human rights during the extraordinary threat posed by national and international terrorism. The extent to which the notion of sovereignty is allowed to trump the protection of citizens was considered by Kofi Annan, and he said:

> Terrorism is one of the threats against which States must protect their citizens. States have not only the right, but also the duty to do so. But States must also take the greatest care to ensure that counter-terrorism measures do not mutate into measures used to cloak, or justify, violations of human rights. Terrorism has a nasty habit of casing the whole spectrum of opinion in a society to lurch in a repressive direction.
>
> Even as many are rightly praising the unity and resolve of the international community in this crucial struggle, important and urgent questions are being asked about whit might be called the 'collateral damage' of the war of terrorism - damage to the presumption of innocence, to precious human rights, to the rule of law, and to the very fabric of democratic governance.
>
> Domestically, the danger is that in pursuit of security, we end up sacrificing crucial liberties, thereby weakening our common security, not strengthening it - and thereby corroding the vessel of democratic government from within. Whether the question involves the treatment of minorities here in the West, or the rights of migrants and asylum seekers, or the presumption of innocence or the right to due process under the law - vigilance must be exercised by all thoughtful citizens to ensure that

> entire groups in our societies are not tarred with one broad brush and punished for the reprehensible behaviour of a few. —
>
> —But our unrelenting position must be that any sacrifice of freedom or the rule of law within states, or any generation of new disputes between States in the name of anti-terrorism, is to hand the terrorists a victory that no act of theirs alone could possibly bring.

Kofi Annan's speech is a continuation of the UN Security Council's Resolution 1373 of September 28, 2001 and other UN Resolutions which emphasise that respect for human rights is not merely a requirement of the rule of law but also the essence of good governance to be observed even during difficult times. This summarises the true position under the rule of law, which is never in suspension in a democracy.

6. DEMOCRATIC ETHOS

The theme of the UNDP Human Development Report, 2002 is 'Deepening Democracy in a Fragmented World'. The report highlights the need for an inclusive democracy so that every section of society is involved in policy making and decision making. The report emphasised the need to strengthen and develop complementarity between institutions of governance. An independent judiciary provides the necessary checks and balances between the democratic instruments of governance. The report points out that India's independent judiciary is the comer stone of the country's democracy. Complementarity developed between the Indian judiciary and the National Human Rights Commission constituted under the Protection of Human Rights Act, 1993 is proving more effective in governance and accountability by improving the quality of governance. I have often said, that the NHRC acts as a catalyst for this purpose, and, therein lies its efficacy.

A constitution of a country depicts the basic structure of its political system. India is a federal polity with a unitary bias. A strong Union is necessary to ensure cohesion and to preserve the core value of 'Unity in Diversity' on account of multi-religious, multi-ethnic and multi-cultural pluralist society. The admixture of diverse traits into a unified composite culture is the peculiarity and panorama of the Indian ethos. The polity assured to the people of India by the Constitution is described in the Preamble as a 'Sovereign, Socialist, Secular, Democratic, Republic' and the Preamble begins with the words 'We the People of India' which indicates that the political sovereignty in India vests in the People. Secularism is embedded in the Indian ethos. *'Sarva Dharma Sambhava'* (equality of all faiths) in *'Vasudhaiy Kutumbakam'* (world is one family) wherein prevails *'Sarve Bhawantu Sukhinah'* (peace and happiness for all) is our faith.

These concepts emphasise respect for human rights treating every member of the human family as equal. Respect for human dignity is assured in the Fundamental Rights guaranteed to the individuals which carve out the sphere of non-invasion of individual's rights by the State. Along with that is the mandate to the'State in the Directive Principles to ensure the formulation and implementation of its policies consistent with the fundamental principles of governance therein, all of which are for human development and respect for human rights. The participatory role of the people in the representative form of government requires certain duties to be performed by every citizen which are the Fundamental Duties. This is necessary, because it is the people who are the *'only keepers'* of the Constitution, to use the words of Joseph Story.

7. FREE AND FMR ELECTIONS

To enable the people to discharge their participatory role, they should be empowered to make informed decisions, and this requires human development through respect for human rights. Good governance is possible only when the State observes the principles fundamental in governance, laid down in the Constitution, and the people in whom the political sovereignty vests and from who all public power is drawn, discharge

effectively their participatory role through their true representatives elected in a free and fair election. The role of the judiciary and other democratic institutions is to perform the duty assigned to them by the Constitution, and to be equally accountable to the people, so that the constitutional governance is achieved. No individual, howsoever highly placed, is immune from accountability, or has absolute power in our constitutional scheme, and it is the duty of the people to ensure that the constitutional scheme becomes a reality. Good governance is possible only in this manner.

The representative form of government based on the premise of the participatory role of the people requires that the elected representatives should be the true representatives of the people. This is possible only if the elections are free and fair, with equal opportunity to every intending suitable candidate to be considered by the electorate for the choice of its representative. The election process must, therefore, satisfy this requirement and it should not have the effect of confining the elections only to a few, eliminating in that process other suitable candidates, denying to the people their right of making an informed choice of their representative.

Unfortunately, for quite some time, the election process appears to have been vitiated by criminalisation of politics and the dominant influence of muscle and money power. Consequent electoral results are, therefore, skewed in many ways: exclusion of suitable candidates at the threshold, impact on election results by the use of muscle and money power, and absence of issue-based differences amongst political parties which denies the people their right of making an informed choice. Politics is governed more by personal interest, than by national interest. Governance through representatives chosen by a vitiated election process does not, therefore, reflect the true will of the people and it does not have a truly representative character. The ensuing result is not in conformity with the nature of constitutional governance. The result also militates against the people's right to a truly democratic governance which is a denial of inclusive democracy. This is a negation of constitutional governance.

8. ROLE OF JUDICIARY, MEDIA AND THE PEOPLE

Right to corruption-free governance is also a basic human right in a democratic polity. Corruption anywhere is detrimental to society but it is even more in a developing nation. Corruption has the adverse effect of denying to the people that which is legitimately due to them for their development. The IMF and the World Bank have indicated that the quality of governance in a developing nation and the state of corruption therein would be a relevant factor for their decision to provide support for development, since corruption results in the funds not being utilized for the purpose of development. Based on the premise that the people have a right to corruption-free governance, without which there is violation of their right to equality guaranteed in art. 14 and right to life under art. 21 of the Constitution of India, the Supreme Court intervened in the *Hawala* Case *[Vineet Narain & Ors.* v. *Union of India & Anr,* AIR 1996 SC 3386] to enforce probity in public life and accountability of public men. This was done by invoking the constitutional remedy under art. 32 (also a Fundamental Right) to enforce the people's fundamental rights, and the CBI (the premier investigating agency) was directed to equally apply the law for investigation into the accusations of bribery against highly placed persons, and to launch prosecution for the criminal offences made out against them. The linkage between human rights and constitutional governance was clearly accepted by the Supreme Court, and an innovation was made to utilize the judicial process for correcting an aberration in governance for enforcing human rights.

Development of the judicial process of Public Interest Litigation (PIL) is due to the seeming failure of the other branches to effectively discharge their functions in certain spheres of public concern. Since the issues raised in the PIL pertain to enforcement of Fundamental Rights, whenever the issue has a legal component, the Supreme Court has stepped in under art. 32 to fill the vacuum. Nature abhors vacuum. The Supreme Court has invoked its power under art. 142 to make such orders, as are necessary, to do justice in the cause. To begin with, PIL commenced on an uncharted wsvsfifc, \sv& "wAs. \& &eNe\o^nvex&, ^mcvpVes, have emerged to

regulate its course and give it a precedent value. This has happened, more by judicial orders, as yet. The need is to compile these judicial orders and give it the form of binding rules to ensure uniformity of procedure and predictability of the outcome, in accordance with settled norms. Juristic basis for every order in PIL is necessary for uniformity, certainty and its lasting effect. The principle underlying a representative action under Order 1 Rule 8, of the Civil Procedure Code (CPC), and control of the court through prior leave, with similar procedure, and appointment of an *'amicus curiae'* would prevent the possibility of abuse of PIL for ulterior purposes by motivated people. There is need to amend the rules of Supreme Court and the High Courts to embody these principles. An exercise on these lines to amend the Supreme Court Rules was performed in 1997 by a Committee constituted by me as Chief Justice of India for this purpose. I am not aware of the steps, if any, taken thereafter for its implementation.

It is through the judicial process of PIL that serious issues pertaining to probity in public life, rights of the marginalized and sustainable development, relating to environment, ecology, public accountability etc. have been dealt with by the Supreme Court and High Courts. Notwithstanding the resistance of other branches, PIL has come to stay because it is perceived by the people as a public law remedy for the enforcement of their rights. *Vishaka* v. *State of Rajasthan* [AIR 1997 SC 3011] is an instance of filling legislative vacuum in the sphere of gender justice. PIL has come to stay because it is within the ambit of constitutional governance.

Even though, an independent judiciary is the constitutional watchdog in our scheme, the ultimate responsibility for good governance is that of the people. Mahatma Gandhi administered this caution when he said:

> There is a higher court than courts of justice and that is the court of conscience. It supercedes all other courts.

It is also useful to recall the words of wisdom of Judge Learned Hand, who said:

> A society so riven that the spirit of moderation is gone, no court can save, a society where that spirit flourishes, no court need save. In a society which evades its responsibility thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.
>
> What is the spirit of moderation? It is the tempo which does not press a partisan advantage to its bitter end which can understand and will respect the other side, which feels a unity between all citizens - real and not factitious product of propaganda which recognises their common fate and their common aspirations in a word, which has faith in the sacredness of the individual.
>
> I often wonder if we do not rest our hopes too much upon constitutions, upon laws and upon courts. Believe me, these are false hopes. Liberty lies in the hearts of men; when it dies there, no court can do much to help it.

Education of the citizens in the spirit of the Constitution and their empowerment 'to live by the rule of the Constitution' would ensure good governance as envisaged by the Constitution. After all, it is the *People* who are the *'only keepers'* of the Constitution.

The media has an important role in the formation of public opinion. It is the public watchdog. The freedom of press is derived from the people's 'right to know', implied from the freedom of speech and expression [art. 19(l)(a)]. Accountability of public men can be enforced by a vigilant and objective media. The media is, therefore, a powerful tool of good governance. It is meant to inform the people, and also be its powerful voice.

9. CONCLUSION

Granville Austin, speaking of the Indian Constitution, said:

> I conclude with a grand and cheering paradox. Although the sins of omission and commission of past governments have shaken democracy, and although the credibility of governments and politicians has dropped to a level that appears to endanger constitutional government in India, the democratic ethos, the principle of representative government, seems deeply rooted among citizens. It has taken time for the constitution to become secure. In the future, government or the citizens may slight or ignore it, yet it is accepted as the nation's foundation document, some say the new *dharmasastra.* It has given citizens standards by which to measure performance, to vote for or against their representatives. —.
>
> A final remark: All these years the citizen's lot has been improving, even if slowly, and government in the country has been functioning, and this is something we non-functionary historians and analysts should not forget.

By and large, the constitutional governance in India has been functional, even in difficult times. This has been possible because the governance has centered around respect for human dignity, which is a core value of our constitutional philosophy, and the democratic institutions have come to stay, notwithstanding the allergy to them, at times, of those in power. This is the strength of our constitutional philosophy backed by the Indian ethos.

CONTRIBUTION OF PROFESSOR AMARTYA SEN IN THE CONTEXT OF DEVELOPING ECONOMY LIKE INDIA*

Ashok K. Lahiri

1. INTRODUCTION

I am grateful to The National Law University, Jodhpur and Professor N. L. Mitra, Vice-Chancellor of the University for giving me the privilege to deliver the Amartya Sen Lecture. Amartya Sen has been the role model for my generation of economists, and the subsequent ones in this country. He has been the symbol and face of the best that the Indian economists have been doing over half a century since independence.

Apart from being the role model for Indian economists, Sen has also been a great source of inspiration for economists in India. Because of his several stints of teaching in India, he is some one that many economists in India have had the benefit of interacting with and hence relating to. There are several economists in India who proudly proclaim to be Sen's students. I must confess that although Professor Sen left the Delhi School of Economics the year I joined my master's programme there, often when someone says that I have been a student of Sen, I remain quiet rather than offering a categorical contradiction.

Analyzing the contribution of Professor Amartya Sen in the context of a developing economy like India is a formidable task. For a part of his academic career, Sen has pursued the problems of

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collective choice and social welfare as well as some fundamental problems going deep into the philosophical foundations of economics. The scope of much of this work is broad enough to transcend the limits of developing and developed economies. However, starting from his early days, there has been a large portion of Sen's work that is almost custom-made for a developing country like India.

In fact, it has been argued by Majumdar (1998) that Sen's work had an underlying grand plan to study 'impurities' of one kind or another. Majumdar (1998) quotes Banerjee (1998), where he says:

> His [Sen's] paper on 'Peasants and Dualism: With or Without Surplus Labour' showed that the decision problems faced by a peasant and even those faced by a peasant who has surplus labour (labour that seemingly should have been sold on the labour market but is not) can be analysed by using the standard tools of micro-economics and yield interesting insights. While this paper was important for its specific results, it was perhaps even more important for the 'space' it created for development economics within the rest of economics - it insisted that development economics does not need to be either completely disjoint from all of the rest of economics ('peasants are different: optimization theory does not apply to them') or completely subsumed by it ('peasants are just like any other entrepreneur'). As I see it, the great contribution of Amartya Sen to theoretical development economics has been the delineation of this space. He saw, perhaps before anybody else, the need for this space* and a way of defining it. In his work subsequent to the 1966 paper, he moved towards poverty as the lever that will allow him to extract such a space.

In this paper, I shall try and focus on a part of Sen's work that relates to choice of techniques and attempt to relate it to some contemporary problems in India. My focus on Choice of

Techniques, and not on say poverty and famines, does not reveal my preference ordering of the relative importance of these two topics in terms of either Sen's contributions in these two areas or their seriousness in the Indian economy. However, there is some historical significance of Choice of Techniques in the evolution of Sen's work in economics. As Bagchi (1998) has pointed out:

> Sen's first professional contribution, to *the Economic Weekly (EW),* appeared in the second half of 1956 [Sen 1956a] and he followed up with another article for the *EW* in the same year [Sen 1956b]. These maiden appearances in the *EW* at once provoked controversies, and Sen replied to his critics in his incisive style [Sen 1956c, 1956d, and 1956e]. He contributed four articles to the *EW* in 1957 (one of them in rebuttal of criticisms made by economists whose positions he had shown to be logically faulty). In the same year appeared his paper on the choice of techniques in the pages of the *Quarterly Journal of Economics* [Sen 1957], a paper which made him well known in the international community of economists—. In his very first appearance in the pages of *EW* (the direct predecessor of *EPW),* which was recognized as the journal par excellence, in which such issues were debated, Sen (1956a) tackled the problem of the choice of techniques, a subject on which he was to publish his first book [Sen I960].

2. CHOICE OF TECHNIQUES - A SIMPLE MODEL

To relate the subject matter of Sen's "Choice of Techniques" to the present day India, consider for example the discussion about the feasibility of the average 8 per cent growth per year in the Tenth Plan. A critical component of the feasibility is the Incremental Capital-output Ratio [ICOR]. The Tenth Plan pegs the ICOR at 3.58 relative to 4.53 in the Ninth Plan, which together with an investment rate of 28.41 per cent of GDP - again higher than 24.23 per cent in the Ninth Plan - yields a growth rate of 8 per cent in the

Tenth Plan. Growth depends on how much investment we are going to have and how much extra income we are going to generate per unit of investment - the ICOR - a factor that critically depends on the technology that we are going to use.

Technology has been of considerable interest to the Indian economists for quite some time. For example, Prof. K.N.Raj, one of Sen's contemporaries, published a series of two influential articles entitled 'Small-Scale Industries: Problem of Technological Change' in the *EW* - predecessor of *the Economic and Political Weekly [EPW]* - in April, 1956. According to Raj:

> The controversy regarding the policy to be adopted towards household and small-scale enterprises in the Second Plan has now gone on for over a year. In this controversy, there has been a tendency on the part of economists to take the view that the case for fostering such industries through protection depends primarily on humanitarian and political considerations. They seem to argue that on 'strict economic considerations' there is no case for such protection, and that where this policy involves preventing or regulating the introduction of improved technology (as in the standard issue of handlooms versus automatic looms), it is injurious to economic progress.' His main focus was change from cottage to factory production, and he drew attention to the necessity of subsidizing those who became jobless due to technological change. — Economic progress has been historically associated with improved technology, and so it seems logical to them that any policy which retards or slows down the pace of technological change is necessarily detrimental to development.

Raj pointed out the problems of dislocation and human misery associated with the displacement of labour from existing techniques, as well as the need for some protection, whether it involves direct subsidization or not, to those displaced by

technological change. Furthermore, he pointed out the need for clarity on the preferred objective of maximizing output and maximizing growth.

During 1955-57, Sen joined the debate and published a series of papers on the subject, which he consolidated in his classic book *'Choice of Techniques'*. This was his dissertation for a Prize Fellowship of Trinity College, subsequently submitted for a Ph. D. degree at Cambridge University and also published by Oxford University Press in 1960. Sen gave a full treatment of the problems involved in choosing the appropriate technology for the modern or advanced sector.

The choice of technique poses an associated choice problem between generating maximum employment today and maximizing growth. What is often lost sight of is that what ensures highest employment today; need not be the most growth enhancing strategy. Sen's Choice of Technique lucidly clarified how formulation of policies in a developing country with the problems of poverty and unemployment has to carefully balance the twin needs of generating income and employment for as many people as soon as possible, and of sustaining high growth. The choice of technology becomes an important issue in this context. While everyone in a developing country is all for technological advancement and bridging the technological divide between the 'advanced' west and a developing country, there is also the burning problem of generating as much employment as possible through the most labour-intensive techniques. Thus, simultaneously with the clamour for state- of- the- art technology, there is an emphasis on small-scale production, ban on labour-displacing technology, etc., particularly with defective telescopic psychology making future satisfaction mean less than present satisfaction in a poor developing economy.

2.1 The simple model

In Sen's formulation, there are two sectors of the economy: a pre-capitalistic family-based peasant economy - the backward (B) sector - with large-scale 'open' and/or disguised unemployment;

the other a state-owned 'advanced' (A) sector. Sector A has got two departments - I producing capital goods, and II producing corn, the only consumer good, which is also produced by sector B. The choice is between techniques L and H - low and high capital-intensive technologies. Capital intensity is defined as the number of man-years required in department I to make sufficient fixed capital to employ one man fully in department II.

The symbols used are as follows:
w = real wage per labourer per period;
a = capital intensity;
P_c = productivity per labourer per period in corn production in department II of sector A;
L_t = number of labourers employed in department I;
L_c = number of labourers employed in department II;
C = total corn production in sector A;
W_c = total wages bill in department II, sector A; and
N = surplus of corn production over wages bill $(C\text{-}W_c)$ in department II, sector A.
For any variable, primed and unprimed notations are used for H and L, respectively, and numerical suffixes are used for denoting periods. If the capital intensities are a and a' for L and H, and w is the wage rate, then S amount of corn extracted from sector B can employ

A -*Ir* =" in department I in the

initial period. This, in turn, generates

4 -^-^-

' *a* *w.a* of employment in department II in period 1, when technology L is used, and

r -I p =^*Ec*_
H ^*c*. -*r c*
1
w.a

of corn, where i^is the productivity per labourer in department I with technique L. Similarly, for technique H,

$$C'' - T' \quad P' - \frac{c\,p'_c}{w.a}$$

Technique L gives a larger, equal or smaller volume of corn output than technique H in the first period depending on whether

$$\frac{P}{a} \quad \frac{K_c}{a'}$$

$$P_c \qquad a$$

(Condition 1)

It does not, however, follow that the technique which gives a larger product in the first period must of necessity give a larger product also in later periods. This is because different amounts are reinvested under different techniques. The surplus of corn available after payment of wages - which are fully consumed - under techniques L and H are given by

$$w.a$$

and

$$w.a$$

Technique L gives a larger, equal or smaller rate of surplus than does technique H, depending upon whether

$$\frac{P_c - w}{a} \gtrless \frac{P'_c - w}{a}$$

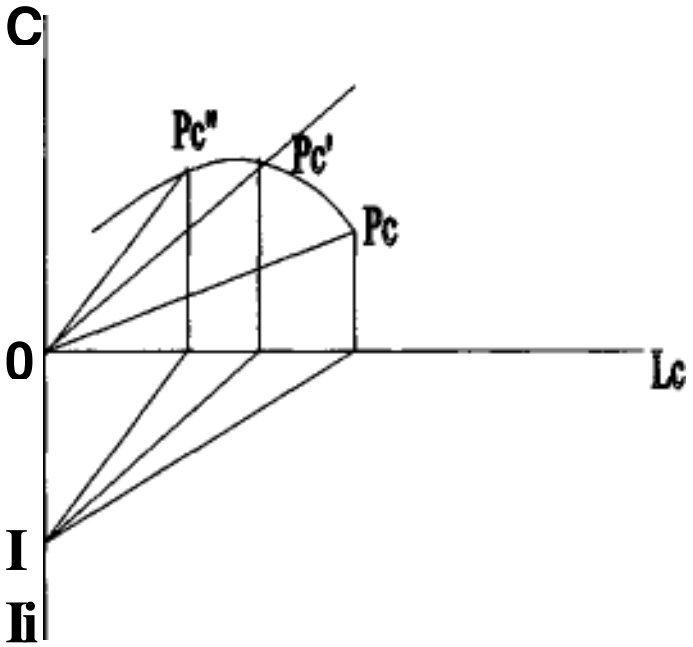
or

$$\frac{P_{,,} - w}{F_c - w} \gtrless \frac{a}{a'}$$

(Condition 2)

According to the standard Harrod-Domar condition, maximization of surplus (N) per unit of investment (S) leads to the maximum rate of growth. The difference between Conditions 1 and 2 starkly brings out the difference between the strategies for maximizing output or employment today and maximizing growth and hence output and employment over the medium to long run.

Diagram I

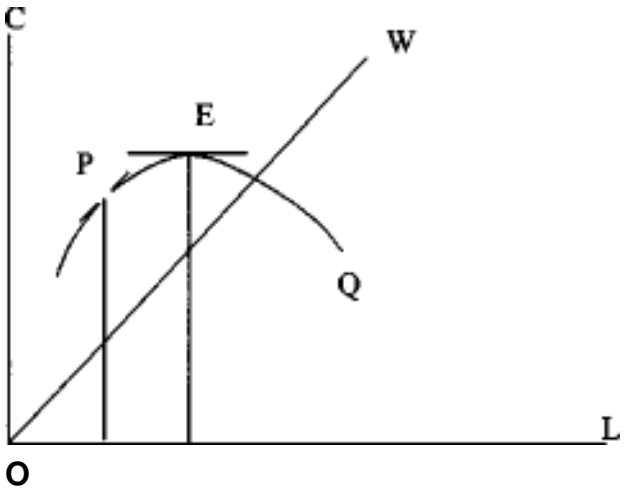


Showing employment in Department I on the southern axis, S amount of corn allows a fixed number of labourers, say I (where S = w.I) to be employed in Department I. Employment created in Department II by 01 of real investment in Department I depends on the capital intensity a. Considering three alternative capital intensities denoted by the tangents of the angles OL_cI, OL_cI, and $OL_C"I$, respectively, and three alternative productivity of labour associated with them - given by P_cOL_c, P_cOL_c, and $P_C"OL_c$, we can trace out the corn output under the three technologies. If we have many alternative technologies, we get a curve Q representing the relationship between employment in Department II and output of corn governed by technological possibilities.

If we draw the curve Q representing the relationship between employment in department II and the output of corn governed by technological possibilities, and the line W_c representing the wage bill corresponding to the levels of employment in department II, then E represents the point of maximum output which corresponds to Condition I, and P is the point of maximum surplus of corn production over corn consumption, which corresponds to Condition II.

If the future is as important as the present then P is preferable to E. Given sufficient time, a higher growth gives us more consumption goods, even if it gives us a much smaller output of consumption goods at present.

Diagram 2



Professor Francis Bator, in an influential article in the Quarterly Journal of Economics in 1957, had claimed that there is no conflict between maximizing present output and maximizing the growth rate. Sen points out that this is the result of his assumption that 'the rate of saving is independent of the (as if) market imputed distribution of income.' Furthermore, Sen doubted whether the implicit assumption that the real wage rate can be varied in whatever way we like, or the taxation system can give us any rate of saving, is correct.

2.2 Application to cotton weaving

In one of the appendices to the book, Sen considered the five technological possibilities: the fly-shuttle handloom (Rs. 30-50), the 'Banaras' semi-automatic hand loom (Rs. 200), the small-scale cottage power loom (Rs. 1,500), the non-automatic factory power loom (Rs. 4,000), and automatic power loom (Rs. 10,000). The fixed capital cost per loom under the different technologies is given in parentheses. By assuming one shift in the first three and two shifts in the last two technologies, and output per loom of 6, 20, 30, 80, and 80, respectively, and Rs. 0.25 (4 annas) per yard as the value of cloth per yard, Sen calculated the output to fixed capital ratio as 9.0, 7.5, 1.5, 1.5 and 0.6 for the five technologies. In terms of capital-output ratio, clearly the fly-shuttle handloom dominated the other four technologies.

Assuming labour per loom per shift to be 1, 1, 1, ^{l}A, and 1/16 for the five technologies, and the same wage rate for all the technologies, Sen showed that Banaras automatic handloom leads to a higher rate of surplus than the other four when the wage rate is below Rs. 5 per day, while non-automatic power loom is the most surplus yielding when the wage rate is between Rs. 5 and Rs. 12 per day. At a wage of Rs. 13 or above per day, the automatic power loom yielded the highest rate of surplus.

Sen with his characteristic lucidness brings in here the issue of technological change in the Indian cotton textile industry discussed by Prof. K. N. Raj. The question raised by Raj is how to subsidize those who become jobless due to technological change. Raj suggested the inclusion of cost of maintaining the displaced labour force as a part of the total cost and this makes his criterion less favourable to mechanized techniques than the surplus criterion proper.

2.3 Application to Ambar Charkha

In a separate appendix, Sen also examined the Ambar Charkha - an improved version of the hand spinning wheel consisting of a carding unit, a 'belni' and a spinning frame - as a technique of

cotton spinning. The case for its use had been championed by the All India Khadi and Village Industries Board and it had won the favour of Government of India. Assuming the output per Ambar Charkha per worker per day to be 6 hanks or 1/3 lb of yarn, value added per lb. of yarn to be 6 annas and 6 pies, two workers using the Charkha simultaneously for 300 days in a year, and maintenance and depreciation cost of the Charkha at Rs. 20 per year, Sen calculated the value added per Charkha to be Rs. 61 and 4 annas. With the cost of an Ambar Charkha at Rs. 100, the output to capital ratio turned out to be a very favourable 0.61. However. Sen also calculated that there was recurring deficit of Rs. 276 and 4 annas per Charkha, when the value added per year was adjusted for the wage cost of two workers at 9 annas per day. Sen calculated that there is a deficit as long as the wage is more than 1 anna and 8 pies per day per worker!

3. Choice of Techniques - Multiple Goods and External Trade

Sen takes up various extensions of his simple model by introducing diminishing returns to scale, technological change, depreciation, varying gestation lags of different techniques, level of wage as well as efficiency wage, to show that the essential nature of the problem remains the same. Sen also points out the problem of choice involving time, and distributional aspects. Two of the extensions, however, merit special attention.

3.1 Capital goods to produce capital goods

Sen takes up the case of capital goods to produce capital goods and hence choice of capital-intensity for the capital goods sector, and shows that the choice of capital-intensity of the capital goods sector depends on the choice of capital-intensity of the consumer goods sector. As Sen concludes, "For a satisfactory solution of the problem of the choice of capital intensity in one sector we must bring the rest of the economy into the picture" (p. 48). This is an important conclusion that we shall revisit later.

3.2 External trade

In Sen's inimitable words:

> — [T]he problem of technological choice for an underdeveloped economy cannot be discussed very meaningfully without bringing in international trade. This is because the underdeveloped countries, almost without exception, are characterized by the lack of a capital goods sector and in order to exploit modern technology they must import capital goods from abroad. Even to initiate a capital goods sector some import of machinery-to-make machinery is essential, unless of course the economy decides to reenact the long drama of industrial revolution scene by scene, (p. 68).

Going back to the old and simple model, let us assume technique L use machinery that can be produced with unassisted labour, while a part of the machinery for technique H is imported from abroad with the other part made in the economy by a' number of people employed for a year in department I. The original world market price of the foreign part is f and the original quantity imported is l_M. The economy pays for its imports by exporting corn, and g is the original world market price of corn. When more corn is exported to pay for higher amounts $(l_M + AI_M)$ of the imported part of the machinery for technique H, g may fall and f may rise. By how much g and f will change will depend on the arc elasticities of the foreign demand curve for corn and foreign supply curve for the imported part of the machinery under technique H. M, the extra payment for the imported part of the machinery is

$$M = \{f + Af)(l_{M+}AI_M)\text{-}fl_{Ki}$$

which yields

$$M \quad {}_{u}(I_{M+}AI_{M}W_{-l} \qquad .+- \qquad \blacksquare = 1 + -$$

$$\left(\frac{\Delta f}{f}\right)$$

where e is the arc elasticity of foreign supply of machinery purchased from abroad. Thus,

$$1+ 1$$

Similarly, with more corn exported, the price of corn in international markets will decline, and with g, and X_c denoting the original price and quantity of corn, for balancing external payments, we must have

$$AX_c.g = \frac{7}{1-}$$

where *rj* is the arc elasticity of foreign demand for corn. Putting $AI_M = 1$, we get the quantity of corn that has to be exported to buy the 'foreign' part of a technique H machinery as

$$AX_C = \frac{1+-}{1-}$$

Along with this, *(a'w)* amount of corn must be spent in the home economy to produce the 'home' part of the technique H machine. Thus, the rate of surplus per unit of corn-investment in technique H is

$$n = \frac{1}{g}$$

7,

In the case of technique L, the rate of surplus per unit of corn-investment is the same as before, that is

$$n = \frac{P - w}{aw}$$

Assuming the same gestation lag for both the techniques, technique H gives more, equal or less surplus than technique L according as

$$ri \gtrless or \lessgtr n,$$

that is

$$\frac{P' - w}{a'} \gtrless \text{or} \lessgtr \frac{P \quad w}{a} \qquad /* + \; 1 + \frac{}{awg \quad 1-}^{1}$$

V V). (Condition 1) In the limiting case of perfect elasticities, i.e. when $e = TJ = \infty$, we have

$$P' - w \qquad P - w \qquad /$$
$$-* \quad \gtrless or - \lessgtr \frac{}{a} \text{---} 1 + \frac{}{awg}$$

(Condition 2)

Similarly, technique H gives larger, equal or smaller immediate output than technique L depending on whether

$$a$$

$$-\frac{s}{a} \gtrless or \lessgtr -\frac{}{a} \left| 1 + - \frac{}{awg} \right| \qquad MA$$

(Condition 3)

In case of perfect elasticities, this condition reduces to

$$\frac{K}{a'} \qquad \frac{p_c}{a} \quad 1 + - \frac{a}{w} /$$
$$g$$

(Condition 4)

Sen pointed out that the lower the elasticity of foreign demand for our exports, and of foreign supply of machinery, the lower, ceteris paribus, should be the degree of capital-intensity chosen, assuming that a higher degree of capital intensity goes with higher import content in production.

4. CHOICE OF TECHNIQUE IN INDIA

Choice of technique has been a matter of considerable interest in India. The Incremental Capital Output Ratio (ICOR), has been monitored closely. One of the objectives of policy under plans has been to maximize output, and given a fixed amount of investment, output is maximized with the reference to Sen's Choice of Techniques.

4.1 Change in ICOR

The ICOR has fluctuated widely over the plans. For example, the ICOR, which from 3.9 in the Seventh Plan (1985-1990) had decreased to 3.43 in the Eighth Plan (1992-1997), increased to 4.53 in the Ninth Plan (1997-2002) and is targeted to decline again to 3.58 in the Tenth Plan (2002-2007). There are two primary reasons for the variations in the ICOR. First, is the variation in the sectoral composition of growth, and second, the variation in the sectoral ICORs. For example, while the growth rate of manufacturing declined by a factor of almost three from 9.77 to 3.68 per cent between the Eighth and the Ninth plans, the ICOR in manufacturing increased almost three-fold from 6.67 to 18.37.

The aggregate ICOR needs to be analysed together with the changing composition of demand, and sectoral variations in ICORs.

4.2 Choice of technique in the public sector

The performance of public sector savings may reveal some disturbing trends in the choice of techniques. As the *Economic Survey 2002-03* indicates:

> The Public Sector not only continued to be a net dissaver, but it increased its dissavings by nearly Rs. 10,000 crore. The departmental enterprises became net dissevers in 2001-02. the increased savings by non-departmental enterprises were more

> than neutralized by the increased net dissavings of government administration, (p.8)

Irrespective of the fact that the Government, through its choice of techniques, has been maximizing 'output', it is clear that even the departmental and non-departmental enterprises have not been maximizing surplus. While surplus maximization alone cannot be the objective of a government, the present fiscal situation with large revenue deficits and the large wages and salaries bill of the consolidated government relative to its revenues indicate the need for a change of course of action.

The Economic Survey (p.41) points out that the revenue deficit as a proportion of gross domestic product (GDP), after rising from 4.2 per cent in 1990-91 to 6.4 per cent in 1998-99, has risen further to 6.6 per cent in 2001-02 (RE). The fiscal space for augmenting capital expenditure without compromising fiscal sustainability is narrow and consolidation is essential for establishing the foundations for sustained robust growth. This is where the choice of techniques becomes relevant. Finances of both the Central and State Governments have been severely affected by the implementation of the Fifth Central Pay Commission's' recommendations. Given the higher wage rate for government employees it is necessary to rapidly change our choice of technique for producing public goods and services. The emphasis, of late, of looking at Government more as a provider of public goods and services rather than a provider of maximum direct employment necessitates such a change in approach.

4.3 Choice of technique in the private sector

Sen's choice of technique was for the state-owned advanced sector. The choice of techniques for the private sector is quite different from the government. While the government can choose the appropriate techniques on the basis of its social welfare maximization, the private sector is motivated more by profit than anything else. The private sector chooses its techniques to maximize surplus or profit. The critical question is how to ensure the appropriate choice of techniques by the private sector.

The instrumentalities for affecting the choice of techniques by the private sector can be broken up into two parts. First, is the market-based technique such as taxes and subsidies, for example payroll taxes or capital allowances, or customs and excise duties on capital goods? Second is the direct intervention in terms of permits and industrial licenses. With the dismantling of licensing with industrial deregulation under the reforms, what has remained as a direct instrument for influencing private sector choice of techniques is the reservation policy for the small sector.

5. SMALL SCALE RESERVATION POLICY

I now want to draw some conclusions regarding the issue of choice of techniques, especially with reference to small-scale industries (SSI) reservation policy, with reference to Sen's Choice of Techniques. Sen's Choice of Techniques remains extremely relevant in the context of the reservation of products for exclusive manufacture in the small-scale sector, an important policy pursued since 1967.

5.1 Historical background

The policy for reservation of items for manufacture in the SSI sector was introduced in 1967 with the objective to tap the untapped skills, generate employment and to fulfill the basic aim of socio-economic development through proper dispersal of industry in industrially backward areas and creation of self-venture activities. Reservation got proper statutory backing in 1984 through amendment in Industries (Development and Regulation) Act, 1951, which provided for the creation of an Advisory Committee and also punishment for violation of the reservation policy.

The small-scale sector is defined under the Industries (Development and Regulation) Act, 1951 in terms of original value of investment up to a particular limit. Policies for small-scale enterprises (SSEs) in power looms, handlooms, sericulture and handicrafts are administered by the Ministry of Textiles, and in khadi and village industries and in coir fibre by Ministry of Agro

and Rural Industries. Policies for other SSEs are administered by the Ministry of Small Scale Industries. Thus, in practice, the SSI sector serves as a residual sector in the sense that all units that fall within a prescribed investment limit and are not recognized in a particular sub-sector are included in it. SSIs, power looms, handlooms, sericulture, handicrafts, khadi and village industries and coir fibre units are called village and small industries (VSI) by the Planning Commission with effect from December 24, 1999. SSIs and power looms are known as the modern segment of VSI, while handlooms, sericulture, handicrafts, khadi and village industries and coir fibre are known as traditional industries.

Between 1950 and 1960, SSIs were defined as units with original value of investment in fixed assets up to Rs. 5 lakh and employing less than 50 persons with power or less than 100 persons without power. From 1960, the condition on employment was withdrawn. The investment limit was related to only plant and machinery rather than fixed assets from 1966. The limit of investment in plant and machinery was progressively increased to Rs. 7.5 lakh in 1966, Rs. 10 lakh in 1975, Rs. 20 lakh in 1980, Rs. 35 lakh in 1985, Rs. 60 lakh in 1991, and Rs. 3 crore in 1997. While the general limit was rolled back to Rs. 1 crore from 1999, with effect from October 2001, the investment ceiling in respect of 41 items covering two broad groups of hosiery and hand tools was enhanced to Rs. 5 crore.

The definition of SSI in India is somewhat at variance with the general international practice. As noted by Small Industrial Development Bank of India (SIDBI), 2000 at the international level, the general practice for determining the size of a unit for the purposes of classifying it as an SSE, is to define it in terms of the number of employees followed by asset size. For example, Australia, Canada, Denmark, France, Germany, Greece, Indonesia, Ireland, Italy, Korea, the Netherlands, Spain, Sweden, Thailand, USA, and Vietnam define it in terms of employees alone. On the other hand, Belgium, China, Japan, Malaysia, Mexico, the Philippines, Portugal, and Taiwan define it in terms of number of employees followed by asset size. Only, Singapore, like India, defines SSEs for manufacturing in terms of asset size alone.

Three relaxations were allowed in SSI reservation over time. *First,* from 1984, a non-SSI unit was allowed to manufacture the reserved item subject to the condition that it undertakes to export 50 per cent of its production. *Second,* in case of such small units which have been manufacturing the items and attained natural growth, a provision of Carry on Business (COB), wherein the production of reserved item is pegged to the maximum of last three years of production, has been allowed since 1984. *Third,* to provide marketing back up to the small and tiny units manufacturing products reserved for manufacture in the SSI sector, trading through big companies has been allowed ever since 1967. Large companies can obtain the products from small units and use their brand name to sale them.

Initially, in 1967, only 47 items were reserved for manufacture in the SSI sector. The list, primarily because of enlargement by 73 on February 24, 1971, by 53 on February 26, 1974, and 324 on April 26, 1978, got enlarged to 504 by 1978. The recast of the list into NIC codes in 1978 converted the number of items from 504 to 807. After a rapid increase in the list of reserved items in the 1970s, further increases in the list of items were limited in the first half of the 1980s. While some items were added to the reserved list - particularly by 27 on December 30, 1978. and 35 on October 19, 1982-some items were dereserved as well - particularly by 13 on August 3, 1981. On September3, 1983, the number of items in the reserved list reached its peak at 873.

An analysis of the 836 reserved items in December 1996 showed the number of such reserved items to be 1,045 items at the 9-digit product code level. Furthermore, as many as 325 of the items (31.1 per cent) belonged to chemical and chemical products, 138 (13.2 per cent) to metal products, 107 (10.3 per cent) to transport equipment and parts, and 112 (10.7 per cent) to rubber and plastic products. The combined share of items from these four industries in the reserved list was as much as 65.3 per cent.

A trend toward dereservation was observed after 1984. The gradual trend of de-reservation of items from the SSI sector was maintained during the 1990s, and as on date the list has come

down to 749. The list is likely to be further reduced because of the announcement made in the Union Budget 2003-04. Budget 2003-04 envisages de-reservation of 75 items from laboratory chemicals and reagents, leather and leather products, plastic products, chemical products and paper products. All additions & deletions in the reservation list are subject to the recommendation of the Advisory Committee. It has also been a conscious policy of the Government to interact with the stakeholders of the respective trades/items before submitting a comprehensive proposal for consideration of the Advisory Committee. The Advisory Committee has met 22 times so far.

To review the impact of the Reservation Policy, the policy has time and again been considered by different Committees like Bhat Committee (1972), Vijay Raghavan Committee (1995) and Abid Hussain Committee (1997).

5.2 Analytical underpinnings

The definition of SSI in terms of investment in plant and machinery does not automatically guarantee a high labour-intensity of production. Given that one of the important objectives of reservation is employment generation, this objective is achieved only if 'small' enterprises are more labour intensive. But going back to Sen's critical distinction between maximum labour-capital ratio criterion and maximum surplus-to-capital ratio criterion, even if 'small' enterprises generate maximum employment per unit of investment in the short run, they may not generate the maximum surplus per unit of investment. If internal resources are important for further growth, then maximum labour-capital ratio, while ensuring maximum employment generation in the short run, will not ensure maximum employment generation in the medium to long run. Furthermore, even if SSEs generate maximum surplus per unit of investment, such surplus cannot be reinvested in the enterprise once the specified investment limit is reached.

On the question of optimal capital-labour ratio and SSI reservation, according to the Abid Hussain Committee (1997):

> There is no evidence to suggest that any detailed information was collected about the spectrum of production techniques used in the different product lines to determine if the 'optimal' capital-labour ratio in the reserved product line was indeed below the declared limit. A more fundamental point is that this type of information is impossible to collect even for an all-seeing computerized super machine with access to an infinite array of reliable input-output data. In a changing vibrant economy, production techniques are constantly evolving, often due to small changes made by enterprising entrepreneurs to their basic blueprint and the list of blues gets even more complicated and longer.

According to the Committee:

> The last point suggests a reason why we have no explanation in official documents anywhere how the list of reserved items has been selected, and on what basis additional items have been added. The changes over time give the impression that the choice of products was somewhat arbitrary. Eighty per cent of the reserved items are concentrated in 11 three-digit NIC categories. The remainder are spread over 90 three-digit categories. This heavy concentration of policy incidence, together with a long tail demonstrates, to some extent, successful lobbying for reservation by special interest groups. In the absence of a well-defined and rational criterion for product selection - which, we have suggested, is impossible in practice - the scope for such action remains large, and its potential for welfare loss to the consumers and the economy increases commensurably.

The Committee also noted:

> The concentration of reserved items in a narrow group of three digit industries suggests that an attempt might have been made to pick up the most promising sectors. There is no evidence of this, or if these sectors are particularly labour intensive. But two specific points might be made in this context to complement the general point made above about the near impossibility of selecting product lines on the basis of optimal labour intensity. These refer to the distinction between labour intensive enterprises and labour intensive industries, and the variations in product quality within the same product line.

Furthermore, the Committee states:

> Small enterprises are generally more labour intensive than large ones, especially if size is defined in terms of fixed investment rather than employment. But it does not mean that they are concentrated in industries where the mean capital-labour ratio is particularly low. SSEs are found in most industries. There is no reason that in any economy the number employed (or the proportion of total output or investment) in SSEs would be larger in those industries which have a less than average capital-labour ratio than in those in which the ratio is above the average. This is because there is a spectrum of techniques within each industry, and enterprises of different sizes and capital intensities will be found in most of them.

5.3 SSI reservation in a multi-commodity economy

We may recall that, according to Sen, "For a satisfactory solution of the problem of the choice of capital intensity in one sector we must bring the rest of the economy into the picture". As Sen points

out, the root of the problem lies in the fact that while the worker produces one or a few goods, she spends her income on a number of goods. Thus the surplus created in a particular industry can be measured only when the relative prices are known. But the relative prices themselves will depend on the capital-intensities chosen for the other sectors. The problem is compounded when the output of the sector in question is used as inputs in other sectors. Thus, what is needed is a general equilibrium approach, and this is perhaps what the Abid Hussain Committee means when it says "A more fundamental point is that this type of information is impossible to collect even for an all-seeing computerized super machine with access to an infinite array of reliable input-output data."

5.4 SSI reservation with external trade

The historical genesis of reservation, like much of our other policies, is related to what may be termed as "elasticity pessimism". As we have seen above, according to Sen, the lower the elasticity of foreign demand for our exports, and of foreign supply of machinery, the lower, ceteris paribus, should be the degree of capital-intensity chosen, assuming that a higher degree of capital intensity goes with higher import content in production. From 1956 onwards, the country had endured serious foreign exchange constraints, and the share of India in global trade had continuously declined until the mid-1980s. This led to the belief that the elasticities of foreign demand for our exports and of foreign supply of machinery were low.

The dynamism of Indian exports observed since the mid 1980s, together with the strength of the balance of payments as reflected in the comfortable foreign exchange reserves of over $ 70 billion, equivalent to more than a year's imports, necessitates a review of the reservation issue.

The policy of reservation has attracted some attention because of the opening up of imports. As noted by Montek Singh Ahluwalia Committee (2001):

> — [T]he opening up to imports has made continuation of reservation an unsustainable option. With the lifting of quantitative restrictions (QRs) on imports on. 1st April, 2001, a large number of consumer items which are currently reserved products have become freely importable, subject only to tariffs. While tariff rates for many of these items, especially consumer goods, are relatively high, it has been announced that within 3 years we will move to a peak tariff level of 20%. This means that imports produced abroad in economic scale units will be able to compete with Indian SSI producers in the domestic market with relatively modest tariff protection, but Indian producers will not be allowed to increase investment beyond the specified SSI ceiling level in order to become more competitive. With preferential access allowed for some SAARC countries (e.g. Sri Lanka and Nepal), producers located in these countries will be able to access our markets with zero or low tariffs. Continuing with reservation in this environment is completely illogical. It will only tempt Indian entrepreneurs to set up production facilities in neighbouring countries and import products from these locations rather than produce and generate employment at home, a trend that is already in evidence. (Para 4.32).

It is important to emphasise that even if QRs on imports had continued, the product manufactured domestically in SSI units could not have competed with the same product manufactured abroad in economic scale units, and precious export opportunities would have been lost. The permission to non-SSI units to manufacture the reserved item subject to the condition that it undertakes to export 50 percent of its production eased the constraint to some extent, but again, as noted by the Montek Singh Ahluwalia Task Force (2001):

> It is now generally recognized that the policy of imposing a limit on investment in areas which have export potential has prevented India from exploiting world markets in many areas. China's dramatic success in exporting relatively simple [products such as standardized garments. Shoes, toys, etc. achieving export levels that are 40 to 80 times higher than India is well known. One major reason for China's success is that they are able to engage in large-scale production and achieve levels of quality and technology which is not possible with constraints on investment. The consequence has been a tremendous growth in income and employment in China. India could have reaped similar benefits if Indian producers had been allowed to produce on a competitive scale and received the support to achieve export orientation. (Para 4.31):

6. SOME CONCLUDING REMARKS

I have an uneasy feeling, as I have had throughout while writing this paper, that I have focused on a very narrow aspect of Sen's work. Sen has covered a wide spectrum of economics. He has initiated concepts such as rational fool, emphasized the problems of exchange entitlements, poverty and famines, and freedom, and has been one of the main architects of such fundamental concepts such as the human development index. I am tempted to quote him from his 1985 Tanner lectures:

> There are many fundamentally different ways of seeing the quality of living, and quite a few of them have some immediate plausibility. You could be well off, without being well. You could be well, without being able to lead the life you wanted. You could have got the life you wanted, without being happy. You could be happy, without having much freedom. You could have a good deal of freedom, without achieving much. We can go on.

I have focused on choice of techniques, with a profound emphasis on maximizing growth. I hope this will not be construed as too narrow a view of Sen. The only defence that I have is that I have dealt with what Sen tried to tell us right at the beginning of his brilliant innings in Economics, and no matter what the other policies, appropriating choice of techniques will continue to be relevant as enabling mechanism for the pursuit of other policies.

As we have seen, the policy of reservation for SSI as has been pursued for more than thirty-five years is difficult to support on theoretical or empirical grounds. The question that remains is what is the way forward. The SSEs are critical for economic development: they provide the cradle that nurtures big businesses and billionaires of tomorrow, they choose the appropriate product designs and techniques—be it labour—or capital-intensive, and they have the flexible management capacities to respond to the fast changing market conditions.

The Abid Hussain Committee (1997) has recommended:

> —[T]he policy of protection be replaced by promotion as the cornerstone of future policy. Adequate supply of credit, services, technology assistance, infrastructure and low transaction costs are the hallmarks of the proposed strategy for the promotion of SSEs. This can be achieved by developing a variety of linkages between enterprises and their support institutions, partnerships between the private sector and the government, greater information flows and by streamlining the legal and institutional framework.

The Committee recommended a cluster approach for setting up support systems. According to the Committee:

> — [T]he state governments identify the existing SSE clusters and then promote new types of organizations which are joint ventures between the

state governments or the local authorities and business associations in these clusters.

The ongoing experiment in Tirupur, where a joint venture with the local textile manufactures' associations, is trying to solve the water supply and sewage disposal problem in the Coimbatore district of Tamil Nadu provides important pointers in this direction.

So what should be done with SSI reservation? The S.P. Gupta Study Group (2001), after taking into consideration the present global scenario, including the WTO regime, removal of quantitative restrictions, competition from cheap imports, and adoption of international standards, has recommended that:

- Reservation of products may continue for the present and the position may be reviewed from time to time;
- Dereservation of some selected export thrust items could be considered; and
- Investment ceiling of some identified items which are important from the export perspective could be raised to Rs. 5 crore.

The Montek Singh Ahluwalia Task Force, however, has recommended a more aggressive four year schedule for dereservation:

- All items with identified export potential should be dereserved immediately; and
- All other existing reserved items should be classified into two categories: a first category with a ceiling of Rs. 5 crore for whom reservation would end after two years, and a second category with a ceiling of Rs. 3 crore which move into the first category in two years.

What is important to note in this context is that, until; 1997, the reserved items accounted for about 12 per cent of the items produced in the small-sector. At present the proportion is less than 8.4 per cent with only 674 items on the reserved list and more than 8,000 items produced by the small-scale sector. During the last five

years, many items, such as readymade garments, leather shoes, toys, rice milling and dal milling, biscuits, ice cream, some auto components, some agricultural implements, which are important in terms of output, employment and number of units producing such goods, have been dereserved. As a result, the share of the reserved items in total production of the small-sector, which was 28 per cent in 1997, has come down to about 15 per cent.

There appears to be a broad consensus on progress on dereservation. The disagreement appears to be on the dismantling schedule. This brings us to the realm of political economy and an old question that K.N. Raj had raised in the context of the Indian cotton textile industry: how to subsidize those who become jobless due to dereservation. How many, if at all, will loose their livelihood because of dereservation is a matter of empirical investigation. As Sen had pointed out this could be incorporated in the choice of technique exercise by including the cost of maintaining the displaced labour force as a part of the total cost. When we do that, this could make immediate and rapid dereservation less attractive than a more gradual approach, but all this is a matter of empirical investigation. In this context, it is important to note that a 2002 evaluation of the impact of dereservation of 15 items in April 1997 such as ice cream, vinegar, rice and dal milling, biscuits, synthetic syrups and auto components, revealed an improvement in quality and no output or employment losses.

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LENDERS' LIABILITY: AN EVOLVING LEGAL CONCEPT

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1. INTRODUCTION : LENDERS' LIABILITY, CONTOUR OF STUDY

1.1 Lender-borrower relation

The relation between a borrower and a lender is contractual one and hence the liability between the parties is determined by terms and conditions within the framework of the contract. A lender is the person who extends the facility of lending based on mutually acceptable terms and conditions to the person who borrowed the money. The amount lent may be short-term lending to support a project or an overdraft facility extended to support working capital. Lending may also be long term lending against loan instruments like bonds, or debentures. Short term lending is the main business of banking institutions. Long term lending for supporting loan capital is one of the main business of the financial institutions. Person lending may be an individual, collection of individuals like partnership firm; joint venture or may be legal entities like, companies, co-operatives, or trusts. Similarly borrower may also be an individual, collection of individuals or entities. In case of individual lending-borrowing contracts, the relation can be established directly or through accredited agents. In case of entities, the relation is established through contracts between managements representing entities. As for example, if a General manager of a Bank negotiates a lending transaction for and on

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behalf of the Bank, the Bank is the lender; the General Manager only represents the Bank.

1.2 Liabilities of the parties

The liability of the parties in lending-borrowing transaction may be due to (a) execution of the contract according to terms and conditions laid down in the contract, (b) wrong lending and (c) bad lending. The extent of liability may be joint and several. Joint liability is the liability jointly owed by the borrower and the lender. The borrower as well as the lender may have exclusive and several liabilities, notwithstanding the primary liability of the borrower.

1.3 Jurisprudence of lenders' liability

In a lending-borrowing transaction the borrower has the primary obligation to bear the burden of meeting the obligation for borrowing. If the borrower is a *person-in-fact* the liability is unlimited. So the borrower has a primary liability to meet the obligation in case the lending becomes bad. If the borrower is a *person-in-fact,* the person has unlimited liability for bad borrowing, and if there are more than one borrower, the liability is joint and several. The borrower cannot argue that borrowing failed because of reasons beyond the reasonable control of the *person-in-fact* such as economic downturn, market failure etc. If the borrower fails to meet the obligation insolvency proceedings shall start for whatever is possible to be realised from the borrower. The law is not different in case of *person-in-law.* It is far more adverse to the interest of the borrower. The *person-in-law* (legal entity) having limited liability shareholders cannot realize the loss of bad lending from the shareholders. It has to absorb such loss from system management like, adequate provisioning, risk management etc. and pay up the loan. If the institution fails to meet the loss, it faces the challenge of bankruptcy and insolvency. When the borrowers fail to meet the obligation the lender bears the liability of bad lending. Lenders' liability is thus no new concept. The lender may have

contractual liability,[1] tortuous liability[2] and felonious liability.[3] He may have direct liability[4] or vicarious liability.[5] Finally, exclusive liability may fall on him for bad lending because he is the ultimate person to bear the loss of bad lending. Quality of lending is directly related to allocated responsibilities of discharging the liabilities of the parties according to the terms of the contract. The same is also measurable with the transactional cost of realization of the debt. The growing Non-Performing Asset (NPA) in the hand of the banking and financial sector is an indicator of the fact that (a) quality of lending in India is not high; and (b) the cost of realisation of debt is very high due to poor quality of direct and collateral security interest. The lender may be liable for wrong lending meaning thereby that (i) a right decision of lending is wrongly taken; or (b) a wrong decision is taken violating statutory provisions. Such a liability is due to malfeasance (wrong decision taken); misfeasance (right decision wrongly taken) and nonfeasance (right decision not taken). These liabilities are jointly reposed on the borrower and lender to other parties directly involved or to the society or Government. But in case the lender violates any term of the contract, the lender may be liable to the

' 'Contractual liability' means liability attached to the parties to the contract in view of the terms and conditions attached to the contract agreed upon by the parties. In a liberal democratic country with market economy there is freedom of contract. Whatever contains in the contract are the laws for and against the parties to the contract. The contract provides the law for the parties to the contract. Of course, the contract cannot create any obligation or impose any duty on any third party without his consent. But parties are completely bound by the terms and conditions. This is also known as contract sovereign.

[2] '.Tortuous liability' means a liability arising from the denial of a civil right of any person. For example, X has taken a loan for an industry using MIC gas and creates hazard in the neighborhood. Here X is liable for environmental pollution to all those in the neighborhood who have the right to clean environment. Individuals have right to life, freedom of speech and expression, freedom of trade etc. None of these rights can be put to danger by any lending activity. If it does, there can be a tortuous liability. Tortious liability is a common law liability in the absence of any definite law.

[3] 'Felonious liability' is a criminal liability. Violation of any criminal law provision gives rise to criminal liability.

[4] 'Direct liability' is the liability arising out of one's own action.

[5] 'Vicarious liability' is a liability that arises because of action of another, like an employee, agent or any other person for which another person may be held liable.

borrower. Sometimes the lender includes the management for the purpose of attachment of liability because the legislative process exposed the management by attaching personal liability or the judiciary may lift the veil of the entity to fix personal liability.

1.4 Transition from common law definition to rule-based system

To a reader who is not from legal discipline some of the terms used for the purpose of liability may be unfamiliar and technical. For them some common explanation is provided in the footnote.[6] 'Lenders' liability' is not a new concept in India, either. The Indian Contract Act, 1872, contains concepts of'misrepresentation'[7] and 'undue influence',[8] which *inter alia,* evolved along with other contractual aberrations, chiefly to control unhealthy contracts of private moneylenders. The Companies Act, 1956, already contains salutary norms for checking abuses by directors and other 'officers-in-default'.[9] Similarly, The Interest Act, 1974 and the very Act for nationalization of banks,[10] were to infuse greater 'responsibility' in those who take the decision on lending. The basic fabric of common law structure on lenders' liability has not changed much notwithstanding any shift from state controlled economy to globalization and privatization. Of course there has been some conceptual shifts. 'Lenders liability' has become a watchword of good governance in corporate banking. Specially, when in the Indian banking industry NPA management has become critical, lenders' liability cannot be shrugged off by any *ad*

[6] *Supra* notes 2 to 6.

[7] Section 18. 'Misrepresentation' defined - 'Misrepresentation' means and includes - (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him; (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement

[8] Section 16. 'Undue influence' defined. - (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

[9] Sec. 5, Companies Act, 1956.

[10] The Bank Nationalization Act, 1978.

hoc financial design of provisioning, nor can the best judgment rule be used as a defense to existing contractual debts on the Balance Sheet. World over, reasonable forseeability, a standard defense to negligence is now being diluted in the West as will be expounded below.

1.5 Uncomfortable question on managements' liability

A lending decision is arrived on the appreciation of circumstances of investment, investment market conditions, standing of the borrower, the comfort level heightened by collateral through creation of security interest and a lot of other prudential norms. The natural market demand cannot vary based on the nature of ownership of the bank and financial institution. Whenever there is a talk on stricter regulation and widening penumbra of the term lender so as to attach liability of the management, the usual response is that 'in that event the officials would not be able to take any lending decision'! This argument shall confuse 'discretionary power' to be an 'arbitrary one'. That also puts question on the 'rule of law' based behaviour of the management, which is fundamentally opposite to the issue of good governance. Good governance is functionally 'transparent', organizationally 'accountable' and structurally 'responsive'. The debate is important because management is completely separated from ownership and the power of management is now statutorily based and not conceived in delegation alone. In a privately owned institution the quality of lending is based upon strict personal responsibility of the decision-maker. One minor error in the lending decision may cost the job of the management. In a privately owned institution no one would argue that on account of a strict regulatory system one would not lend. If you do not lend in a business of lending you are incompetent official and if you do bad lending you are inefficient. In both the cases you run the risk of loosing the job. In a public sector institution such an exceptional absolute power does not lie on any person. As such, it is very necessary to depend upon the 'rule-based' system and become highly effective and efficient at the same time. Otherwise, there would be no place for the public lending institutions in the lending

business. The silver line between discretionary power and arbitrary power is the best practice i.e. rule of law based.

1.6 Present position in India:

However, attention is drawn to the fact that at present there exists no 'Best Practice Code' (BPC) for the lending sector in India. This is in contrast to the fast developing focus on formalizing certain specified rules to determine 'lenders liability' in other countries such as New Zealand,[11] UK[12] and US.[13] The law in India is not only confusingly unclear but also uncertain and unpredictable. One or two court decisions can hardly clear the entire maze of confusion. Justice delivery system cannot but have a snail's space. The transaction cost of realisation of debt through disposal of security interest created is stupendously high. The standard of disclosure system is very poor in the context of world standard. There is no facility for timely renegotiation.

Hence, theoretically, the penumbra of the concept 'lenders liability' even in existing Indian law can seriously descend on the lender including the liability of the management. Whether the liability of the lender and borrower would be joint or several or both, might depend on the nature of the claim. An idea of emphasizing lenders' liability beyond the above parameter in Indian law is fairly radical. Indeed, it is a fairly contested area in the West as well. An attempt of introducing a legislative design on lenders' liability may affect the existing notion on rights and liabilities of the contracting parties and may necessitate a change in trade usage, which may ignite a jurisprudential debate. Besides, extension of the 'penumbra' of the term 'lender' so as to extend the term to officers-on-default' would require ascertainment of norms of lending decisions which may be a serious and complicated job. However, it is important to note, at this stage, that the notion of

[1] The Resource Management Act, 1992
[12] The Consumer Credit Act, 1974 and Guidelines on Non-status lending.
[13] Fair Credit Reporting Act and the Consumer Credit Act, 1974; Federal Deposit Insurance Corporation, Statements of Policy- 5000, and Truth in Lending Act, 1968

'lenders liability', though not in those precise terms, has always existed in India both in relative and in absolute terms.

2. TYPOLOGY OF LENDERS' LIABILITIES

Who is a lender? A lender is a person who has indulged into the contractual relation of lending an amount to another who is called borrower on such terms and conditions as may be agreed upon by the contracting parties. The following are some of the types of liabilities arising out of the terms of the contract as well as outside the terms.

2.1 Lenders' contractual liability on wrong lending

The essence of a contractual obligation is *'consensus ad idem',* i.e. 'both the parties agreed upon the same thing in the same sense'.[14] The real import of this clause is that: (a) parties to the contract have symmetry of information on the subject matter of the contract or that no party is in a position to monopolize information-advantage to the detriment of the other; (b) parties have absolute freedom of applying their mind without interference by any external force either initiated by a party or otherwise; and (c) there is no enrichment without any cause to a party. Accordingly the theory of 'free consent' is instilled in the philosophy of contractual relation. Contractual relation of lending-borrowing is no exception. Any vitiating act on the part of the lender, such as, an act of coercion, undue influence, [5] fraud, misrepresentation or mistake[16] may not only vitiate the contract but may also bring liability to the lender. One issue may be made clear at the beginning. No party to the contract in ordinary circumstance has any additional burden of disclosure unless the law so demands due to special circumstances.

[14] Sec. 13 of the Indian Contract Act, 1872 codifies the definition of the free consent in the same terms.

[15] In an English case, an old man was advised by his bank to guarantee the advances given to his son. It was held by the court that the bank cannot recover against the guarantee, as the same was tainted by Undue influence. *See Lloyds Bank Ltd.* v. *Bundy,* [1975] Q.B. 326.

[16] These legal terms and the applicational situation of these vitiating factors are provided in sections 15 to 20 of the Indian Contract Act, 1872.

Such special responsibility on disclosure of information or interest is imposed if the position between the contracting parties is based on relation of trust or of special interest. A few examples taken from case law would make the point clear.

(i) Breach in free consent theory: The Indian judiciary applied 'undue influence' in many cases dealing with money lending in rural area and fixed up the responsibility Or liability to the lender.[17] The important issue here is that the judiciary is inclined to believe that the position of the lender is such that the lender can dominate the will of the borrower. Therefore, wherever the Court finds that the conditions of the lending is unconscionable or unreasonable and the same is enjoyed by the lender, the court presumed the undue influence and fixed the responsibility or liability on the lender.[18] Fraud is another vitiating factor, under which the court used to fix responsibility or liability on the lender. The fraud is committed when a party intentionally (1) *suggestio falsie,* that is, a false information that deliberately misleads to gain advantage, or (2) *suppressio vari,* that is, suppression of an essential fact, which the party is bound to disclose and which suppression materially affected the decision of the other party.[19] If the Indian position is examined as is provided in section 17 of the Indian Contract Act, the following is the situation in which a lender may be affixed with responsibility or liability on account of commission of fraud. The lender is responsible if (1) he makes a false suggestion of a fact with an intention of gaining materially, (2) knowing the statement of fact to be false, (3) with the intention that it should be acted upon by the borrower; (4) the borrower acted in reliance upon it;

[17] Out of four illustrations provided in section 16 to make things clear, three illustrations are from lending-borrowing.

[18] See, *Thammana Peda Thatayya* v. *Bhagwandas Atmasingh* (1970) 2 Andh.W.R. 75, at page 81, 84; *Barkatunnisa Begum* v. *Debi Baksh,* AIR 1927 P.C. 84 at 86

[19] A.G.Guest (ed.), *Chitty on Contract,* - vol. II, 120, (Sweet and Maxwell, London, 1994) runs as follows:
If the lender knows of defects in the chattel which are not apparent to the borrower and which make it unfit for the borrower's purpose, he is under a duty to inform the borrower of the defects; if he fails to do so, and the borrower suffers injury through such defects, the lender is liable. See, *Norwood* v. *Navan,* [1981] R.T.R. 457 and *Lunchbury* v. *Morgans,* [1973] A.C. 127.

and (6) the borrower thereby suffered injury. Similarly, misrepresentation[21] of financial condition of borrower may attract liability.[22] If the Lender is in a fiduciary relationship with the borrower, such as solicitors and client; trustee and beneficiary; guardian and ward; parent and child; spiritual leader and disciple; doctor and patient; husband and wife; principal and agent, etc., the lender may exercise undue influence[2] over the borrower because of the same relation. In bankruptcy proceedings the lender is held to have fiduciary duty where the lender exerted 'control' over the bankrupt borrower, resulting in adjustment in priorities as to other estate creditor. Lender may also be liable for coercion if the following elements are proved: (a) that, there is a threat to do something which a party threatening has no legal right to do; (b) that, there is some illegal exaction or some fraud or deception; and (c) that, the restraint is imminent and such as to destroy free agency without protection. *This liability is essentially to another third party whose interest is affected due to the vitiating factor. The third party includes liability due to employees claim, government claim, suppliers' claim, so on so forth affected by a wrong lending.* Here the borrower and the lender may be jointly and severally liable.

ii. Contractual failure of lender's obligation may attract lenders'" liability: A Lender may be liable if there is any breach of condition of contract on his part like for example, failure to fund the committed loans,[24] timely disbursement of loan;[25] not funding

[0] See also, sec. 17 of the Indian Contract Act, 1872.
[21] *Supra* note 9.
[22] *Kruse* v. *Bank of America,* (1988) 202 Cal. App. 3d 495.
[23] *Supra* note 10; See also, Sanjiva Rao, *Contract Act and Law Relating to Tenders,* 1105, (Delhi Law House, 1999).
[24] In *Gujarat State Financial Corporation* v. *Lotus Hotels Pvt.Ltd.* AIR 1982 Guj. 198, where sanction letter was granted but later on the loan was refused. On a writ petition filed by a customer, the Gujarat High Court by applying the principle of 'promissory estoppel' has ordered compensation to be paid by the lender. Commitment letter is an 'in-principal' approval for sanction of loan. This may be at the most called as executory contracts. By applying the principle that 'Contract by a deed poll is valid even if without consideration', courts in foreign countries have dealt with these kinds of cases, where it is basically a question of fact. However, this theory is not applicable in India because of an express provision in the Indian Contract Act, 1872 to that effect. Lenders'

working capital in time; violating conditions of privity and confidentiality[27] etc. However, in case of right to privacy, the court applies the common law principles in the absence of any clear statutory provision. The provision of contract may stipulate condition on the substance and extent of privacy right of the parties. Such a liability of the lender may be directly to the borrower as well as the third party.

(Hi) Failure to properly establish default: If the lender acts prejudicially to the interest of the borrower with an allegation of default on the part of the borrower under the terms and conditions of the contract that results in loss to the borrower, but fails to establish the default, the lender shall be liable to compensate the borrower.[28] Depending upon the form of debt instrument, contractual and statutory requirements, establishment of default, prior to proceed with liquidation of collateral, borrower may require notices and opportunity to cure the default. It is therefore necessary to define 'default' in the agreement between the parties. Any alteration or modification of a document must be reviewed prior to the declaration of default. In addition to this, factual circumstances between the lender and borrower must be reviewed to determine if there may be a claim of waiver or estoppel. If there is any action inconsistent with the strict conditions of the

liability in the case of refusal of loan after a commitment letter is yet to be tested within the realm of consumer law. It is pertinent to point out that Consumer forums have granted compensation in cases where there was delay in conveying the refusal to sanction loan. See also, *Conlan* v. *Wells Fargo* No. 82852 (Cal. Super Ct. Monterey County, 1987);

[25] In *Standard Investments Ltd.,* (1985) 22 D.L.R (4*) 410, the borrower sought a loan for take over of another company was not given loan and his take over bid failed due to actions of the chairman of the bank. The bank was held vicariously liable for loss of profits and business. It was held that the bank acting through chairman had a duty to disclose the interest of the chairman in thwarting the takeover.

[26] *Indian Overseas Bank, Madras* v. *Narayan Prasad Govindlal Patel, Ahmedabad,* AIR 1980 Guj. 158, in which overdraft facility was unilaterally withdrawn by the bank, which was held to be wrong commited by the bank for which, the bank was asked to compensate.

[27] For general information see, Tannan, *Banking, Law and Practice in India,* 236-240 (India Law House, New Delhi, 2002).

[28] See *infra* note 31.

documents that may constitute waiver or estoppel and prohibit the creditor from relying upon default provisions.

However, it is important to note that Lenders' actions within the context of the contract documents would not result in lenders' liability to the borrower. As observed in the celebrated case of *Farah,*[29] if the lender had simply exercised his contractual rights upon default, 'default... enabling the lenders to legitimately enforce their legal rights', there would be no lender liability. If the contractual provisions do not violate any statutory requirements, and if the performance is within the contractually agreed duties, the contracting parties should have no additional liabilities either against each other or against any third party. There will be no cause of action for unconscionable conduct if the conduct is authorized by the terms of the deed of contract to which both parties agreed.

(iv) Breach of privity and confidentiality: Right to privity and confidentiality is a natural associate of the freedom of contract. Right to privacy has been regarded as part of the right to life under article 21 of the Constitution of India. ° Right to privacy is not to be completely equated with the right to privity in a contract. In *R.Rajgopal* v. *State of Tamil Nadu,*[3] the Supreme Court reaffirmed that- the right to privacy is implicit in the right to life and liberty. This is a 'right to be left alone'. The court explained the right as: 'A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education'. Thus, privity of contract is not to be confused with the right to privacy. Article 19 of the Constitution of India, does not include freedom of contract as a fundamental freedom to citizens to be ensured by the state. However, under article 19(l)(g) there is freedom to practice any profession, or to carry on any occupation, trade or business, which cannot be effected without freedom of contract. While the argument may be partially accepted, one

State National Bank v. *Farah Manufacturing Company,* 678 S.W.2d 661.
[30] *Kharaksingh* v. *State ofU.P.,* AIR 1963 SC \295;*Govindv.State of Madhya Pradesh,* AIR 1975 SC 1378, and *Malak Singh Singh* v. *State of Punjab and Hariyana,* (1981) 1 SCC420.
[31] AIR 1995 SC 264.

cannot argue that the two rights, namely freedom of contract and freedom of trade etc. are co-equal. Freedom of contract is very fundamental in a free and liberal society but it is not included in the list of article 19. Freedom of contract in India is therefore not a fundamental right, but only a natural right ensured by statute. As for example, if 'Lottery' is a contract and not a trade or business, any Act prohibiting lottery agreements cannot be called into question of constitutional validity. Similarly, any law requiring information on the credit obtained from banks and financial institutions to be recorded in a public or private registry cannot be challenged on *constitutional virus* unless it can be proved to be antithesis to trade, business or profession. Professional bodies keep the records of the respective professionals; trading and business bodies keep the record of such persons. Similarly all contracts dealing with immovable property are required to be registered with the public registry. So mere keeping of records in the registry cannot be questioned. The problem may lie with 'sharing of information'. Any instrument registered under the Registration Act, 1908 empowers any person to have access to the information by paying relevant prescribed fees. Under the Right to Information Act, 2002 right is accorded to the public to obtain information regarding certain operative facts. This Act does not provide anyone to obtain private information dealing with contractual relations. The state may, by legislation, require recording of information with the registration authority and sharing of such information on terms and conditions to be stipulated as is done by the Registration Act on all contracts dealing with immovable properties. Disclosure norms can also be built up within the contract domain. If in the contract of lending-borrowing, parties themselves agree that (a) all information are to be recorded with the registry; and (b) such information, according to rules laid down, are to be shared between the members of the trade in a given situation, there is no reason why such agreement cannot be enforced by a party. Confidentiality is a natural ally of right to contract. But since these rights are not fundamental rights, these rights are exercised according to law of the land. Presently, common law principles are applied in this area where law of contract is found inadequate. Parties to the contract are entitled to lay down the conditions for them to observe.

2.2 Lenders 'fiduciary liability

2.2.1 Stand of equity in court of justice

Lender-borrower relation is a creditor-debtor relation. As such, liabilities of parties are determined by the contractual terms and conditions in the manner prescribed under the statutory provisions. But occasionally courts extend the relation of trust, or attaches fiduciary obligation to determine the liability of the parties. Equity and natural justice are two pillars of justice delivery system of India. That is the reason why art. 141 of the Constitution of India gives primacy to the law declared by the Judiciary as the law of the land. The distinction between the Court of Law and Court of Justice is that the Court of law can decide cases on application of the law or its interpretation remaining within the four corners of the law stipulated, the Court of Justice has to apply the law with the sauces of equity and natural justice. So contractual terms are also subjected to the application of equity and natural justice. As such, in one case where the lender had an information, which was essential to take a decision of borrowing and which was not known to the borrower and the lender knew that the borrower did not know the information, it was held that lender had the duty to inform the same to the borrower. The lender was held liable for the injury caused to the borrower for not supplying the information.[32] In another case a Bank had a cash credit arrangement with one of its clients, a company. The Managing Director of the said company kept his personal account also with the same branch of the Bank. Money lent to the company was systematically transferred through cheques to the account of the Managing director. The bank never examined these transactions. The Bank was held liable to compensate the company.[33] There were number of cases of trust funds being transferred to the account of the Managing Trustee maintained in the same Bank, held to be a breach of trust.

[32] *In re Standard Investments Ltd.,* (1985) 22 D.L.R (4*) 10. See also, *Cornish* v. *Midland Bank Pic. [* 1985] 3 All.E.R. 513.
[33] *O. R. M* v. *Nagappa Chettiar,* 43 Bom.L.R. 440.
"Ibid.

2.2.2 Role of best practice code in equity

This part of lenders' liability is really difficult to predict in the absence of any *codified best practices.* It is always necessary to have 'best practice code' for the employees of the lenders to follow in order to prevent liability arising out of demand for equity and natural justice. Relation of trust may arise in three different ways. Firstly, the lender may be specifically appointed as a trustee by a deed of trust. Secondly, relational status may impute the relation of trust. And thirdly, transactional situation may demand trust relation due to the call of equity. In the second and third categories of events Indian judges did not behave very differently from the American judges and juries in appreciating demand of equity in contractual situation. A researcher catalogued the reactions of Judges and juries of US, which may seem very radical but when compared to Indian judgments in similar cases these would appear not very uncommon.[35] With increasing pressure by private interest in the business world the demand for 'fair deal' from the lenders, especially where the market is dominantly lenders' market seems to be the consideration of the community interest.

As the business and economic environment changed, the legal duties and obligations of the lenders began to change. Historically, the borrower/lender relationship was universally viewed as a business, creditor/debtor relationship. However, juries are asked to decide whether the borrower/lender relationship is one that will justify a borrower's reliance upon the lender for consultation, advice and an affirmative duty to disclose any and all matters relevant to the borrower's business decisions. If the borrower's business fails, its trusted confidant, the lender, certainly should not be able to collect the defaulted loan, and more probably, should compensate the borrower for its business losses. When juries are allowed to decide, without review by realistic legal standards, whether a lender should have a greater standard of conduct or duty of care, in an unsympathetic business and economic environment, the results are predictable - the big lender should not have let the poor borrower fail. The big lender understands the business jungle much better than the borrower - it should have guided the borrower through that jungle. The borrower was depending on the lender for the map. This may be an extreme characterization - but random juries, generally unsophisticated in the complex business dealings, are capable of extreme views of what is fair and just. This same analysis applies to the expanding duties of good faith and fair dealing, (para 1 A 5). See an article on current theories of lenders' liability by W.Mike Baggett Winstead, *et al,* presented in the Second Annual Construction Law Conference, 1989.

2.2.3 Complexity in affixing fiduciary duty:

The fixation of fiduciary duty in India has three complications. Firstly, Indian Judiciary has the same philosophical understanding as their counterpart in the US legal system, without having an appreciation of the fact that US is a borrowers' market and India is dominantly a lenders' market. In the borrowers market lenders try to allure the borrower into a contract and after lending becomes tough.[36] In the lenders' market the lender is always deceptive. Indian market being a lenders' market an analogy of US system and an economic explanation of US market behaviour shall not always hold good. The second complication is associated with organized and unorganized lending activities available in India. Unorganized lending industry is very strong notwithstanding the rapid growth of the formal sector of banking and financial institutions. And the third difficulty is related to industrial, trade and agricultural credit and also urban and rural credit. Can these credits be evaluated in the same index of measurement? Thus, transactional analysis in India in the context of equity is extremely complicated and tough.

2.2.4 Weakness of the lending industry

The above factors get further complicated when we look into the weaknesses of the lending industry. On account of the market so far remaining small and closed and dominantly belonging to lenders', there has been no systematic learning of art and science of lending practices and monitoring the borrowers' performance. The human resource employed in the lending industry is comparatively poor especially at the grass root level. The triangular relational process in the industry and possibility of

When soliciting borrowers, lenders are very agreeable - they take them golfing, to dinner, and are agreeable to give notices of default and otherwise modify contract provisions to protect their good friends - the pursued borrowers. Everything is hugs and kisses in the desired new relationship. After the loan is made, the lender must protect its depositor and shareholder loan proceeds. If the borrower begins to falter in the business or economic environment, the hugs and kisses quickly changed to suspicion and distrust. Lenders are taught to monitor their borrowers' performance. As the borrower's condition deteriorates, so does the lender's approach and attitude. (Para 1 B 1). *Ibid.*

considering the implication of equity at two relational processes is a complex and case-to-case phenomenon. To make the statement clearer, one has to understand that banking industry is dependent on the public deposit. Though the 'depositor-banker' relation is considered as creditor-debtor relation, but there is a possibility of application of the principle of trust at that level also. So in the triangular relation between the depositor-banker-borrower, equity may implicate at two levels, between the depositor & banker and between banker & borrower. When a banker is lending the money of the depositor to a particular borrower without the knowledge of the depositor, the banker being a professional operator becomes trustee of the depositor. The lender, therefore, may run the risk of double hazard. The lender functions as the trustee of the depositor.[37] The lender is also liable on equity for professional non-disclosure to the borrower. Whereas the former can also be covered by deposit insurance, the later is covered by professional conduct only. The third factor in the lending business that complicates the affair is that the economic reality is neither within the control of the lender nor of the borrower. The lender may have followed all economic parameters following all best practice guidelines and prudential norms. The borrower may have used adequate diligence and business prudence. Still the lending may fail. If borrowers are broken, can the lender be far off?

The lender is equally responsible to minimize the damage in the event of bottomline economic reality.[38] In macro financial assessment the lender is always considered to have better capacity of appreciation than the borrower. As such, any failure of the lender to assess the macro economic condition goes generally at the peril of the lender. *In lender-borrower litigation the sympathy of the court always lies with the borrower because of such inherent weakness of an individual.* The court has a feeling that often a timely restructuring of the debt considering the inherent weakness

In *Commercial Cotton Co.* v. *United California Bank,* (1985) 163 Cal. App. 3d 495 held that a depositor relationship with a lender was 'quasi fiduciary', ara D, *supra).*

'— emphasizes the lender's sympathy for the borrower's circumstances and the willingness of the lender to cooperate—'. *Id.* at para 1B.6.

of individual can provide a new lease of life to the borrower. Of course, one who comes to equity must come with clean hands!

'Lending' is a financial service that can be conducted in the usual business transaction. 'Banking' industry is special not because it is a lending institution but because the state is authorizing the bank to take public deposit for that purpose. Hence the state is responsible to see that there is no shaking of public faith, which will disturb the economy as a whole by causing public distrust on 'saving'. No other institution except a Bank can have access to the public deposit encashable by cheque or withdrawal slip and can also use the word 'bank' to its name. As such the Central Bank of a country is concerned with the business of lending. Quality of lending by a bank is a deep concern for the safety of the public deposit. Otherwise 'lending' as a financial service is not the consideration of the Central Bank. In India, Reserve bank is also responsible for the entire financial system. As such lending industry comes under its primary regulation. The most intricate challenge is that the Contract Act and the Transfer of Property Act presently cover the whole issue of creation of security interest for the purpose oi adding quality in the credit system. *The Transfer of Property Ac\ was intended in 1882 to regulate the feudal society under a 'statw quo' legal structure. Naturally, the same cannot hold the fort it steering the regulatory mechanism of a dynamic financial market* Unfortunately, that limited regulation for security interest creation and priority determination (by Registration Act) are the only lega process available to the banks. So the quality of lending cannot b< improved. As a result 'the spread' between the cost of borrowin] and cost of lending has to be pegged high to cover the risk of NPA The implementation system is also 'age-old' to suit a *'status quo* feudal society. Financial market requires a certain legal systerr with a fast justice delivery system. Both are absent here. *Th financial sector reform can only be meaningful if the legal systei is capable of adding quality in lending and fast track justice l both the parties.* Delay of justice does good to no body but injure both. As such, legal regime on security interest creation; publi registration with priority determination and enforcement of tr security interest at the quickest time, are essential features for £ efficient financial sector management.

In most of the countries the Banking Act does not talk about organisation and management pattern. That is the job of the Companies Act. Provisions are mostly focused on the functional regulation. As for example, the British Act provides for 'deposit' function; authorization of deposit taking institution; regulatory power of the Authority to regulate deposit taking power; constitution of the authority; tribunal; deposit guarantee fund creation and its management. There is no word about lending activity.

In India we have to take a mixed course because principle of good governance is not taken into account in organization and management of entities under the Companies Act. It is necessary that principle of good governance be essentially adhered to in the financial sector, especially to protect the interest of the depositor and investor. But functional regulation has to remain in the center-stage of the regulatory mechanism. Presently, the Reserve Bank enforces such regulation by its policy and guideline. But where the enforceable law is uncertain such policy and guideline can easily be ignored. As for example, Reserve Bank of India cannot issue a guideline on 'foreclosure' of asset kept in security against a banking transaction because the matter has a specific law meant for property transaction for all purposes. There is no differential in the legislative policy as reflected in the statutes between dealings in property transaction in a feudal society and that, which is needed in trade, commerce and industries. The objective of law and order in a state is taken independently of the question of determination of rights and obligations. As such, the Regulator does not have any clear power to stipulate the ground rules. That goes against the interest of the lending institutions.

2.3 Lenders" tortuous liability

2.3.1 Interference in the business of the borrower:

In *Farah,*[39] the lender caused two of their representatives to be elected to the Board of the borrower. These representatives acted in the best interest of the lender and not that of the borrower. The

Supra note 18.

Court applied the principle of tortuous interference with contract; found that the directors, as representatives of the lenders, breached their common law duty of loyalty to the corporation. This principle is quite well established in the corporate law and can apply to similar facts. However, one should keep in mind the principle that directors are not responsible for ordinary mistakes of business judgment. *Directors nominated in the Board of the borrowing institution may lead to two arguments. Firstly, lender may be held equally liable for the failure of the policy and function of the borrower and hence, equally responsible for the bad and default lending.* Secondly, if the nominated member informs back to the lender about the state of affairs, there may be a charge on insider trading. As such the lending institutions must have to take a policy as to how this conflict of interest can be maintained with arms-length distance in the management of the borrowing institution.

2.3.2 Good faith and fair deal

Tortuous liability, in most of the cases, arises from the duty of good faith and fair deal. In India there is no 'Codified Restatements' determining tortuous liability. There has been very marginal attempt in the financial sector to adopt Best Practice Code (BPC) that would apportion financial liability. Indian Judiciary would not agree to follow some of the US common law practices based on the principle of contract sovereign, such as:

(a) Good faith and fair dealing will not impose a duty contrary to express contract terms;
(b) Good faith and fair dealings arise only out of special relationship;
(c) If there is no contract, there is no implied obligation to good faith and fair dealing etc.

Indian Courts have also not decided any case of lenders' liability on the basis of equitable subordination.

2.3.3 Vicarious Liability

It is widely accepted that the vicarious liability issue in India has been restricted to establishing principal-agent relationship between

the bank and the defaulting employee. There is, however, no instance of cracking the corporate shell for affixing personal liability on the officer. But, in a surprisingly bold decision, the Supreme Court directed an amount of compensation of Rs. 10,000 awarded by the National Commission for Mental Harassment to be recovered from such officers proportionately from their salary.

2.4 Felonious Liability

Felonious tort is the liability of the principal because the felony is also tort. But there is no vicarious liability of the enterprise for the crime of the employee. No act of crime can be covered within the course of employment. *For all offences committed by an employee, the person committing the offence is personally liable and the institution is not liable.* No one can authorize any other person to commit an offence nor can promise to be binding for such an act. For all acts of cheating, forgery, criminal conspiracy, embezzlement of fund, criminal breach of trust, the person committing the offence will be personally liable.

Financial fraud not amounting to cheating, forgery, and criminal breach of trust or embezzlement of fund, is not an offence. Such an act may be in the borderline of felony and tort. Therefore, for financial fraud the person committing the financial fraud and the entity, both may be liable. The institution is vicariously liable for the tort[42] committed by the employee and the employee may be liable for felony.

In criminal breach of trust,[43] there has to be an existing duty of trust. Entrustment connotes ordinarily that the property is handed

[40] The well known case of *SBI* v. *Shyama Devi,* AIR 1973 SC 2451.
[41] *Lucknow Development Authority* v. *M.K.Gupta,* AIR 1994 SC 787.
[42] *Supra* note 43 and *Bank of Bihar* v. *Mahavir lal & others,* AIR 1964 SC 377.
[43] Section 405 - Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits 'criminal breach of trust'.

over by A to B in whom A reposes confidence for a specific purpose. In 'bad lending' a depositor's money is legally the bank's money, which an officer of the bank handles. Indeed, between bank officer and customer, there is no such duty of good faith and trust ascribed in the present law. Even in highly developed law of USA, there is no trust *simpliciter.* In fact, courts have had to evolve as 'fact-sensitive fiduciaries'.[44]

2.5 STATUTORY LIABILITY ON ENVIRONMENTAL ASSESSMENT

Many tortuous liabilities are now codified as statutory liability. As for example, codification of environmental law reduced the tortuous liability in statutory breach of duty. In a recent research survey it was found that most of the financial institutions do not have any expert to evaluate environmental hazard arising out of implementation of a project. Institutions only insist on obtaining an environmental clearance certificate from the respective government authority. The financial institutions and banks have neither expertise to apply their mind nor do they have any system of absorbing the cost of environmental management within the project finance. That results in two types of liabilities of the lending institutions. *Firstly,* even if there is no legal liability of the financial institutions to apply their mind in clearing project finance in case they depend on the clearance certificate, ultimately the liability of the failure of the project shall fall upon the financiers. If the borrower ultimately could not take off or had to close on account of agitation on the ground of environmental hazard, the loan could not be recovered or recovery would become slow and at high cost. *Secondly,* in a plea of joint liability the lender may be held liable for not applying his mind for performing statutory duty. There is also some incidental responsibility, such as, the project cost would be under-valued. The project would be not properly financed. In the event of environmental hazard the lender may be liable to pay compensation. *No lender may escape liability if there is no reasonable evidence that the lender has sufficiently applied his mind on environmental issue. A* mere plea that on the advice of

[44] *Irish Bank Pic.* v. *Byran,* (1995) 2 F.L.R. 325 and *Berkeley's Bank Pic.* v. *O'Brien,* [1993] 4 All.E.R. 1417.

an authority the lender did decide the issue of passing a project finance, may not absolve from breach of statutory responsibility. The lender and the borrower may be jointly and severally responsible.

2.6 LENDERS ' ULTIMATE LIABILITY FOR BAD LENDING

For bad lending, the lender has a serious direct liability. Like the borrower, the lender also cannot argue that the lending failed in spite of following the prudent policy of lending.

In case of bad lending, such a liability can arise: (a) in the scheduled issue of contractual relation like the lending activity or may also arise (b) in the non-scheduled issues, such as issuing a credit to develop an industry, say, which is injurious to environment. In the first case the liability is due to bad lending and in the second case the liability is on account of defective lending supporting activity, which leads to environmental pollution or hazard or, which is on account of breach of any statutory conditions or non-performance of a common law obligation. The first one is direct due to the bad lending but the second one is indirect by way of aiding and abetment in a wrong act. There is a vicarious liability in an action against tort. In the first case, the liability is due to bad lending, which cannot be passed on to the public depositors whose deposits have been used for lending purposes. In the second case, the liability is to the society at large and to the suffering party in particular.

If the lender is allowed to argue that since lender has followed all prudential norms and all basic principles of procedure, lender ought not to be liable for bad lending, who would then take the burden of liability? Would it mean that such sum of money would be omitted from receivables? What v,would be corresponding reduction in the liability side? If the concern has good profit, which can take care of the reduction of the receivables, there is no problem. It means the owner of the entity has to receive less because of reduction of profit. Suppose there is no profit or there is inadequate profit, what could be done and what is the argument? One thing can be argued that let the non-realizable receivables be

written off over a period of years. Or in other words, the owners may have to continue to be satisfied with less profit or none in future, until the loss on account of non-realization of the amount is recouped from the profit realized from other transaction. Or the institution should go for restructuring with necessary reduction in the Capital due to accumulation of non-performing assets, which in restructuring phase are required to be written off. Can the concern or the owners argue that since the credit was given scrupulously based on the principles of business prudence following all norms, the owner of the lending industry cannot take the responsibility? Their profit must not be reduced either in the current year or in the subsequent years and the credit risk has to be taken over by some one else? A bad lending is not necessarily an outcome of a wrong lending. It may be on account of the entire economy of the country in the downhill. It may be on account of global or national depression. Why should then one unit of the industry take the responsibility? Does it not sound better for the entire lending industry being treated alike for the entire loss on bad lending? Should there be credit risk insurance? Can one argue that bad lending is due to bad financial management and hence, a State responsibility! Is it a fair system to pass on the burden of bad lending to public exchequer for the failure in a private deal? Why should taxpayers bear the responsibility for the business loss of a person, even if the transaction is made prudently? However, if the Government is the owner of the financial institution, the taxpayers are denied to question the prudence of the fiscal measure to meet bad lending. The argument that the Government owns the concern on behalf of the people is a queer logic. If Government ownership would mean bad lending, and that the government does not know the art and science of lending, it may be argued, that government ought not do the business in the usual style of governance. It could hire the management who could take the lending decision with attached liabilities for bad lending. The decision of lending, including policy formulation shall not be ordinarily a government's job. So in all cases, for a bad loan, the lender, i.e., the concern or person lending the money, has to ultimately bear the responsibility. The owners have to bear the loss of capital and revenue, failing which it has to become bankrupt. However, the government may

bail out a public lending institution as if it is a sovereign guarantee to meet good the loss from the revenue collected from taxpayers.

Such a logic may give rise to inefficiency and bad management. Any industry cannot survive on creches provided by the State. A prudent businessman will not argue on the above line. A prudent businessman in their decision for lending appreciates entire fact situation, both internal and external. Any business decision is based upon several external factors including the economic downturn. Risks of all such factors, internal and external, ultimately determine the lending decision. Once the lending decision is made, the borrower and the lender take their respective position on their obligations. However, in risk management, insurance plays a significant factor. In the great depression, the government of USA had to take a decision on deposit insurance in order to restore the confidence of the depositors on banking business. Deposit insurance has also been introduced in India, predominantly because the banking business has to confront constantly the risk of bad lending. In the process, there is probability of asset depletion in the industry. With the slightest discomfort and doubt, depositors may run on the bank leading to the failure of any bank. Any doubt in the banking system is highly injurious to the country as a whole and that is the reason why, political economists designed compulsory insurance up to a certain limit. Insurance industry can however independently design a product for such risk management. The other alternative is instead of deposit insurance, there may be insurance of lending activities, which can be termed as project insurance. Such insurance cost may be even subsumed in the project cost itself. The problem of designing such insurance product is because of involvement of high moral hazard in calculating the risk in project lending insurance-cover.

[45] Banking Regulation Act, 1949.

3. LENDERS' LIABILITY UNDER CORPORATE GOVERNANCE

3.1 Extent of management's responsibility

Now that it is clear that if somebody has to be liable for the bad and wrong lending the shareholders of the lending entity cannot refuse to bear the loss, both capital and revenue. The Banking Regulation Act, 1949 does not talk about any liability of the management though the power of the management is now vested by the authority of the statute[46] both for the private and public sector institutions. The power of the management is not conferred by way of delegated process. The CEO collects his power from the statute. As such, there is a need to have a review of the regulatory framework outlining strict and comprehensive direct responsibility for bad lending and allocating the management responsibility. It is time to ask a more substantive question at the normative level: what should this liability entail and who should be the 'lender'? Can the penumbra of 'lenders liability' law be advanced to expose the management (like, the concept of officer-in-default prescribed in the Companies Act), by cracking the corporate shell or lifting of the veil? How far is it prudent to insulate the management (of all stages) under the corporate veil? It is the management that takes lending decisions. Shareholders are no more connected with any business decisions. The Board of Directors, which is supposed to be at the helm of affairs and the apex center of power according to the Companies Act, is only a puppet or a mere ritual in the hands of the management. Why then the management is not to be exposed for bad and wrong lending? The Companies Act, 1956, already contains the core law of cracking the corporate shell,[47] but the Banking Regulation Act, 1949 is silent and does not contain any provision for exposure of management or officer-in-default.

Section 10(B) of the Banking Regulation Act, 1949, which provides for a banking company to be managed by a whole time Managing Director. [47] *See,* S.5 of the Indian Companies Act, 1956. It is in detail discussed further in this article.

3.2 Cracking of the corporate shell and lifting the veil:

The philosophy of corporate shell relates to the statutory insulation provided for the functionaries of the entity. In *Solomon* v. *Solomon & Co.*[4]* the judiciary explained this concept of liability of the company distinguished from the liability of the functionaries of the company. A corporate entity takes the liability of the functions undertaken for the company. No shareholder or manager is liable. It is the unlimited liability of the company for entire function of the functionaries. This is the essence of the *legal personality.* All liabilities are assumed by the entity arising out of the actions of the individuals. A company is a *principal-in-perpetuity.* It is always represented by its functionaries as the agent. This is referred to as the corporate shell, as strong as unbreakable unless broken by the same or any other legislation. In the nineteenth and twentieth centuries there have been many legislative designs and reasons for the legislature to crack the shell (which often is referred by the authors as piercing the viel).[49] Not only that, the court did make the shell look like a veil so as to lift whenever the judiciary, as the groom wanted to. In basic this is the corporate veil theory ensured by the judiciary for its bride, whenever it wants to lift it could! Limited liability is the second fundamental principle of corporate law. Under this principle, 'shareholders are not liable for the obligations of the corporate beyond their capital investment'.[51] The corporate is viewed as an entity independent of its shareholders, and it alone is liable for the consequences of its actions. One policy

[48] 1897 A.C 277.

[49] As for example, Income tax and other tax laws affix the personal liability of the 'officer-in-default' along with the corporate liability for the tax law violation; Company law itself punctured the corporate shell through several provisions attaching personal liability, like Section 45 on reduction of members below statutory minimum, Section 62 & 63 for wrong and non-disclosure in the prospectus, Section 147 for the improper use of name of the company, so on and so forth.

[50] *Tata Engineering & Locomotive Co. Ltd.* v. *State of Bihar,* (1964) 34 Com. Cases 458. See also, *P.N.B.Finance Ltd.* v. *Sheetal Prasad Jain* (1983) 54 Com. Cases 66. In this case, the court attached the personal liability to the functionaries without extending the protection under the doctrine of corporate viel.

[51] Phillip I. Blumberg, *The Law of Corporate Groups: Substantive Law,* (1987).

reason offered in support of the limited liability form of business enterprise is that 'the notion of limited liability' encourages development of public markets for stocks and thus helps make possible the liquidity and diversification of benefits that investors receive from those markets.[52] Another purpose of the limited liability form of business is the 'ability to separate the parts of the firm that are subject to regulation from those that are not leaving the unregulated part of the business free to avoid the costs of regulation.' These purposes support the general rule that the separateness of a corporation from its shareholders will normally be respected.[53]

The above discussion is relevant to establish the point that any digression from the limited liability has to be a very cautious inroad.

The well-known theory of lifting the corporate veil is the exception to the sanctity of corporate liability. The link, the veil jurisprudence and lender liability is natural: lender liability can be a (potential) ground for lifting the corporate veil. Recent scholarly works have compared lender liability to piercing the corporate veil doctrine.[54] It is supported by the fact that the contours of this doctrine are in any case not clear; it remains fact-specific inquiry, which can, therefore, accommodate lender liability.[55] Hence, it is not a watertight compartment and can accommodate new principles like lender liability.

Hiding Behind the Corporate Veil: Employer Abuse of the Corporate Form to Avoid or Deny Workers' Collectively Bargained and Statutory Rights, 100 W.VA.L.REV. 537 (1998).

[53] Cynthia Nance, Affliated Corporation Liability under the WARM Act, 52 Rutgers L.Rev. 495, (2000)

[54] See, Lawrence J. Shehin , in Lender Liability and the Corporate Veil: An Analysis of Lender as Shareholders Under CERCLA, 25 B.C. ENVTL. AFF. L. REV. 687 (1998). This is in context of lender liability rules created by the widened 'owner/operator' concept in the Environment Protection Act, 1986.

'The law in this area has not crystallized. Case results are very fact specific, and the fact patterns that cause a court to pierce or not to pierce are not clearly understood. The area of uncertainty is broad enough that litigants have continued to bring a large number of cases'. Thompson, at 1036.

In any case, a broad principle can be derived thus: 'typically, veil piercing is a method by which liability is extended from the corporation *to the individuals causing the lending activity* for the purpose of preventing fraud or to right a particular wrong'. The very point of veil-piercing is to avoid injustice by disregarding the formal structure of a transaction or relationship in favor of its substance, to impose personal liability on persons who have, in substance, run their nominally incorporated business in a way that makes it unfair to allow them to deny their responsibility for the obligations of the business by interposing the corporation's separate legal personality.[57]

However, in the context of lenders liability especially for financial institutions, the corporate veil theory may be applied by the Indian Judiciary to examine the management's liability for 'bad lending'. It is widely accepted that the vicarious liability issue in India has been restricted to the establishing principal-agent relationship between the bank and the defaulting employee.[S8]There is no instance of cracking the corporate shell for affixing personal liability on the officer. However, in a surprisingly bold decision, the Supreme Court directed an amount of compensation of Rs. 10,000 awarded by the National Commission for mental harassment to be recovered from such officers proportionately from their salary.[59]

The inarticulate premise of the court seems to be based on the 'expectation principle' for damages under which the aggrieved debtor is entitled to that quantum of damages, which he

[16] *Middleton* v. *Parish of Jefferson,* 707 So. 2d 454,457 (La. Ct. App. 1998).

57 *West Va. Highlands Conservancy, Inc.* v. *Public Serv. Comm'n.,* No. 25048, 1998 WL 874963, at * 4 (W. Va. Dec. 14,1998).

58 The well-known case of 55/v. *ShyamaDevi,* **AIR** 1973 SC 2451.

[59] *Lucknow Development Authority* v. *M.K. Gupta,* **AIR** 1994 SC 787. Compliance of the Order was to be reported to the Supreme Court within one month from the date fixed for compliance. On another occasion, *Central Co operative Consumers Stores Ltd.* v. *Labour Court,* 70, *Taxman,* 6 (SC), under the COPRA, 1986 the officers were held liable personally for wasteful litigation, and the officers responsible were compelled to pay compensation to the , employer. The second case though promoting deterrence, does not change the vicarious liability rule.

legitimately expects to be shared by the lender or the officer-in-default. Often the liability is so huge that the Court may be reluctant to trigger off individual liability. It may be mentioned that the 'expectation interest' approach itself is not infallible. This is so because there is a strong case for the point that the expectation theory gives to the plaintiff, the debtor, a handle to expect his burden and obligation to be shared by his creditor who had no role in the execution of the project for which loan was taken and that led to any violation of statutory or non-statutory provision. Nevertheless, there is no real deterrence in penalizing a fictional entity[60] since due to separation of ownership and management; the only interest group to 'feel the pinch' is the 'shareholders group' who in any event do not manage their lending entity.

Let us examine the corporate veil theory from another perspective. The *corporate veil* insulates the management and as such the manager is not personally liable for his decision. What is the liability of a lender? The financial liability of a lender may arise due to bad lending. The bad lending may be on account of breach of a corresponding duty, such as, duty to take adequate care to examine the worthiness of the purpose for which lending-borrowing is necessary; and/or duty of *'creating sufficient comfort'* so that there is certainty of getting the loan amount back with interest. Here the credit becomes unworthy of realization and the lender becomes liable to financially make good of the loss. Though the actual lending decision is taken by a 'manager' the liability remains with the entity or the body corporate for two obvious reasons. Firstly, as was already stated, the manager is insulated by corporate veil; and secondly, the manager functions for and on behalf of the corporate entity, as if an agent. Function of an agent binds the principal based on the principle of'*qua facet per alliums facet per se,*' i.e., one who does something through another does it oneself. There is another liability due to breach of duty to take care of ascertainment that no statutory obligation is violated by performance of the contract, so on and so forth. These are statutory

A corporate entity is a collection of contracts: there is a contract between shareholders *inter se,* between the directors and the company, between the company and debtors/creditors and between the company and end users.

liabilities arising out of violation of some statutory obligation. Breach of all these duties may be due to fraud, or culpable negligence or wanton disregard to duties. Why should the actual lending officer be not liable for such fault? This question gives rise to the possibility of lifting the veil. It is true that in many cases the officer individually is so insignificant that the huge sum that is in stake cannot be recovered from such official. Lifting the veil thus can hardly achieve any goal. A professional manager may be broken, may be declared insolvent, or can be asked to pay an amount of compensation. He or a group of managers committing fraud or error of judgment or wanton disregard to duties, can not be asked to raise the fund to bear lenders liability.

3.3 Best Practice Code on lending decision

Is this a sufficient ground for making the management not liable for professional negligence or fraud or disregard to duties? In the absence of any statutory stipulation, an officer-in-default is not liable for any wrong and bad lending decision is taken in good faith and honest belief that the decision is taken in the best interest of the business though in fact the truth lies otherwise. The officer-in-default is personally liable only in the event of offence committed. In order to make management at any level liable on the ground of absence of proper care there is required to have 'Best Practice Code' codifying norms of taking lending decision. It is also be made legal requirement to place the matter where any decision is either taken or required to be taken deviating from the 'best practice norm' before the Board. The BPC has to be reviewed from time to time and the standard of care expected is expressly provided in the BPC.

Any discretionary power given to any level of management must be covered by BPC laying down the procedure of making the decision. BPC has to show that the discretionary power of rank manager is not an arbitrary decision. A codified procedure with checks and balances makes the exercise result-specific. In most of the scam incidents it is found the basis lies in the absence of any BPC on lending decision. In private sector discretionary power is result-oriented. Absence of positive result may result in the

removal of the official. In a public sector organisation the same is required to be based on rule based procedure with checks and balances. My personal experience is that there is no BPC in investment and lending decisions. As such these are gross demonstration of arbitrary power to the detriment of the institution. Such a gross violation of care and prudential norm must attach personal liability.

3.4 Liability on fraud

Under Companies Act there are provisions for the piercing the veil on the ground of fraud[61] and fixation of personal liability. Similar provision is required to be inserted in the Banking Regulation Act, 1949. The Act may also provide for restoration of the amount through tracing of assets. It is difficult to depend upon the court on each individual issue for lifting the veil, because of the delay involved in justice. It is therefore necessary to provide in the BRA to personal liability of the party participating in the fraud and also the power of the institution to trace the property without affecting the *bona fide* customers.

3.5 Traditional limit of the lenders liability

Traditional lenders' liability claims fall into three heads: fraud, breach of fiduciary duty and negligence.[62] In tort law an argument can be advanced that the act of bad lending was not done 'in the course of employment'. A master is not liable for the dishonest or criminal acts of his servants when the servant merely takes the opportunity afforded by his service to commit the wrongful act, which leaves the aggrieved party to proceed against the 'bad lender'. However, there exists no privity of contract between the officer and the borrower. As for torts, the 'duty of care'

[61] Section 542 of the Companies Act, 1956 prescribing personal liability of the ftinctionary for fraudulent conduct of business, when the company is in the course of winding up.
[62] *Scott* v. *Dime Savings Bank of New York,* 1995 U.S. Dist. LEXIS 4009(march 31,1995).
[63] Lord Denning in *Morris* v. *C.W. Martin & Sons Ltd.,* [1965] 2 All E.R. 725. Followed in *State Bank of India* v. *Dhyaam Devi,* AIR 1978 SC 1263.

jurisprudence in this regard has not developed to evolve into a rigid norm. Hence, in the US, there is a trend to establish a fact-specific 'quasi-fiduciary' relationship so as to make the officer a 'constructive trustee'. But firstly this is unpredictable, secondly there is zero deterrence, the only outcome is restitution!

3.6 Special personal liability of promoters

Special liabilities of players in the market are required to be specifically fixed either by the statute or by the regulator. One special issue must be remembered is that the regulator can never affix criminal liability; criminalization is absolutely a legislative prerogative. As such, the regulator can only affix civil as well as punitive fine on the players. There is a special liability of the promoters of private and co-operative banks asking them to contribute towards the paid up capital to the extent of 40% and the same is to be locked in for a period of five years. But there is no regulation affixing the special liability of the promoters. The policy is required to be determined as what is to be the special civil and contractual liability of the promoters of a private bank and the same to continue for how many years. Generally the following special contractual liability is fixed on the promoters at the time of issuance of license, viz., liability for misstatement and suppression of facts; misuse of provisions of the license and non-fulfillment of conditions stipulated in the license; act of deceit against creditors and investors; and not taking adequate provision to protect the interest of the depositors. The personal liability of the promoters for such an act is restricted for a period of five to ten years. Based on such provision the lock-in period is determined.

3.7 Special personal liability of directors

There are some special liabilities of the directors specially to bear personally prescribed in the Companies Act. Some of these liabilities are criminal in character including attracting imprisonment, such as misstatement in the prospectus[64]. But directors are not personally liable for wrong decisions; they are

[64] Sections 62, 63 and 67 of the Companies Act, 1956.

protected by the corporate veil. But specific regulation can affix the directors for bearing personal liability. Some of these grounds respected world over are, misuse of power and over-stepping in decision making (removal of corporate veil); dealing with inside information; violating prudential norms without any due diligence and business prudence for doing so; neglecting audit report and not meeting the objections (as for example, if dividend is declared without making adequate provisioning or provisioning as directed by the regulator to protect the interest of the depositors, directors are personally laible); suppressing the information to the regulator and violating regulator's directive. We have very little of such specific liabilities affixed by the regulation. SEBI has formulated some regulation in some areas but by and large, banking sector is still in open to be infected with all the above *virus.*

3.8 Special personal liability of the management

The Reserve Bank has the power by virtue of statutory provision. But if there is a violation what is to happen is required to be fixed by the regulator. There are some provisions in the companies Act for affixing the special liability of the management. This has been discussed in the section dealing with corporate veil. Under the banking regulatory system there is no personal liability of the management. Generally speaking the following areas are areas of personal liability if the regulator so affixes by regulation, e.g., violating the prudential norms without recourse to the Board of Directors (When the matter is placed before the Board the management is insulated but that exposes the directors acting in disregard); failure to follow the instructions and guidelines of the regulator; dealing with inside information to the detriment of interest of the depositors; and any other matter of act of imprudence as may be prescribed by the regulator.

4. A CRITICAL ECONOMIC REVIEW OF LENDERS' LIABILITY IN COMPARATIVE LEGAL ANALYSIS

4.1 Wider ramification of the concept of lenders' liability

The quest of the enquiry 'who should be a lender' is essentially a policy issue: it is normative and not positive. The Banking

Regulation Act understands a bank as a company, which accepts for the purpose of lending on investment, deposit of money from the public, repayable on demand or otherwise. However, our current agenda is broader, as in India, there is a large presence of unincorporated lenders. It is suggested that reference could be made to the Financial Transactions Reports Act, 1988 of Australia. The Act creates the concept of a 'cash-dealer'.[65] Though the object of the Financial Transactions Reports Act is primarily to curb tax evasion, this notion of the 'cash dealer' can be captured in the limited context of identifying the unincorporated lender. Examining the issue from the Companies' Act perspective, sec. 5 of the Companies Act, 1956, defines 'officer-in-default' to include the managing director, the manager, the secretary, shadow director etc. 'Officer', as a term in sec. 5, is a functional and fact-specific inquiry. However, sec. 5 is merely an exposition of 'officer' as used elsewhere in the Companies Act and cannot be interpreted to mean that the officer is in default when the company is in default. The significance of sec. 5 lies elsewhere: this provision abolishes the defense of absence of *mens rea* for 'officers-in-default'. So,

Cash dealer, by S.3(a) of the Act means:-(a)
financial institution;
(b) a body corporate that is, or, if it had been incorporated in Australia, would be a financial corporation within the meaning of paragraph 51 (xx) of the Constitution.
(c) an insurer or an insurance intermediary.
(d) a Securities dealer.
(e) a futures broker.
(f) a Registrar or Deputy Registrar of a Registry established under Section 14 of the Commonwealth Inscribed Stock Act, 1911.
(g) a trustee or manager of a unit trust.
(h) a person who carries on a business of issuing , selling or redeeming traveler's cheques, money orders of similar instruments; (i) a person who is a bullion seller.
(j) a person (other than a financial institution) who carries on a business of: (i) collecting, holding, exchanging or remitting currency, or otherwise negotiating currency transfers, on behalf of other persons; or (ii) preparing pay-rolls on behalf of other persons in whole or in part from currency collected; or
(iii) delivering currency (including payrolls); (1) a person who carries on a business of operating a gambling house or casino; and a bookmaker, including a totalisator agency board and any other person who operates a totalisator betting service.

wherever the 'officer-in-default' liability applies, e.g., in non-disclosure of conflict of interest, the director is strictly liable. sec.633 though provides an escape route to the officers-in-default since it gives discretionary power to the court to relieve liability from officers-in-default for acts done in good faith, *it* is submitted that in context of the fact that sec. 5 of the Companies Act, post the 1988 amendment,[66] abolished the *mens rea* defense, S.633 should be read down to that extent. In other words, power of the court to give relief based on good faith where it concerns officers-in-default, should be understood as impliedly repealed. Else the purpose of the legislative amendment of sec. 5 would stand defeated.

Can product liability be linked to lender's liability? There is no direct answer to this question. It is applicable by way of analogy. In the Consumer Protection Act, 1986 (COPRA), the definition of a consumer is such that product liability can attach to the 'lender' viewing the loan transaction not as goods[67] but as 'service'.[6] There is Indian case law to this effect as well[69] and it is clear that bank customers are 'consumers' for the purpose of the COPRA. Fraud committed in the bank account,[7] delay in collection of salary cheques[71] and the like have triggered off product liability under the COPRA.

4.2 An economic analysis of lender liability

In agency theory of corporate law, the corporate is viewed as a 'nexus of contracts' between different factors of production. Shareholders possess antecedent rights as the company's owners to have it operated in their interests and ultimately to control it. The

Companies (Amendment) Act, 1988.

[67] The expression 'goods' in S.2(l)(d)(i) is to be interpreted in the light of the Sale of Goods Act which excludes a 'contract of cash' from its purview. However, a loan transaction can come under 'service'

[68] See *supra* note 26.

[69] In *Amrit Laal* v. *Instant Instant Growth Funds Pvt. Ltd.,* (1992) CPJ 647(Del), it was held that opening and maintaining accounts of customers is a contract and is therefore a service.

[70] *Hematnti Chutia* v. *United Commercial Bank, (*1994) CPJ 505 (A).

[71] *Madubhai R. Patel* v. *SBI,* II (1996) CPJ 132(NC).

stress on shareholders value is simply because it makes the company-itself nothing but a web of contracts, more efficient. But though ownership is divorced from management,[72] owners are interested in maximum profits at reasonable risk whereas the interest of management is less clearly defined.[73] This increases agency costs. The link of this discussion to the current context is that the liability of the management may be seen as imposing an additional cost on the shareholder-agency function of the corporate and result in inefficiency. This additional cost involves the risk of bad lending both on account of fault in the decision and circumstantial. But does it include fraudulent and culpably negligent bad decision?

It is true, therefore, that initially, it may appear that there is an inherent inconsistency in corporate governance and lenders liability. The aim of corporate governance is to maximize shareholder value[74](the premise being that this is the key to the two above-stated broader objectives of corporate governance). But, *prima facie,* lender liability seems to erode shareholder value. A lender liability claim, in the microanalysis, erodes shareholder value of the lending institution since it will either result in litigation costs or, by internalizing prevention controls, will nevertheless increase transaction costs of the lending firm.

Is lenders' liability then, inconsistent with corporate governance jurisprudence? It is submitted that it is not so. A two pronged reasoning can be provided for this. The first leg of the argument is that: (a) all lenders in some context or the other are borrowers as well; and (b) lenders such as banks have an interest in good governance of their channels of investment. In other words, though *prima facie,* lenders liability may be opposed to shareholders value maximization, internalization of lender liability law (in this sense it only means best practice rules for lending activity) will improve investment climate for the bank since the resultant improved business climate will ultimately benefit banks as well. So, on a macro-analysis, lenders liability law benefits everybody!

John Parkinson, *et al, The Political Economy of the Company,* 91 (2000).
Id. at 68.
Kumara Mangalam Birla Committee Report on Corporate Governance, 2000.

The second leg of the argument forces a challenge on economic efficiency as a value itself (this being the premise of shareholder value maximization) and makes social justice the ultimate goal of commercial law.[75] This analysis will result in favoring the creation of a lenders' liability law since typically, the borrower is less really empowered than the lender. An instance of this is the Truth in Lending Act, 1968 of the U.S., which imposes a high duty of full disclosure of material facts to credit consumers.

A logical answer lies in the 'default rule': the default rule in debtor-creditor relationship provides parties with "the type of contract that they would have agreed —[upon] if they had had the time and money to bargain over all aspects of their deal."

If in a contract paradigm of managing agency or asset management company (AMC) to be appointed such a personal liability can be attached with economic prudence there is no reason why fixation of liability cannot be made with cost efficiency in the contract of managerial assignment.

5. A COMPARATIVE SURVEY ON LENDERS LIABILITY IN THE DEVELOPED WORLD

Comprehensive Environmental Response Compensation and Liability Act, 1980 (CERCLA) of the U.S. has heralded lender liability for environmental issues but technically, it provides that a party who holds indicia of ownership to protect a security interest is not to be considered an owner or operator so long as it does not participate in the management of the facility. [6] Later cases extended this liability to situations where the lender was found to be in control of the borrower and more disturbingly to situations where the lender could be found to have been in a position to affect

[75] Dworkin says it is an unpleasant social goal , *c.f.* Daniel A. Fraber, Eco-pragmatism, (1992), But Posner says court should apply economic efficiency as parties themselves applied it impliedly. Richard Posner, *Economic Analysis oj Law,* 81 (1986).

[76] 42 USC, Section 9601 (20)(A).

decisions relating to the disposal of hazardous materials. The EPA responded to the confusion surrounding the liability of lenders by adopting a Lender Liability Rule in 1992.[78] The Rule provided a safe harbor for lenders and made it clear that lenders could safely engage in a wide variety of activities including requiring environmental audits; requiring compliance with state and federal environmental laws; engaging in loan workout activities and foreclosing on the property where necessary. While the Rule was not a perfect solution for lenders it was well received in the lending community. But the Rule was subsequently struck down[79] so as the position now stands, lender liability for environmental costs is nebulous: the EPA requires management participation of the lender but courts have interpreted it such that even if a creditor can affect the business decision of the defaulting debtor he may be held liable! Such a position is unwelcome in India and a lesson should be learnt from the U.S. experience in lender liability albeit in the context of environment law.

The Resources Management Act, 1992 of New Zealand makes every person prima facie subject to the jurisdiction of New Zealand for violation of a duty to avoid, remedy or mitigate any adverse effect on the environment arising from any activity carried on by or on behalf of that[80] Though the purpose of this Act is sustainable

[77] See *United States* v. *Fleet Factors Corp.,* 901 F2d 1550 (11* Cir. 1990). These decisions were based on the 'owner or operator' provisions of CERCLA, which provide that such a party may be found liable for clearup costs even if that party had nothing to do with causing the contamination.

[78] See 57 Fed Reg. 18382 (daily ed. April 29, 1992).

[79] *Kelly* v. *EPA,* 15 F3d 1100 (DC Cir), reh denied, 25 F3d 1088 (DC Cir 1994), cert, denied, *American Bankers Association* v. *Kelley,* 115 S Ct 900 (1995).

[80] 17. Duty to avoid, remedy, or mitigate adverse effects—(1) Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of that person, whether or not the activity is in accordance with a rule in a plan, a resource consent, section 10 (certain existing uses protected), or section 20 (certain existing lawful activities allowed).

(2) The duty referred to in subsection (1) is not of itself enforceable against any person, and no person is liable to any other person for a breach of that duty.

(3) Notwithstanding subsection (2), an enforcement order or abatement notice may be made or served under Part XII.

development and not lender liability, due to the U.S. experience of unexpected liabilities on creditors, the creditor lobby is apprehensive of the tentacles of this legislation. In the realm of lending to consumers for non-business usages, the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996,[82] amended by the Truth in Lending Act (TILA) of the U.S. has set the trend. This Act authorizes federal Truth in Lending enforcement agencies to order creditors to make monetary and other arrangements to the accounts of consumers where an annual percentage charge was inadequately disclosed and even contemplates restitution of undisclosed errors. The stated purpose of this informed use of credit[83] is a context where creditors were creating unhealthy markets of credit.[84] The Truth-in-Lending Act requires lenders to disclose the terms and costs of all loan plans, including the annual percentage rate, points and fees; the total of the principal amount being financed; payment due date and terms, including any balloon payment where applicable and late payment fees; features of variable-rate loans, including the highest rate the lender would charge, how it is calculated and the resulting

(a) Require a person to cease, or prohibit a person from commencing, anything that, in the opinion of the Planning Tribunal or an enforcement officer, is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment; or

(b) Require a person to do something that, in the opinion of the Planning Tribunal or an enforcement officer, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by, or on behalf of, that person.

[81] Sec. 5 of RMA, 1992.

[82] Pub.L. 104-208, Div. A, Title II, Subtitle E, Sept, 30, 1996, 110 Stat. 3009-462.

[83] The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices. Sec. 1601 of the Act.

[84] The Congress also finds that there has been a recent trend toward leasing automobiles and other durable goods for consumer use as an alternative to installment credit sales.

monthly payment; total finance charges; whether the loan is assumable; application fee; annual or one-time service fees; pre-payment penalties; and, where applicable, confirm for you the address of the property securing the loan. The TILA is intended to enable the customer to compare the cost of cash versus credit transaction and the difference in the cost of credit among different lenders. The regulation also requires a maximum interest rate to be stated in variable rate contracts secured by the borrower's dwelling, imposes limitations on home equity plans that are subject to the requirements of certain sections of the Act and requires a maximum interest that may apply during the term of a mortgage loan. TILA also establishes disclosure standards for advertisements that refer to certain credit terms. This legislation is an exposition of the failure of the efficiency doctrine. Lewis A. Kornhauser in *'Corporate Law and Maximization of Social Welfare*\ [85] states that the goal of efficiency in interpretation of legal rules for commercial and corporate law has been accepted by Western scholars: so corporate and commercial law should simply provide a structure in which society will function smoothly. One compelling understanding of efficiency rule is: wealth maximization.[8] *However he argues that both efficiency and social welfare are not intrinsically valuable and that law should only pursue them to the extent they provide reasonable and practical proxies for individual well being.* [7] This is what the TILA seeks to do.

It is interesting that the TILA differentiates lender liability on basis of the recipient (consumer). This translates into a higher liability for more vulnerable credit consumers. The justification provided is consumer detriment under imperfect information. Hence the lender is liable to reduce search costs for the vulnerable consumer and to provide him or her with greater access to market information. In the FDIC (Federal Deposit Insurance Corporation) Statements of

The Jurisprudential Foundations of Corporate And Commercial Law, 87 (2000). [86] Richard Possner's rule.

[87] *Ibid*

[88] The report of the Director General of Fair Trading's Inquiry on Vulnerable Consumers and Financial Services, 1999.

Policy- 5000, directors and officers of banks have obligations to discharge duties owed to their institutions and to the shareholders and to the creditors of the institutions... the *duty of loyalty* requires directors and officers to administer the affairs of the bank with candor, personal honesty and integrity. They are prohibited from advancing their own personal or business interests or those of others, at the expense of the bank.

The *duty of care* requires directors and officers to act as prudent and diligent businesspersons in conducting the affairs of the bank. The context of this is that FDIC will refrain from civil liability suit if this standard is maintained. The duty of care gives directors an obligation to act on an informed basis after due consideration of the relevant materials and appropriate deliberations including the input of legal and financial experts.

There is a distinction made, however in outside and inside directors. An insider director is understood to have greater knowledge and responsibility for the day to day running of the company.[90] In any case, the FDIC Guidelines do not impose a liability on officers. The Fair Credit Reporting Act and the Consumer Credit Protection by the FDIC, further strengthen lender liability law in the U.S.

The Office of Fair Trading under the Consumer Credit Act, 1974 in U.K, is evolving a best-practices code. For instance, this Office has issued Guidelines for debt management companies. The Office of Fair Trading has no objection in principle to companies charging for, or consumers choosing to pay for, debt management advice or services. However all consumers are entitled to have those services carried out with reasonable care and skill. Furthermore, the consumers using these services will often be feeling desperate because of the nature of their financial problems and, by definition, have the least available financial resources. Companies, which choose to charge such consumers for these

[89] 'Officers' are, according to the FDIC Statement of Policy, 'responsible for running the day to day operations of the institutions incompliance with applicable laws, rules, regulations and the principles of safety and soundness. [96] FDIC Financial Institution Letter(FIL..87..92) DATED December 3,1992.

services must accept an unusually heavy burden of responsibility to ensure that the advice and services they give, are appropriate and represent value for money.[91]

Finally, the Financial Transactions Reports Act, 1988 of Australia, creates a lender liability in the sense that it imposes strict reporting requirements on 'cash dealers'.

6. CONCLUSION: LEGAL PARADIGM ON LENDERS' LIABILITY

6.1 General remarks

Lender may become, therefore, liable at three stages, namely, at the stage of contract and performance, secondly, at the stage of wrong lending and finally, when the lending becomes bad. The liability at the first stage is against the borrower. If the borrower sustained any loss due to non performance of the contract by the lender or wrongly dealing with the performance, the lender may not only become liable to the borrower but also may become liable to third parties, because of the failure of the borrower. The lending business is generally based on standard form contracts. Often, it is found that standard form contract is inadequate, one sided and defective. It is inadequate because, empirically it is found that most of the standard form lending contracts do not contain provisions for circumstantial variation, liability for disclosure, statement containing the disclosure by the lender and straightening the lender's obligations, provision for *vis majure* and alternative dispute resolution. Standard form contract is one sided because conditions are arbitrarily imposed, some of the provisions are apparently against the borrower. Naturally, if and when the matter goes to the court, court has to strike down many of the provisions to the detriment of the interest of the lender. The standard form contract is often defective because, often it does not adequately take care of the moral hazards. Fraud committed by a lender's staff in collusion with borrower does not have adequate legal protection in India for protecting the interest of lender.

[91] http://www.oft.gov.uk/html/rsearch/reports/cca-debt/debtl .htm

6.2 Periodical review of contractual terms

The standard form contract has two types of fault, it is not contemporised and it is not customized. Every individual lending agreement has its own nuances. In most of the cases there is no application of the mind to review. Even losses of jurisdictional matters are also ignored more often than observed. As a result conditions are likely to be hit by the logic of undue influence. Individual variations are not seriously taken care of by the decision-makers.

6.3 Fraudulent contract

Even if no lender's staff is responsible for the borrower and the borrower commits it, legal provision is quiet inadequate and ineffective to protect the interest of the lender. This part requires legal intervention. A committee of the Reserve Bank of India as already suggested to make 'financial fraud' an offence. In the event, it is declared as an offence, the lender must have adequate protection to recover the amount with power to trace back & forward, attach and confiscate the amount defrauded or assets created out of that amount.

6.4 Wrong lending

If it is a wrong lending, the lender is generally liable to the borrower as well as third parties on account of the error of judgment on the part of its employees or due to negligence. The protection against lender's liability on this core depends upon the Best Practices code (BPC) and legal compliance system in the lending business. Legal compliance must be insisted in the case of major lending transactions. The use of discretionary power is required to be based upon BPC to make it completely free of arbitrariness. Most of the major frauds committed in India in the last twenty years are because of absence of BPC in using the arbitrary power. The principle of good governance in lending business is absolutely necessary. Wherever, a major decision is taken based on discretionary powers, matter must be brought to the notice of the Board of Directors and must be monitored closely by

a Board's committee on financial outlay, which is to be headed by an expert non-executive member. Unless financial fraud is made *ipso facto* an offence with all associated investigatory and reclaimable power, the lender has to allow its management to take decisions following rule of law even if it is discretionary power.

6.5 Best Practice Code on lending functions

Lender's lending power under the present legal system is highly subjective and discretionary. There is very little effort to standardize the procedure of taking decisions on lending. Procedural rules are extremely important in order to provide for a comparative scale of efficiency and operational behaviour. Discretionary power is not arbitrary power. It is, therefore, urgently necessary to prepare a best practice code on the procedure to be adopted for lending decision especially in case of corporate project finance, to start with. However, it is imperative that the officers responsible to lending function must internalize through intensive training these best practice rules. The BPC shall include procedure for application for borrowing; investigation; compliance of procedural rules; decision making; disclosure system; monitoring and use of funds for the purpose; defining default; investigation in the event of default, management's responsibility to place before the board or in the investment committee of the board; cooperation and restructuring; remedy for mismanagement and non-observance of best practice etc.

6.6 Bad lending

In the event of bad lending, it is a bad case. The lender may protect his interest only by sufficient business prudence even to the extent of using sniffing sense to appreciate investment claim. The lender may also protect his interest by taking insurance cover if available. Adequate provision on prudential norms can also be based on the BPC. It is not enough to keep provisions out of profit. But it is necessary that the same is required to be invested in absolutely secured systems, preferably in government bonds.

6.7 Regulatory law on lending function

There is no definite legal prescription to regulate function of banks and financial institutions. The Banking Regulation Act deals more with organisation and management structure than regulating banking functions. An omnibus Act is to be suggested with the regulatory codification on functional aspects of the banks as a depositor and a lender. The codified statute ought to contain general regulatory rules for (a) lending institutions, (b) lending instruments, (c) regulator's empowerment, (d) indoor management and jurisdiction for self regulation, (e) remedial and consequential power of the regulator in the event of non-observance, (f) lenders right to realisation and enforcement of security interest, (g) sharing of information of borrowers by the lending institutions through registry, (h) making insider trading impossible, if not prohibited (i) dispute resolution mechanism.

6.8 In-house dispute resolution mechanism and consumer protection

There must be a referee to deal with grievances immediately, which must be quick and efficient having the power under the present Arbitration Act. The institution must have power to make rules of procedure to notify.

6.9 Suggested regulative design

There are some important areas, such as, (a) Financial fraud or systemic fraud, which requires a legislative intervention because it has to be treated as serious offence, such an act being an act of financial terrorism endangering the entire system; and, (b) Security interest creation, priority determination and enforcement, which are critical areas of affixing liability of the directors and management, which require legislative intervention.

Otherwise the issue is to be covered by developing adequate ground rules and redressal method to deal with foul play by affixing the personal liability by regulation and also by encouraging the development of practice code, code of conduct,

code of ethics and legal audit. Some of the issues that are required to be addressed to affix personal liability are given above. Even in the above areas of statutory grounds the regulation may prepare ground rules of contractual relation and affix appropriate liability. As for example, a bank may be required to develop the practice code on investment and internally affix liability for violation of the norm. A detail scheme on such regulatory framework may be developed.

THE BEST BAKERY CASE: IS OUR CRIMINAL JUSTICE DELIVERY SYSTEM BEST?

*K. I. Vibhute**

1. THE BEST BAKERY ' ON FIRE'

On February 27, 2002, Gujarat witnessed a ghastly inhuman act when fifty nine persons, mostly 'tor *sevaks"*[1] returning from Ayodhya, traveling in the *Sabarmati Express* were burnt to death by a mob[1] of about 1000 persons, mostly Muslims, at Godhra, which triggered a series of communal riots, planned or instant, in nearly twenty districts of Gujarat between February and May 2002 and claimed about two thousand lives, mostly of Muslims.[2]

One of the 'instant' & 'retaliatory' [and gruesome] communal riots in the series that followed the equally infamous the Sabarmati Express carnage was the Best Bakery massacre in Vadodara,[3] wherein a violent mob of about 15,000 persons armed with petrol bombs, plausibly 'reacting' to the burning train, *Sabarmati Express,* incidence on March 1, 2002, ransacked, torched and set on fire the Best Bakery and brutally roasted alive seven persons and killed other five persons. And nine of them were from the bakery owner Habibullah's family and three were Hindus, who lost their lives as the mob believed them to be Muslims. Two other

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[1] However, an inquiry instituted revealed that the fire emanated from one of the bogies of the train itself. One hundred and thirty one persons are booked under the POTA. Trial is still pending.

[2] *Times of India,* New Delhi, July 13,2003, (8).

[3] Other notorious and ghastly communal riots were: the Frenzied violence, wherein a mob allegedly owing allegiance to the *Viswa Hindu Parishad* (VHP) and *Bajarang Dal* (BD) plunged the homes of Muslims and raped their women; the Kidyad massacre in Panchmahals, wherein over sixty persons travelling in a tempo were set ablaze, the Dipda darwaji killings in Mehsana, wherein eleven persons were burnt and their remaining were dumped in sewage, and the Gulberg riots.

persons, who are still missing, are also believed to be dead in the massacre.

Twenty one persons were charged and prosecuted for committing acts contrary to sections 147 (riot); 148 (riot with deadly weapons); 149 (unlawful assembly); 188 (disobedience to order promulgated by public servant); 504 (intentional breach of peace); 342 (wrongful confinement); 427 (mischief by causing damage to property); 436 (mischief by fire & explosives); 395 (dacoity); 307 (attempt to commit murder), & 302 (murder), of the Indian Penal Code, 1860 (IPC).

2. THE BEST BAKERY 'RULING': A 'FAST' (HALF) BAKED CAKE?

On June 27, 2003, Judge Hemantsinh U. Mahida, Additional Sessions Judge of a fast track court, Vadodara, acquitted all the 21 accused persons on the ground that the testimony of all the witnesses appeared before him was 'not adequate enough' to 'convict' the suspected culprits.[4] 'That a violent mob caused the death of 14 people in the incident is beyond question', the court observed, but 'there is not even an iota of evidence produced on record of the case which can be legally accepted' to 'connect the accused with the charges leveled against them', the court ruled.[5] Judge Mahida, pulling up the police for 'shoddy investigation' and for 'fabricating' evidence to 'frame' the 'innocents' and commenting on the 'handling' of the Best Bakery massacre, observed:

> After years of experience it can be said that whenever communal riots takes place, the police investigation in the riot related offences turns out to

See *State of Gujarat* v. *Rajubhai Dhamirbhai Baria & Ors.,* Sessions Case no. 248/02 (Translation-Mimeo). The author gratefully acknowledges his colleague Ms. Richa Mathur for making him available a copy of the trial court's judgement and of the NHRC's Special Leave Petition (SLP). [5] *State of Gujarat* v. *Rajubhai Dhamirbhai Baria & Ors., ibid.,* para. 52.

> be lame as compared to other investigations. The real culprits escape from the scene of offence on arrival of the police. The innocent passer-by and others watching the sight curiously remain under impression that they would not be harmed since they are innocent. However, from amongst such people and from the surrounding population the police selectively picks certain persons of their choice. — Just as bogus accused are roped in the offence, bogus witnesses are also roped and involved and similarly bogus *panchas* are created. Since the accused are bogus, the depositions made by the true and real witnesses also turn out to be meaningless against the bogus accused. — From the case papers of the police investigation, there appears to be clear circumstances to believe that the police officers have abruptly and arbitrarily recorded the so-called statements of the witnesses subsequently and have falsely incorporated the names of the accused persons.[6]

The trial court concluded:

> In short, there is no cogent, reliable and legal evidence produced on record so as to establish guilt against the accused who are produced before this court. Looking to the circumstances of the case, it clearly transpires from judicial scrutiny of the evidence produced on record of the case that totally false evidence has created against wrong accused.[7]

A reading of the trial court's judgement reveals that the fast track court relied heavily upon testimony of the main complainant Zahira Shaikh, a 18 year-old daughter of the Bakery owner HabibuUah Shaikh, who lost her nine relatives in the Best Bakery

[6] *Ibid.,* paras. 42, 49 & 50.
[7] *Ibid.,* para. 45.

massacre; her mother, Shaherunissa Shaikh, & younger brother, Nafitullah Shaikh, and one Lai Mohammad Khudabaksh, to held all the accused 'innocent'.

Zahira, resiling from her earlier statement made before the police, categorically denied that she had either 'seen' anybody or 'heard' anything in front of the Best Bakery on the evening of March 1, 2002 [when the Best Bakery was set on fire] as that evening was 'dark and smoky'. Deposing before the court she said:

> I do not know what the 15,000-strong mob was doing in front of the Bakery on the evening of March 1. As the mob gathered on the day of the incident, I ran upstairs with my family. I was very scared so I hid. I do not know what the mob was doing below.

Denying that she had ever gone to the police to make her complaint, Zahira asserted in the Mahida court:

> No, I had not gone to make a complaint. Police had taken my statement and signature at SSG Hospital where I was getting treated after the incident. My statements of March 9 and April 1, 2002 to the police are false.

Further, when Judge Mahida pointed out to her that she had claimed in her police complaint that the mob was carrying swords, kerosene cans and other sharp-edged weapons, she said that the statement was 'false'.[8] Later Zahira's mother Shaherunissa, & younger brother, Nafitullah, also turned 'hostile' to the prosecution by retracting from their earlier statements. Nafitullah, in a tone similar to that of her sister Zahira, deposing before the court said:

[8] *Indian Express,* New Delhi, May 19, 2003 (4). Plausibly, relying on, and encouraged by, the Zahira's denials, all other witnesses (including Zahira's mother and brother), allegedly at the behest of some local leaders of the BJP and the police, refused to identify the accused during the court proceedings.

> I do not know as to how our house was burnt. We were hiding on the terrace when the fire broke out. There was lot of smoke due to fire and lights were also off. There were ten to fifteen thousand people in the crowd and I fell unconscious due to smoke. 1 regained consciousness thereafter in the hospital. I have not seen any body either setting fire or doing anything else.[9]

The court, while acquitting the 'innocent' accused, also placed its high reliance upon the testimony of another key-witness, Lai Mohammed, who, when the Best Bakery was burning, was [is still] living in the neighbourhood of the Best Bakery and whose premises were also put on fire by the same mob. In his statement before the police recorded on March 9, 2002, he implicated the accused persons. But three months thereafter, on June 16,2002, for undisclosed reasons, he gave a 'supplementary statement' to the police not only retracting from his earlier recorded statement but also stating that 'some of the accused persons' [implicated in the Best Bakery case] in fact 'sheltered him and his family' when his house was 'attacked' and the Best Bakery was reeling under 'fire'. Deposing before the court he said:

> On 01.03.02 — I was at my residence with the 18 members of my family. At the time of incident I was very much scared and worried about our life. — - I know all the accused present in the court. All accused are residing in our area. At the night of the incident all these accused constantly protected us and they have only saved our life. — I say that is only because of these accused today our lives are saved. — The arson on the night of incident was a horrible nightmare. We were not safe in our houses and therefore we had gone out. Had we gone ahead, anybody would have killed. These accused called us

[9] *Supra* n. 4, para. 39.

> and saved us. — We are in all 65 persons including several women and children who have been saved by these people. If those persons in Best Bakery had also come out, it is true that these people would have certainly saved them.[10]

Recalling the hitherto well established rules of administration of criminal justice that a Judge has to: function merely as an 'umpire'; adjudge the 'guilt' of an accused on the basis of evidence brought before him, and ensure that hundreds of criminals may escape but one single innocent must not be punished, Judge Mahida, in a sort of helpless tone, said that [his] court, in the instant case, had:

> — [N]o powers and jurisdiction to find and establish that if the accused is not guilty, then who is the real offender or that to award compensation from the government to the sufferer. The court of justice is not the court of justice in its real sense but it is a court of evidence'.[1]

Further, in the same spirit he, probably appreciating the difficulty [in the absence of cogent evidence] of the Public Prosecutor to prove his case, Judge Mahida remarked:

> In the circumstances [as aforesaid] the public prosecutor is burdened with the most difficult uphill task of driving a dead horse so as to reach the winning point. Howsoever hard he may hit the horse with his shoes or hunter, the dead horse can never proceed further.[12]

[10] See,/tod., para. 41.
[1] *Ibid.,* para. 48.
[12] #>/</., para.51.

3. THE BEST BAKERY CASE 'UNDER FIRE'

The 'political and judicial handling' of the Best Bakery massacre, the first of the post- *Sabarmati Express* communal riots to come up for judicial determination of the 'fault' and thereby setting 'judicial tone & precedent' for the other cases in the series of the post-Godhra communal violence awaiting trial across Gujarat, however, has now been projected as a classic and illustrious blot on the governance according to 'rule of law' in Gujarat and an impending challenge to the criminal justice delivery system vogue in India. It is pertinent to recall here that the National Human Rights Commission (NHRC), recalling the politico-socio-communal 'climate' between March and May 2002 in Gujarat, and doubting impartiality & integrity of the Bharatiya Janata Party (BJP)-led state government of Gujarat in conducting effective investigation and ensuring 'fair trial', urged the Gujarat Government to transfer the Best Bakery carnage [and other communal riots that took place in Gujarat] to the Central Bureau of Investigation (CBI). However, the Narendra Modi Government, deposing its faith in the state investigatory and prosecutory agencies and pleading that such a move would unnecessarily cast aspersions on the integrity and competence of the state machinery, refused to concede the NHRC's plea. He, with pride, also claimed that the justice delivery 'system' in the state is the best one.

Recalling the State Government's claim that a 'full proof investigation' was carried out against all the accused persons and the prosecution was having in its armory all the 'strong' evidence against all of the 'suspected' culprits to 'convict' them, it is pertinent to note some of the significant facts having bearing on the 'fair' trial. They are: *first,* the prosecutor appointed by the Government in the Best Bakery case, Raghuvir Pandya, had contested the Vadodara municipality elections with BJP's support, *secondly,* of the 120 witnesses listed by the prosecution, about a third (47), including 12 eye-witnesses, never made to appear before the court; *thirdly,* of the (73) witnesses who

[13] *Times of India,* New Delhi, July 11,2003, (7).

appeared, about a half of them (37) turned 'hostile' in the court; *fourthly,* the prosecution's one of the prime & key witnesses Ms. Shaherunissa Shaikh did not dare to disclose the 'truth' because she was afraid of her life; *fifthly,* Zahira [who in earlier statement made to the police 'identified' 10 accused persons who had burnt alive some of her relatives in front of her eyes], another key eyewitness, who was 'escorted' to the trial court by the local sitting BJP legislator, Madhu Shrivastava,[14] on the day of her testimony, and who allegedly intimidated her, told the court that she had neither 'seen' nor 'heard' anything about the incident;[15] *sixthly,* another witness, one Lai Mohammed, who in his earlier statement made to the police [on March 9, 2002] initially identified all the accused persons, gave a supplementary statement [on June 16, 2002] to the police saying that when his premises were attacked on March 1, 2002, the day on which the Best Bakery was put on fire, he and his family members were indeed sheltered by some of the accused persons; *seventhly,* another key witness did not depose before the court, who according to his brother's deposition, had lost his mental balance, and *eighthly,* the fast track court 'examined' the Investigating Officer (IO) and 'heard' all the 21 accused and 'recorded' their statements under sec. 313, CrPC and 'heard' 'arguments' in part in a single day [June 21, 2003].[16]

A number of human rights' activists and defenders, from India and abroad,[17] who have greeted the Best Bakery case with utter distress

[14] However, Madhu Shrivastava's version was that he accompanied Zahira on that day only because she received threats from anti-social elements. See Indian Express, New Delhi, May 19, 2003 (4) & June 28, 2003 (2). It was also reported that Chandrakant Shrivastava, a Congress councillor and cousin of Madhu Shrivastava, was responsible for intimidating Zahira and her mother. And Sonia Gandhi has ordered an inquiry into a media report alleging the role of Chandrakant Shrivastava in the Best Bakery case and assured a proper action against him, if his role in the silencing the witnesses of the Best Bakery is proved. See Indian Express, New Delhi, August 8, 2003, (1 &2).

[15] *Times of India,* New Delhi, June 30, 2003, (12).

[16] *Times of India,* New Delhi, August 28, 2003, (1).

[17] For example, the Amnesty International is very critical of the 'handling' of the Best Bakery case and mobilising its members to call on the Government of India to ensure safety and protection of witness in the Gujarat communal violence and

and suspicion, have not only exhibited their 'deep concern' for human rights of the victims of the Best Bakery massacre and for 'fair and just trial' but also expressed their strong 'reservations' about, and 'reflections' on, the investigatory, prosecutory, and judicial 'handling' of the Best Bakery case. The case, according to some of the critiques, delivers 'injustice' rather than 'justice' and carries 'miscarriage of justice'.[18] Other cases of communal riots awaiting trial in Gujarat, they apprehend, will carry further the 'tone', 'tenor', and 'legacy' of the Best Bakery case. It will also have demoralising effect on witnesses in the other cases of communal riots awaiting trial and the judicial verdict will go in the Best Bakery way, if witnesses are not protected, the critiques

Critiques of the Best Bakery judgement, among other things, also wondered as to why and for what reasons Judge Mahida remained 'a mere mute spectator' when witness after witness turned 'hostile' in his court and 'failed' to invoke his statutory powers [such as the power to hold the proceedings in camera, power to recall and re-examine witnesses and power to order further investigation] to make the trial a 'fair' one; to unearth the 'truth', and thereby to deliver 'justice'.[20]

The Best Bakery case came under severe 'fire' when two of the prosecution's key-witnesses, Zahira Shaikh and, her mother,

to institute an inquiry by an independent agency in the circumstances leading to withdrawal of the testimony of key-witnesses in the Best Bakery case. See http://web.amnesty.org/library, visited on 28* August 2003.

The Citizens for Justice and Peace, for example, pleading that the June 27 verdict of Judge Mahida carried 'a serious miscarriage of justice' & blaming the Public Prosecutor as well as the trial court for 'failing to carry out their duties to ensure congenial atmosphere in the trial', petitioned the apex court for retrial of the case.

[19] This apprehension gets support from the fact that during the hearings of the Nanavati-Shah Commission probing the riots several witnesses had said that either there were no riots in their area or they were not there when it occurred. See, for example, *Times of India,* Bombay, August 28, 2003 (4).

[20] For example see, Mani Mitta, It's about rule of law, Mr. Modi, *Indian Express,* New Delhi, August 7,2003 (8).

Shaherunissa Shaikh, disclosed in media that they had to 'lie' the court out of 'fear' and 'danger' to their lives and of their relatives. [21] 'I was threatened by BJP leader Madhu Shrivastava. He told me that if I say the truth in the court my mother and other family members would be killed. So, I lied in the court because of fear and these accused were set off free', Zahira told the press in Mumbai. Crying for 'justice', she, further, disclosed that 'Shrivastava used to call me regularly over the phone and threatened me. He also told me that everyone in the court are *[sic]* his men and nobody will believe me. And therefore under pressure I lied.'[22]

Subsequently, Zahira, with her plea for re-investigation & re-trial of the Best Bakery outside Gujarat, approached the NHRC, the Citizens for Justice and Peace [a Mumbai-based NGO], and the Supreme Court of India.

On July 11, 2003, she approached the NHRC [which earlier on April 1, 2002 urged the Gujarat Government to transfer the Best Bakery massacre, along with other communal riots, to the CBI and to create special courts to try those cases & to appoint special prosecutors for conducting the proceedings],[23] to seek its intervention for re-opening the case outside Gujarat.

[21] See *Times of India,* Bombay, July 7,2003 (1).

[22] See, *Frontline,* vol. 20 (Issue 15), July 19-Aug 01, 2003. However, it is pertinent to recall here three significant instances having nexus with Zahira's statement to appreciate Zahira's claim in the right perspective. First, Madhu Shrivastava admittedly accompanied Zahira on the day of her appearance in the trial court because she received threats from some anti-social elements. Second, when Zahira, after her deposition in the trial court, was asked by the media persons as to why she had turned 'hostile', Madhu Shrivastava reportedly said that she would 'not speak' to media as it was a matter of life of 21 persons [accused] and he asked the press 'to leave her alone'. Third, on the day of acquittal of the accused, families of the accused showered their praises on Madhu Shrivastava and expressed their deep gratitude to him for what he had done for them. See *Indian Express,* New Delhi, May 19, 2003 (4) & June 28, 2003 (2):

[23] In the absence of the Gujarat Government's request, the Central Government expressed its inability to transfer the investigation of the cases to the CBI.

Alleging that 'crucial evidence was shut out through 'threats & intimidation' and that 'the eye-witnesses could not identify the perpetrators of the ghastly crime only because of threats, intimidation and hostile environment within the court as well as in Gujarat generally', and contending that the trial court's judgement premised on such an evidence is liable to be set aside, she also moved the Supreme Court for seeking its 'directions' for reinvestigating the Best Bakery case by CBI [or any other independent agency] and its retrial 'at any place outside Gujarat' under constant monitoring of the apex court. She in her petition asserted that the Best Bakery case is a case where 'miscarriage of justice' has occurred at every level of the justice delivery system. 'The investigation was defective, the witnesses were not protected, the Public Prosecutor glossed over his job of effective representation of the victims, the trial judge mechanically acquitted all the accused and the entire trial was conducted in a hostile atmosphere', she contended in her petition to the apex court.[24]

The NHRC, through Special Leave Petition (SLP), arguing that the trial court has not paid adequate attention to the fact that many key witnesses had turned 'hostile' & that ...atmosphere in Gujarat was not conducive for a 'fair trial', and disclosing some pertinent 'errors of omission and commission' committed by the police & the trial court in 'handling' the Best Bakery case that led to the acquittal of all the accused charged with the heinous crime of charring to death 14 persons got scot-free and the crime remained unpunished, by invoking art. 136 of the Constitution of India,[25]

However, on May 6, 2002 the Rajya Sabha, through a resolution unanimously adopted, urged the Central Government to intervene effectively under art. 355 of the Constitution to protect lives and property of the citizens in the State. Such a resolution would have justified the Central Government to intervene in the communal riot cases occurred in Gujarat.

[24] *The Hindu,* New Delhi, September 2, 2003 (11). The apex court has decided to club this petition with the NHRC's SLP for hearing.

[25] Art. 136 (1), which is material for us, reads: '(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to

also appealed the Supreme Court for re-investigation and re-trial of the Best Bakery case outside Gujarat. Submitting that the Gujarat High Court, even if approached or being seized of the case, is not empowered to order either 'reinvestigation' or 'retrial' of the Best Bakery outside Gujarat and that only the apex court, by virtue of arts. 136 and 142 of the Constitution, being vested with such a power, in its discretion, can grant special leave to appeal from the Best Bakery judgement and to 'order', with a view to 'doing complete justice' in a cause or matter pending before it, re-investigation and retrial of the Best Bakery.

According to the NHRC, the prosecution by examining Lai Mohammed, who, in his supplementary statement, resiling from his original statement, stated that some of the accused persons in fact have 'sheltered' and 'saved' him and his family members when his premises were attacked by the mob, and thereby giving 'signals' to it that he was not going to 'support the prosecution', has taken the steps to weaken', rather than to strengthen, its case. Such a 'dramatic *volte-face'* by Lai Mohammad, the NHRC felt, was adequate enough to give 'signals' and 'caution' the investigating agency that its witnesses were reeling under some 'external pressure' and to take appropriate steps to protect its witnesses from such an external pressure to make its case strong.

NHRC, outlining in its SLP how the trial was reduced to a mere 'farce' by, among other things, doing away with a detailed cross-examination of the investigating officer who took the witness stand on June 21, 2003. On the same day, judge Mahida completed the examination and recording of the statements of all the 21 accused persons under sec. 313 of the CrPC and proceeded to hear arguments in part. The Fast Track Court, true to its name, delivered its judgement in the Best Bakery case on June 27, 2003, which began on February 20,2003.

appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal in the territory of India. —

The NHRC, in this backdrop, 'prayed' the apex court 'to set aside the impugned judgement of the trial court in the Best Bakery case' and 'to issue directions for further investigations of the case by an independent agency and re-trial of the case in a competent court located outside the State of Gujarat'.[26] It has, *inter alia,* contended in its SLP that:

1. The concept of fair trial is a constitutional 'imperative' and is explicitly recognised as such in the specific provisions of the Constitution including articles 14, 19, 21, 22 and 39A of the Constitution as well as in various provisions of the Code of Criminal Procedure, 1973, (CrPC).
2. The right to fair trial is also explicitly recognised as a human right in terms of art. 14 of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by India and which now forms a part of the statutory legal regime explicitly recognised under sec. 2(1 Xd) of the Protection of Human Rights Act, 1993, (POHRA).
3. Violation of a right to fair trial is not only a violation of fundamental right under the Constitution of India but also violative of the internationally recognised human rights as spelt out in the ICCPR to which India is a party.
4. Criminal justice system in India endeavours to provide fair treatment not only to the accused but also to the victims of crime as well as witnesses involved therein. A denial to fair trial or access to justice to accused, victims of crime, or witness vitiates a criminal trial. Depositions of witnesses and victims of crime under fear of their own safety, therefore, not only vitiates the whole trial but also amounts to a mockery of criminal justice system.
5. Whenever a criminal goes unpunished, it is the society at large that suffers because the victims become demoralised and

Through a separate application filed under sec. 406 of CrPC, the NHRC also urged the Supreme Court to transfer four other serious cases of communal riots for their trial outside Gujarat. These cases include one relating to the Godhra train burning of February 28 that triggered the riots. See, *National Human Rights Commission* v. *State of Gujarat,* [Transfer Petition (Criminal) No. 194-202 of 2003].

> criminals encouraged. It therefore, becomes duty of the apex court to use all its powers to unearth the truth and render justice so that the crime is punished.[27]

Exhibiting its 'deep concern' about 'the damage to the credibility of the criminal justice delivery system and the negation of human rights of victims caused by the Best Bakery judgement', the NHRC also urged the Supreme Court, 'in the interest of justice' and 'to enhance the efficacy of the criminal justice delivery system', to invoke its powers under art. 142 of the Constitution[28] 'to lay down guidelines and directions in relation to protection of witnesses and victims of crime in criminal trials which can be adhered to both by the prosecuting and law enforcement agencies as well as the subordinate judiciary'.

However, the BJP, a political party ruling in Gujarat and leading the National Democratic Alliance (NDA) Government at the Center, did not like the NHRC's 'intervention' in the Best Bakery case. V. K. Malhotra, the BJP spokesman, labelling the NHRC as 'anti-Hindu', reportedly, remarked:

> What the NHRC has done is not proper and we hope that Central Government takes the necessary action. Filing the SLP in the Supreme Court is unprecedented and is a danger to the federal structure of the country.[29]

[27] See Special Leave Petition (Criminal) of 2003 *In the matter of National Human Rights Commission* v. *State of Gujarat & Ors.,* filed on July 31,2003, para 4.

[8] Art. 142, *in materia,* says: '(1) The Supreme Court in the exercise of its jurisdiction may pass such decree order or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.' [29] *Hindustan Times,* New Delhi, August 8,2003, (1).

Narendra Modi, the Chief Minister of Gujarat, a few days prior to the scheduled hearing by the Supreme Court of the NHRC's SLP and preferring appeal in the Gujarat High Court against the Mahida judgement, resorted to an unprecedented device by approaching the President of India urging him to make survey of all the hitherto riots. In a letter addressed to the President of India, indirectly attacking the NHRC, he urged the President to make public details of all the riots since independence to 'expose the vested interests that have targeted not only Gujarat but have tried to weaken the democratic fabric and reputed institutions of this country'. 'When group clashes and communal riots [plausibly referring to the 1984 Sikh massacre in Delhi purportedly engineered by the Congress Party] occur in many parts of the country, why is such a focus on Gujarat?', the Chief Minister Narendra Modi queries with the President.[30]

However, on August 7, 2003, a day prior to the scheduled hearing of the NHRC's petition in the Supreme Court, when it became very clear to the Government of Gujarat that it was bound to invite some severe strictures from the apex court for its 'handling' the Best Bakery case, the Modi Government suddenly felt 'aggrieved' by the Judge Mahida's ruling and filed its appeal [under sec. 378, CrPC] in the Gujarat High Court against the Best Bakery judgement.[31] Obviously, this step was taken by the Gujarat Government just to pre-empt the NHRC's SLP and to save itself from the inevitable strictures.

Further, the appeal listed twenty grounds, many of which are 'general' and 'routine' grounds for assailing a trial court's judgement in an appellate court, for setting aside the order of acquittal of the Mahida court in the Best Bakery case. The hitherto judicial precedents reveal that normally, an appellate court does not 'reverse' an order of acquittal, unless the appellant cites extraordinary grounds to do so. But the Gujarat Government's in

See *Indian Express,* New Delhi, August 7, 2003, (8) & August 8,2003, (1). *State of Gujarat* v. *Rajubhai Dhamirbhai Bariya & Others,* Criminal Appeal No. 956 of 2003.

the Best Bakery did not cite any such extraordinary ground. Interestingly, it refrained from seeking 'retrial' of the Best Bakery case on the basis of further '(re) investigation'. The government, as sounded in its appeal, desires the Gujarat High Court to direct the trial court to examine afresh the 'evidence' before it, even though the same quality of evidence has led to the collapse of the prosecution's case against the accused.

The State government felt 'aggrieved', *inter alia,* by the fact that the trial court failed to consider Zahira Shaikh's statement to the police as a First Information Report (FIR) wherein she claimed that she had not only witnessed the gruesome act but also disclosed names of the persons who set the Best Bakery on fire and killed her relatives and others in front of her eyes. The trial court, it pleads, 'acted illegally' and 'with material irregularities' when it did not rely upon statement of Zahira, who disclosed the names of the accused involved in the incident. The court also 'erred in law' by treating statement of one Raees Khan, one of the witnesses who was not examined by the prosecution, as an FIR. The trial court, asserts the State Government, also 'materially erred' in law by ignoring the 'settled legal position' that merely because witnesses turn hostile, their evidence does not become unrealistic and unbelievable and thereby liable to be rejected by a trial court. The Government claims that the Investigating Officer (10) has duly 'proved' during his examination that the statements of witnesses recorded during the course of investigation, even though some of them turned hostile. 'When the witnesses turn hostile, their statements to police can be relied upon by the trial court to corroborate any piece of circumstantial evidence, which is of substantive nature', the Government pleads in its appeal. Further, the appeal claims that the trial court has failed in its duty by delivering the judgement without appreciating the entire evidence and by giving its findings only on few of the issues raised by the prosecution.[32]

See *Indian Express,* New Delhi, August 8, 2003, (1 & 2); *The Hindu,* August 28, 2003 (11), and *Frontline,* vol. 20, Issue 17, August 16-29, 2003.

4. THE BEST BAKERY CASE: INTERVENTION BY THE SUPREME COURT OF INDIA

On August 8, 2003, a three-Judge Bench, comprising V. N. Khare, Chief Justice of India (CJI), S. B. Sinha & Arun Kumar, J J., of the Supreme Court of India, in spite of the pre-emptive act of the Gujarat Government, directed the Gujarat Government to submit, within two weeks, the statement of the witnesses given to the police and before the trial court; the memo of the grounds of appeal filed by the State Government in the Gujarat High Court, and names of the lawyers appearing on behalf of it in the High Court. It also 'directed' the Gujarat Government 'to provide protection to the witnesses and their families' and asked it to inform the (apex) court of 'the steps, if any, taken by the Government for extending protection to the lives of victims, their families and their relations', and the 'action' taken by it 'against those who are said to have extended threat or coercion to the witnesses'. However, the Supreme Court, in spite of deposing its faith in the judicial system and the Gujarat High Court, refused to allow the appeal as a 'mere eyewash' and desired to 'monitor' the trial.[33]

The Gujarat government, responding to the notice of the apex court, reiterated its stand on the NHRC's intervention in the Best Bakery. Assailing the NHRC for 'rushing' to the Supreme Court for seeking retrial of the Best Bakery case, it pleaded that the NHRC's SLP is 'thoroughly misconceived' & 'prejudiced' and therefore is untenable in law. Contending that the NHRC is 'appeared to be carried away by the campaign orchestrated by a section of media casting aspersions on the functionaries of administration of justice', the government urged the apex court not to entertain the petition as it will set a bad precedent having wide

[33] *The Hindu,* New Delhi, August 9, 2003, (1). Recently, the apex court has decided to hear the special leave petitions filed by the Citizens for Justice and Peace and of Zahira Shaikh seeking re-investigation by the CBI and re-trial of the Best Bakery outside Gujarat with the NHRC's SLP. See, *The Hindu,* New Delhi, September 2, 2003, (11).

repercussions on the criminal cases pending throughout the country. Further, the NHRC's petition, according to it, 'does not survive' as its appeal against the trial court's verdict is pending in the Gujarat High Court and there are no precedents of bypassing High Courts in criminal trials ending in acquittals. Similarly, the NHRC's prayer for laying down guidelines for the protection of witnesses and victims of crime in the criminal trial, which in ultimate analysis not only amounts to a prayer for enacting a new law but also seeking a remedy not provided under law, it opines, makes the petition untenable. Referring to the direction of the apex court to the state government for protecting witnesses, the government said that the threat to life of the two key-witnesses, Zahira and her mother, came to its notice through media and none of the witnesses of the Best Bakery case had either before or during pendency of the trial complained to the police or the State Government about the threat or coercion extended to them. Further, most of the witnesses in other communal riots cases refused to accept the protection for the time being.[34]

Subsequently, the apex court, on September 12, 2003, taking a serious note of the tone, tenor and quality of the Government's appeal to the High Court, termed the appeal as 'mere eyewash' and warned the State Government that the court is not going to be a 'silent spectator'. 'Is this an appeal? You do not take any plea and it is for the courts to do everything. Even a counsel with one year's experience will not draft such an appeal. It is just an eyewash and nothing else', CJI V. N. Khare, speaking for self and his co-judges on the Bench, remarked. Commenting upon quality of the appeal and recalling the hitherto conduct of the state machineries, the CJI expressed his apprehension that the appeal gives him an impression that the State will repeat its conduct once again before the High Court. And it summoned the State's Chief Secretary and

[34] Affidavit filed by J. R. Rajput, Deputy Secretary to the Gujarat Government in August.

the State Director General of Police (DGP) to get to know more about the appeal.[35]

On September 19, 2003 the apex court indeed grilled the Chief Secretary and the Director General of Police of Gujarat to extract a sort of admission from them that the witnesses in the Best Bakery case were 'won over' and 'coerced' to turn them 'hostile' to the prosecution.[36] The DGP, quoting the Vadodara Police Commissioner, categorically told the CJI that the witnesses were 'coerced and won over' by the accused. However, he asserted that there were 'no bogus accused' in the case as alleged by the trial court. And the Chief Secretary of the state disclosed before the apex court that the Advocate-General of Gujarat had been personally asked to 'amend' the appeal to seek 'further inquiry', 'collection of additional evidence', and 'direction for re-trial' and to argue it before the High Court. The Chief Secretary, in his affidavit, also stated that the state government, in consultation with the Advocate-General, is in the process of appointing Special Public Prosecutors to conduct the prosecution and to 'monitor' it by an officer of the rank of Inspector-General of Police. Nevertheless, the apex court made it clear that it will also appoint its *amicus curiae* to assist the prosecution and monitor the progress of the trial in the High Court. The apex court, however, remarked that it is 'not bypassing the High Court' but it wants that 'the matter be seriously prosecuted'.

Expressing displeasure of the Bench on the conduct of the Government and the prosecution in handling the Best Bakery case, the CJI thundered that his Lordship and colleagues on the Bench have 'no trust' in the prosecution agency of Gujarat and said that there appears to be 'some collusion between the government and the prosecution' as the later did not bother to cross-examine the

" See *Times of India,* September 13, 2003 (1), and Indian Express, New Delhi, September 13,2003(1 & 2).

[36] See *Indian Express,* New Delhi, September 20, 2003 (1 & 2) and *The Hindu,* New Delhi, September 20, 2003 (1).

hostile witnesses to know as to why they turned hostile to the prosecution.[37]

Reacting to the State's counsel Additional Solicitor General Mukul Rohatgi's reliance on the 1984 anti-Sikhs riots in Delhi after assassination of the then Prime Minister of India, Mrs. Indira Gandhi, to impress upon the apex court that 'the malady in our system is such that the guilty persons in riot cases are mostly unpunished' and thereby to elevate the subversion of law in Gujarat to the status of a general systematic failure in all riots cases in India, the CJI re-countered, 'are you saying the rioters in Gujarat should also be acquitted because of this malady?'[38] Reminding the Modi Government of its *'rajdharmd'*[19] the CJI in no unclear terms warned:

> I have no faith left in the prosecution and the Gujarat government. I am not saying article 356 (President's Rule) be imposed. You have to protect people and punish the guilty. What else is *rajdharmal* You quit if you cannot prosecute the guilty. — Democracy does not mean you will not prosecute anyone.[40]

However, the CJI, refuting an implicit attempt of the state counsel to blame Judge Mahida for collapse of the Best Bakery case, reiterated that 'we have absolute faith in our courts. If the

[37] *Times of India,* New Delhi, September 13,2003 (1).
[38] Rohatgi's reference to the Delhi riots is an echo of the letter Narendra Modi addressed to the President of India seeking general record of riot cases in the country in the post-independent era and sharing his agony for underserved attention to the Gujarat riots.
[39] Atal Bihari Vajpayee, the Prime Minister of India, in April 2002 referring to the Godhra and the post-Godhra riots *vis-a-vis* the states responsibility used the term *Rajdharma* to indicate that a true Ruler never discriminates his subjects and he is required to provide justice to every citizen without any bias.
[40] *Times of India,* New Delhi, September 13,2003 (1).

Government does not bring facts and evidence before the court, what can it do than acquitting the accused.'[41]

5. Is our Criminal Justice Delivery System Best?-A Look 'through' and 'Beyond' the 'Best Bakery' Case

5. J Is our Criminal Justice Delivery System Best?-A Look 'through' the 'Best Bakery' Case

It may be recalled here that Judge Mahida 'blames' the police for 'shoddy investigation', which, in turn, blames all the 'hostile' key-witnesses and the prosecutor for not effectively 'exposing' them [hostile witnesses]. And the 'key-witnesses', who turned 'hostile' to the prosecution, blame, the named 'politically powerful and influential' persons, who have allegedly 'intimidated' them to 'lie' the court. A cumulative effect of all these factors was that all the 21 accused 'proved' innocent and the real culprits [who were not brought before the court have gone] are remained 'unpunished' and are roaming freely in the society.

A close look at the Best Bakery case, in the backdrop of the attending circumstances, prior to, during and after the Judge Mahida Ruling, as outlined in the preceding pages, thus, illustriously demonstrates that our criminal justice delivery system is not in sound health. Almost all the critiques of the Best Bakery case feel that it was not a 'fair trial' and it therefore led to 'miscarriage of justice'. A set of prominent reasoning given by the critiques are: (i) investigation was carried out and presented in the trial court was tainted with a lot of deliberate flaws and twists; (ii) a number of witnesses, including key-witnesses, were not only 'threatened' or 'induced' by either accused or their well-wishers to dire consequences if they dare to speak 'truth' in the court; (iii) about one-third of the listed witnesses, including key-witnesses, for undisclosed reasons were not examined; (iv) a number of witnesses, including eye-witnesses were 'kept-away' from the trial court and a majority of witnesses those appeared before the court,

[41] *Indian Express,* New Delhi, September 13,2003 (1 & 2).

resiling, under 'threat', 'coercion' or 'intimidation', from their statements earlier, turned 'hostile' to the prosecution; (v) the police, prosecution and the trial court, even after getting ample signals of their 'resiling' and 'hostile' tendencies, did not either take any effective steps to instill 'confidence' in them nor created the atmosphere conducive for their free and fearless deposition before the trial court; (vi) the prosecution as well as the trial court did not effectively 'grill' the 10 as well as witnesses to extract 'truth' from them; (vii) the trial court, on technical grounds, by not treating the statement of Zahira, who in her earlier statement recorded immediately on the next day of the Best Bakery massacre, implicated majority of the accused for burning in front of her eyes her relatives, as FIR of the case, and by its 'misplaced' emphasis and heavy reliance on the subsequent supplementary statement of Lai Mohhammed, and on his deposition terming the accused 'saviour' of his own life and that of his family members on the unfortunate day when the Best Bakery was put on fire killing fourteen persons, had erred in law by holding all the accused not guilty, (viii) the whole criminal law system failed to render justice to the victims of crime as well by not punishing the real culprits; (ix) Judge Mahida, by his 'mechanical adherence' to the principle that hundreds of criminals may escape, but one single innocent must not be punished' and insistence for the 'proof beyond reasonable doubt' to hold the accused guilty, has adopted an easy course for acquitting the accused; (x) the trial court was not equally sensitive and cautious to ensure that no criminal should also escape from criminal liability, and (xi) the trial court, though it had come to the conclusion that 'totally false evidence had been created against the wrong accused', did not proceed against the investigating agency and thereby it encouraged the fabrication of false evidence, which did strike at the very root of the criminal justice delivery system.

Our criminal justice delivery system, if seen 'through' the Best Bakery case, thus, gives us an impression that our criminal law system: (i) allows witnesses, with impunity, to turn 'hostile', by choice or under 'compulsion, threat, or inducement'; (ii) makes a trial judge to feel 'helpless' and a 'mute spectator' when a witness

after witness turns 'hostile' to the prosecution in his court and when 'atmosphere' in his court becomes hostile to, and intimidating for, key-witnesses to depose before him freely and fearlessly and thereby it makes him to feel that his court is not a court of justice but merely a court of evidence and, therefore, compels him to be a mere compulsive apathetic & insensitive observer of the plight of victims of crime, and (iii) allows a 'collusion' between investigatory and prosecutory agencies of the state to ensure 'acquittal' rather than 'conviction' of accused and thereby make a trial 'farce' and the whole system a 'mockery' and also permits 'political heavy weights' or 'power brokers' to hijack the whole criminal justice delivery system and thereby to make it an utter failure and a 'criminal injustice' delivery system. All these questions, in the backdrop of the Best Bakery case and in the light of criminal law system regime vogue in India, deserve a serious consideration and attention.

5.1.1 Is a witness, with impunity, free to turn 'hostile' to the prosecution?

The Best Bakery case collapsed because of key-witnesses turning 'hostile'[42] to the prosecution. But Zahira Shaikh and her mother, who on oath in the Mhaida court resiled from their statements made earlier to the police, on occasions more than once, have said that they have lied to the court as they were 'coerced and induced' to do so. In fact, Zahira even approached the NHRC and the Supreme Court, vocally reiterating that she lied the court, to plead for reinvestigation and retrial of the Best Bakery case. And the apex court has decided to hear petition along with the NHRC's SLP. These facts ostensibly create an impression that a witness, on oath, can retract with impunity from earlier statements and get away with even though that witness had misled the court and instrumental in making the trial a 'farce' inevitably leading to

'Hostile witness' is not defined in the IEA. But as understood in India, a 'hostile witness' is a witness who tries to defeat the prosecution by suppressing the truth or is gained over by the opposite party. See *Yusufv. U.P.,* 1973 CrLJ 1220.

'miscarriage of justice'. And no state functionary - the police, prosecution, trial court, even the apex court, one might feel, can do anything about it. Is it due to lapses on part of the legal system or due to lack of will on part of the state functionaries? This query obviously needs, at least, a look at the relevant legal regime in India.

Sections 161 and 162 of the CrPC deal with examination of witnesses by the police during investigation. The former empowers an 10 to examine any person who is supposedly acquainted with the facts and circumstances of the case under investigation and puts such a person under legal obligation to answer truly all the questions put to him by the 10. The 10 may or may not reduce statements of a witness in writing. But if he reduces them in writing, the later section provides that these statements are not necessarily required to be signed by the maker. Sec. 162 further states that the statements made by any person to a police officer during investigation can be used by the accused and with the permission of the court only for the purpose of contradicting the witness in accordance with sec. 145 of the Indian Evidence Act, 1872 (IEA). In other words, such statements cannot be used as previous statements for the purpose of corroborating the witness. Sec. 161 requires a police officer to examine witnesses and puts such persons under legal mandate to answer all the questions but sec. 162 prohibits the police to use these statements in legal proceedings. Such a legal stand flows from, and is premised on, distrust and suspicious credibility of the police. But such a provision not mandating a witness to sign his statements made to an 10, enables, rather encourages, a witness to, with impunity, to turn hostile to the prosecution at the trial due either to threats, fear or coercion. Ostensibly, such retractions of witnesses during a criminal trial lead to 'miscarriage of justice'.

The term 'miscarriage of justice', which is nowhere defined either in substantive or procedural law in India, generally refers to the failure of criminal process to function in such a manner as to achieve outcomes which are considered 'just' from different perspectives. See Frank Belloni & Jacqueline, *Criminal Injustice* (Macmillan, London, 2000).

However, sec. 154 of the IEA, plausibly to cure this legal infirmity, empowers the prosecution, with permission of the trial court, to cross-examine its own witness if he turns 'hostile' to it. And when a prosecution witness states something what is destructive of the prosecution case, the prosecutor is entitled to pray for such permission and the trial court is bound to grant such a petition. The utility of cross-examination of a prosecution witness by the prosecutor under sec. 154, IEA, is supposed to be that it is a means whereby the trial court can more readily get the truth out of the witness, as the party's own witness makes statements adverse to the party calling him.[45] It would, therefore, be wrong for the prosecutor not to exercise its right to seek permission to put leading questions to its witness when he gives answers fatal to its [prosecution's] story by treating him as a 'hostile' witness. Nevertheless, a trial judge, by virtue of sec. 311, IEA, can summon and examine a 'hostile witness', if his evidence is necessary for a 'just' decision.[47]

Further, sec. 193 of the IPC and sec. 344 of the CrPC, with a view to deterring a witness from resiling his statements made earlier, make the act of giving false evidence in a judicial proceeding punishable by a Judicial Magistrate of the First Class by an imprisonment for a term up to seven years with fine. However, the mere fact that a deponent had made contradictory statements at two different stages in a judicial proceeding is not by itself always sufficient to justify a prosecution for perjury under sec. 193 of the IPC, but it must be proved that the deponent has intentionally given a false statement at any stage of the judicial proceedings. And such a prosecution for perjury should be taken only if it is expedient in the interest of justice. [8] It also criminalises the act of giving false evidence in proceedings other than judicial ones and

[44] *G. S. Bakshi* v. *State (Delhi Administration),* AIR 1979 SC 569.
[45] *Samir Das* v. *State ofTripura,* 1999 CrLJ 953 (Gau.).
[46] *Food Inspector* v. *A. K. Ahammad Haji,* 1984 CrLJ (NOC) 82.
[47] *M. H. Pandey* v. *Deputy Superintendent of Police, Madras,* 2001(1) Crimes 486 (Mad.).
[48] *K. T. M. S. Mohd.* V. *Union of India,* 1992 CrLJ 2781 (SC).

provides for an imprisonment for a term up to three years with fine. However, sec. 344 of the CrPC empowers a Court of Session or Judicial Magistrate of the First Class, who is of the opinion that a witness appeared before him has given false evidence and 'interest of justice' warrant his summary trial, to impose a sentence of imprisonment for a term up to three months, with or without fine, for giving false evidence.

We do have another two sections in the IPC, namely, sec. 182 and 211. With a view to preventing a person from giving false information to a public servant and thereby intending to mislead him, sec. 182, IPC, provides for an imprisonment for a term up to six months or fine up to one thousand rupees for giving false information to a public servant. It criminalises the giving of false information which misleads a public servant into doing what he ought not to do, whether that can be shown to be intended for the purpose of injuring any particular person or not.[49] Its object is that a public servant should not be falsely given information. This section undoubtedly takes in its ambit any false information given to the police as the expression 'public servant' used in sec. 182 sufficiently covers a Police Officer. It also takes in its ambit the information even if it is given to a Police Officer in the course of investigation under sec. 161, CrPC in reply to questions put by him. The section is not confined to information which is volunteered and which falls under sec, 154 of the CrPC.[50] And sec. 211 of IPC penalizes a person for making false charges and/or instituting a false criminal case against another. A reading of provisions of sec. 182, along with that of sec. 211, makes it clear that information given to the public servant short of amounting to institution of criminal proceedings against a defined person and short of amounting to the falsely charging of defined person with an offence as defined in the IPC can be brought under it.

The criminal law system, thus, does not allow a witness, even under the so-called 'threat' or 'coercion' or 'inducement', to turn,

DaulatRam v. *State of Punjab,* AIR 1962 SC 1206.
Emperor v. *Gopal Das,* 37 CrLJ 870 (Sind).

with impunity, hostile to the prosecution and thereby to make the prosecution's case weak. However, the hitherto judicial responses to the cases of perjury reveals that hostile witnesses are seldom made criminally responsible for giving on oath false evidence. Law enforcement agencies of State, for reasons known best to them, have hardly resorted to their statutory powers to book the hostile witnesses for perjury as well as persons giving false information to the police and thereby to deter them as well as potential 'hostile' witnesses and 'false' informers. The Best Bakery case, wherein Zahira and her mother have publicly been reiterating that they, under 'threat and intimidation', have given 'false evidence' in the trial court, is the latest testimony of such a judicial apathy to perjury cases. Further, the criminal law system does not, on its own, accord any 'protection' to witnesses to make them bold and courageous to speak truth before trial courts and to instill their confidence in the administration of criminal justice.

5.1.2 Was Judge Mahida indeed 'helpless' to deliver justice?

A reading of the Best Bakery ruling given by Judge Mahida discloses that he, in the absence of statutory powers, was indeed placed in a 'helpless' situation as he, in the absence of 'cogent evidence', could not only held the 'innocent' and 'bogus' accused of burning 14 persons alive 'guilty' but also could not order the investigatory as well as prosecutory agencies to find out the 'real' culprits. He, for the same reasons, though unwillingly, could not direct the government to 'compensate' the unfortunate victims of the Best Bakery massacre.

However, a perusal of the CrPC; the IEA, and IPC, contrary to the assertion of Judge Mahida that a trial judge is merely an umpire who has to adjudge the criminal trial based on the evidence adduced before him, reveals that a judge is not only armed with the power to ascertain 'truth' of, and render 'justice' in, a case brought before him but he is also duty-bound to do so.

Section 311 of the CrPC empowers a trial judge, in his discretion, to recall and re-examine any person already examined, particularly

when it appears to him that such evidence is essential to arrive him at the just decision in the case before him. It confers a wide discretion on the court to act as the exigencies of justice require. A trial court is expected to exercise its inherent power conferred by this section in the interest of justice[51] and to serve the cause of justice.[52] If ends of justice require, it may even summon and examine witnesses 'deliberately kept back' by the prosecution.[53] A trial court is duty-bound under sec. 311, CrPC, to examine all the material witnesses for rendering a just decision.[54]

Under sec. 309 (2) of the CrPC, a trial court can, for reasons to be recorded in writing, postpone the trial in order to ensure that a safe atmosphere is created to enable witnesses to depose without any fear. By invoking his powers under this section Judge Mahida would have certainly enabled him to relieve the key-witnesses, Zahira and her mother, from the 'external intimidative pressure' compelling them to speak lie and also to make the court room atmosphere less hostile. Undoubtedly, in the Best Bakery case, by virtue of sec. 9 (6) of CrPC, it was incumbent on the prosecution to apply to the trial court to have the trial conducted in camera when it found that one witness after the other were resiling from their earlier statements. But the trial court in no way was powerless to suggest that the trial should be held in camera.

Discretionary powers conferred on a trial judge by sec. 311of the CrPC are further complemented by sec. 165 ofthelEA,[55] which authorises him, with a view to discovering or obtaining proper proof of relevant facts, to ask 'any questions he pleases, in any form, at any time, about any fact' and no party is entitled to make any objections to such questions. It confers vast and unrestricted powers on the trial court to put any question he pleases in any form at any time, to any witness in order to discover relevant facts.

[51] *Rajendra Prasad v. Narcotic Cell, Delhi,* AIR 1999 SC 2292.
[52] *Nagina Sharma* v. *State of Bihar,* 1991 CrLJl 195 (Pat.).
[53] *Darya Singh* v. *State of Punjab,* AIR 1965 SC 328.
[54] *State of Gujarat* v. *Senma Savabhai Bhikabhai,* 1995 CrLJ 3061 (Guj.)
[55] *Jamatraj Kewalji Govani* v. *State of Maharashtra,* AIR 1968 SC 178.

Almost five decades ago a Division Bench of the Calcutta High Court, outlining the legislative intent of sec. 165 of the IEA and reading thereunder the duty of a trial court to unearth the truth, observed:

> It is obvious that the judge contemplated by the section is not a mere umpire at a wit combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and, to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or wilfully avoided. — If therefore the judge finds that the examination of a witness is not being conducted in such a way as to unfold the truth, it is not only his right but also his duty to intervene with his own questions, —. There is no limit to the questions what the judge may put and if — he has not yet got to the bottom of the matter — there is no reason why he should not go on with the examination, whatever the number of the questions required to achieve the purpose of eliciting the truth.[56]

In 1981, Justice O. Chinnappa Reddy, the then judge of the Supreme Court, was more eloquent when he observed:

> The adversary system of trial being what is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal

Sunil Chandra v. *the State,* (1954) CriLJ 805 (Cal.), pp. 817-18.

> Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth.[5]

Further, sec. 173 (8), CrPC, empowers a trial court to 'direct the police, even after laying final report, to carry out further investigation. The court is not obliged to hear the accused while issuing such a direction.[58] And by virtue of sec. 319 of the CrPC, a trial court, when it appears to it that there are other persons who in fact appear to be guilty of the offence(s) but are not arrested, can, on its own, proceed to put the criminal law machinery in action. The power exercisable under sec. 319 is an extraordinary power conferred on the Court to do real justice.

A close reading of the Judge Mahida's judgement, unfortunately, reveals that he, in the present submission with due respect, preferred not to either invoke his above mentioned statutory powers to intensively grill the 'hostile' witnesses to extract from them the truth or to order further inquiry in the Best Bakery massacre to unearth the truth.

With due respect it is again submitted that Judge Mahida by refusing to wield his statutory powers [and not because of the absence of any statutory powers] and by putting his 'misplaced' reliance on testimony of some of the key-witnesses, like Lai Mohammad, has put himself in 'helpless' situation to make his court a mere 'court of evidence' and not a 'court of justice'.

Ram Chander v. *State ofHaryana,* AIR 1981 SC 1036, at para. 2. Also see *State ofRajasthan* v. *Ani,* AIR 1997 SC 1023; *Raghunandan* v. *State ofU.P.,* AIR 1974 SC 467, and *Nepal Chandra Roy* v. *Netai Chandra Das,* (1971) 3 SCC 303.

Shri Bhagwan Samartha Sree Pada Vallabha Vishwandadha Maharaj v. *State ofA.P.,* AIR 1999 SC 2332.

However, Judge Mahida was right when he felt 'helpless' for compensating victims of the Best Bakery massacre. Criminal law system in vogue does not unfortunately enable a trial court to compensate victims of crime if accused are not held guilty for the charged offence(s). We do not have a statute providing for compensation to victims of crime. Nevertheless, sec. 357 of the CrPC and sec. 5 of the Probation of Offenders Act, 1958 (POA), provide for, though discretionary, the payment of compensation to crime victims.[59]

Section 357(1) of the CrPC[60] empowers a trial court (as well as an appellate court), in its discretion, at the time of passing judgement, to award compensation to victims of crime 'out of the fine' imposed on offenders). Such an order of compensation can be passed in favour of: (i) a complainant for meeting expenses properly incurred in the prosecution, (ii) a person who has suffered loss or injury by the offence and who can recover compensation in

[59] For further details see K. I. Vibhute, Compensating Victims of Crime in India: An Appraisal, 32 *JILI6&* (1990).

[60] Clause (1) of the section reads: When a Court imposes a sentence or fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgement, order the whole or any part of the fine recovered to be applied-

(a) In defraying the expenses properly incurred in the prosecution;
(b) In the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
(c) When any person is convicted of any offence for having caused death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;
(d) When any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating or of having dishonestly assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensation any *bonafide* purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

a Civil Court, (iii) a person who is entitled to recover damages under the Fatal Accidents Act, when there is a conviction for causing death or abetment thereof, and (iv) a bona fide purchaser of property that has become the subject of theft, criminal misappropriation, criminal breach of trust, cheating, or receiving or retaining or disposing of stolen property, and which is ordered to be restored to its rightful owner. However, sub-section (3) of sec. 357 enables a Court to order payment of compensation even in cases where substantive sentence of imprisonment was awarded. Section 357, thus, indents to empower a Court to, some extent, reassure a victim of crime that (s)he is not forgotten in the criminal justice system. Section 5 of the POA[61] also empowers a trial court, in its discretion, to direct an offender, whom it desires to release him after admonition or on probation of good conduct, to pay 'reasonable compensation' to his victim for 'loss or injury' caused to him by commission of the offence. However, courts in India have seldom resorted to these enabling provisions.

5.1. 3 A 'collusion' between 'investigatory' and 'prosecutory' state functionaries

The police in Gujarat are accused of deliberate failure in combating the communal riots spread in twenty districts of Gujarat during March-May 2002. If press reports and the NHRC's assertions are reliable, the police deliberately reached late at the riot spots. Subsequently, they also turned their blind eye to the intimidation of the victims and witnesses by either accused directly or through their 'well-wishers', to 'weaken' or 'spoil' the prosecution's riot cases. And the police also deliberately delayed the investigation and arrest of the suspected persons to enable them either to intimidate or win-over the witnesses. Referring implicitly

Section 5 (1) reads: *Power of court to require released offenders to pay compensation and costs*- (1) The court directing the release of an offender under section 3 or 4 may, if it thinks fit, make at the same time a further order directing him to pay - (a) such compensation as the court thinks *reasonable* for *loss* or injury caused to any person by the commission of the offence; and (b) such *costs* of the proceedings as the court thinks reasonable.

to the Best Bakery trial, the apex court lamented the fact that 'criminals often have access to the police and influential persons' and that 'the trial in most of the sensational cases does not start till the witnesses are won-over'.[62] Subsequently, none other than the DGP of Gujarat, as mentioned earlier, categorically told the apex court that the witnesses of the Best Bakery were indeed 'coerced and won over' by the accused.

There are strong indications to believe that the police had deliberately indulged into 'lapses' to ensure that the statement of Zahira, who in her statement recorded on the very next day of the Best Bakery massacre named ten of the accused persons who had burnt alive some of her relatives and family members in her presence, not be treated as FIR. They rather made, on technical grounds, the Mahida court to believe that the statement of Raees Khan, who was not examined by Judge Mahida, was a proper FIR. During the Best Bakery trial the police had not only 'kept away' from the court witnesses, including some eye-witnesses, probably 'inconvenient' to the prosecution but 'preferred' to produce the 'won-over' or 'coerced' or 'intimidated' witnesses, including Zahira and her mother, brother and sister, who either 'agreed' or 'made to agree' to be 'hostile' to the prosecution. Here, it is necessary to recall depositions of, at least two illustrative star-witnesses, Lai Mohammed and Zahira, to substantiate this observation. Lai Mohammed, who, as stated above, for undisclosed reasons, gave his supplementary statement to the police resiling from his earlier statement made to the police 'identifying' almost all the accused, was produced before the court to willfully damage the prosecution's case as the police and prosecution were well aware of his 'earlier statement' as well as his 'subsequent stand'. Lai Mohammed, contrary to his earlier statement, referred to some of the accused as 'saviors' of his life and of his family members on the evening when the same accused allegedly put the Best Bakery on fire. The police and the prosecution, ultimately, made Judge Mahida not only to believe Lai Mohammed but also to rely heavily upon his testimony. A reading of the Best Bakery verdict reveals

Indian Express, New Delhi, August 9,2003 (2).

that Judge Mahida has attached immense 'evidentiary value' to the Lai Mohammed's deposition in holding all the accused 'innocent' and 'not guilty'. Zahira, on the other hand, as disclosed by herself, was 'made' to 'lie' the court. She was intimidated 'out side' as well as 'in side' the court room (by the hostile atmosphere in the court room) to resile from earlier statements made to the police and neither the police nor the prosecutor endeavored to instill in her the required 'courage' and 'confidence' to speak the 'truth'. Even Judge Mahida, though statutorily empowered, failed to create an atmosphere conducive for such a free and fearless deposition of witness in his court. The PP has also not raised the issue of the security of his witnesses. Even, he did not bother to either draw attention of Judge Mahida to the press reports revealing intimidation of witnesses or the thitherto published NHRC reports revealing the fact that witnesses were reeling under 'threat' and 'recommending' their protection. It also seems from the Mahida Judgement that the PP was also not very keen to grill Zahira to know 'contradictions' between her 'original' and 'resiled' statements and the reasons, if any, therefore. He did not even confront with Zahira to know the circumstances and reasons, if any, for making her earlier signed statement and subsequently resiling from it.

The PP, in spite of the fact that not only Zahira but a number of other witnesses one after another turned 'hostile', never either asked for an adjournment to investigate this 'unusual' phenomenon to make his case strong nor relied upon his statutory power, though discretionary, to seek the court's permission to 'declare' the witnesses resiling from their earlier statements, including Zahira, as 'hostile' and thereby to cross-examine them to unravel the 'truth'. In fact it is duty of a PP to cross-examine, of course, with the court's permission, his own witness if he discovers that the witness is trying to be 'hostile' to the prosecution.[63]

Maharani Kniord Kumari Devi v. *Ghasi Kuar,* ILR 1962 Cut. 767. *Cited from,* Ratanlal & Dhirajlal, *the Law of Evidence* (Wadhwa, Nagpur, 20th edn.) 1301.

It, thus, seems that, the PP, in collusion with the investigatory agency of the state, pursued the Best Bakery case half-heartedly effort pregnant with insincerity and assiduousness design. Such a lapse on part of the PP, against the backdrop of his (past) ideological and political nexus with the BJP, not only seriously doubts the professional credibility and integrity of the PP but also hints at his 'collusion' with the investigatory agency. Was the PP, in collusion with the police, not at the first place interested in making the prosecution a 'dead horse' by not diligently resorting to his statutory powers and then undertaking the 'uphill task', borrowing from Judge Mahida's argument, 'of driving the dead horse', even by hitting it hard with his shoes or hunter, 'to reach the winning point'?

5.2 A look 'beyond' the 'Best Bakery case: 'fair trial' and 'miscarriage of justice'- Emerging Facets

Critiques of the Best Bakery feel that our criminal justice delivery system has miserably failed to ensure a 'fair trial' and thereby led to the 'miscarriage of justice'. The connotations of the 'fair trial' and 'miscarriage of justice' thitherto the Best Bakery were predominantly linked with the gross violations of the procedural safeguards and rights of accused in criminal law processes starting from his arrest to the final disposal of his trial.

Denial to him of his rights and safeguards have been perceived as the indicators for conceiving a trial 'unfair' and the 'justice' rendered as 'miscarriage of justice'. However, 'handling' of the Best Bakery case in the existing criminal justice delivery system has made us to, in the interest of 'justice', ponder seriously upon, addition of a few thitherto-unknown pertinent dimensions and counters to these concepts. A proper and effective investigation of a case in search of truth by Investigating Officer *(IO)* as *well* as. due protection to prosecution-witnesses and victims of crime; a prosecution sensitive to, and a real representation of, victims of crime throughout the trial; a duty of a Court *to* make every possible effort to make the in-court atmosphere conducive for free and fearless depositions in his court; a judicial tendency not to strictly

adhere to the traditional burden of proof beyond reasonable doubt but to search for the truth, and crime victim right to be compensated, are some of the new facets and contours of the emerging connotations of'fair trial' and 'miscarriage of justice'.

However, it is interesting to note some of the reforms suggested by the Committee on Reforms of Criminal Justice System, appointed by the Government of India and headed by Dr. Justice V. S. Malimath, in its Report[64] submitted to the Central Home Ministry in March 2003, coincidentally have a great bearing upon, and contextual relevance with, the 'handling' of the Best Bakery case and 'issues and controversies' arose therefrom. It delves into the hitherto factors alien to the so-called 'unfair' fair trial and the 'miscarriage of justice'. A reading of the Committee Report and the signals receiving from the Central Government and the Supreme Court of India in response to the Report make us to feel that the so-called notions of 'fair trial' and 'miscarriage of justice' are inviting some new contours.

The Malimath Committee has suggested comprehensive reforms, though some of them are controversial, in the entire criminal law system, including some of the 'fundamental principles' that have been 'guiding principles' of, and 'foundations' for, the hitherto criminal justice delivery system in India. However, here below we will refer to only those reforms having bearing on the issues raised and controversies that arose from the Best Bakery case and will, at appropriate place, also offer our comments on their feasibility and desirability.

5.2.1. Investigatory andprosecutory machinery: professional commitment and co-ordination

Obviously, the machinery of criminal justice system is put into gear when an offence is allegedly committed and investigated by the police. When an offence is committed and is brought to notice

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

of the police, it is their responsibility to investigate into the matter to find out who has supposedly committed the alleged offence, ascertain the facts and circumstances relevant to the crime and collect all the relevant oral as well as circumstantial evidence, that is necessary to prove the case in a court of law. The success or failure of the case obviously depends upon the quality of evidence collected by the 10. A prompt and quality investigation of a case by the police is, therefore, the foundation of the effective criminal justice delivery system. The manner in which police investigations are conducted is of crucial importance to the functioning of criminal justice system. 'Not only serious miscarriage of justice will result if the collection of evidence is vitiated by error or malpractice, but successful prosecution of the guilty' feels the Malimath Committee, 'depends on a thorough and careful search for truth and collection of evidence which is both admissible and probative.' And 'in undertaking this search, it is', according to the Committee, 'the duty of the police to investigate fairly and thoroughly and collect all evidence, whether for or against the suspect.'[6] Quality investigation not only warrants an unbiased and impartial investigation by the police but also the collection of 'untainted' information. However, it is a matter of common knowledge that the existing Police Organisation in India is structurally as well as functionally dependent on, and close to, the executive and their political masters. Such a proximity, as it happened in the Best Bakery, doubts the professional credibility and integrity of the police when it comes to the investigation and collection of quality evidence and its evidentiary value in a court of law. The Malimath Committee, pleading for insularity and integrity of the investigatory agency in criminal justice system, rightly observed:

> For fair and impartial investigation, it is imperative that the investigating machinery is immune from political and other extra influences and acts in accordance with the law of the land and the

Government of India, *Report: Committee on Reforms of Criminal Justice System* (Ministry of Home Affairs, 2003), vol. I, para. 7.2.

> Constitution. It has, however, been observed that the people in authority think nothing of wielding influence to scuttle and, and even thwart, criminal investigations or to bend them to suit their political or personal conveniences. — Integrity of the 10 has a vital bearing on the integrity of the investigation conducted by him. The misconduct of the IOs has been often overlooked due to misplaced and misconceived service loyalties.[66]

Referring to, with approval, the recommendation of the Law Commission of India[6] and of the K. Pradmanabham Committee on Police Reforms that Crime Police (an investigating agency) be separated from the Law and Order Police (ordinary police) by putting the former under the control of judiciary, and accepting it in principle, the Malimath Committee has recommended that all the serious crimes triable by Sessions Courts be tried by the Crime Police and other crimes created by the special and local Acts be handled by the Law and Order Police.[68]

Such a separate wing of investigation with clear mandate that it is accountable only to *rule of law* is, in the backdrop of the instances like the Best Bakery, the need of the day. It will, to some extent, prevent the collusion between the investigatory and prosecutory agencies of a State.

It is, however, obvious that a good investigation and full-proof evidence does not necessarily lead to conviction of the accused unless a PP is equally professionally as well as ideologically impartial, independent and committed to his profession as he, as an Officer of the Court, is required to assist the court in the search of truth, which is the ultimate objective of criminal justice delivery system. It is needless to say that good and painstaking

[66] *Ibid,* para 7.12.
[67] Law Commission of India, *One Hundred and Fifty-fourth Report on the Code of Criminal Procedure,* 1973 (Government of India, 1996).
[68] *Supra* note 65, paras 7.9.4-7.9.8.

investigation will be futile if PP is indifferent, inefficient and partial. However, the institution of Public Prosecutor in India, for a variety of reasons, has been weak and politicized. Recruitment of a PP, in most of the cases, is made on the basis his 'political pulls', 'ideological', or 'personal' connections and not on his professional merits and competence.[69] In such a situation, as evident in the Best Bakery case, a professionally unethical co-ordination and collusion between the investigatory and prosecutory agencies of a State cannot be ruled out.

The Malimath Committee, with a view to overcoming such a 'collusion' and facilitating effective co-ordination between the investigating and prosecuting officers, has, *inter alia,* also suggested that a Police Officer of the rank of Director General of Police (DGP) be, in consultation with the State Advocate-General, appointed as the Director of Prosecution. And the Director of Prosecution, *inter alia,* be authorized to call reports in all cases that end in acquittal from the Prosecutor who conducted the case and the Superintendent of Police of the District concerned to ensure accountability as well as to monitor the cases of acquittals.

In this context it is interesting to note here that almost all the Public Prosecutors appointed by the Gujarat Government in the post-Godhra communal riot cases have BJP, Vishwa Hindu Parishad (VHP) or Rashtriya Sawyansevak Sangh (RSS) connection. For example, Dilip Trivedi, who was appointed as Public Prosecutor in the Sardarpura riot case, wherein 33 persons were burnt alive on February 28, 2002, and the Dipda Darwaja riot case, wherein 11 persons were hacked to death, is a General Secretary of VHP. Piyush Gandhi, a member of the VHP Lawyers' Panel and President of a District Unit of VHP, representing the Government in the Panchmahals riot case. P. S. Dhora, who is handling riot cases in Anand and Kheda districts of Gujarat, is a known RSS sympathizer, and Chetan Shah, a member the VHP advocate panel, is handling the Naroda and the Gulberg riot cases wherein 89 and 39 persons were killed respectively, and Sanjay Bhatt, who is recently asked to handle the Vadodara riot cases, is the nephew of VHP city unit president Ajay Joshi and a VHP advocate, who defended the 21 accused in die Best Bakery case. See Indian Express, New Delhi, September 20,2003 (1 &2). [70] *Supra* note 65, paras 8.12 & 8.13.

5.2.2. 'Hostile' witnesses and 'perjury': a plea for effective measures

In most of the criminal trials the prosecution mainly relies on the oral evidence of witnesses for proving its case against the accused. Unfortunately, as our experience reveals, there is no dearth of witnesses who come to the courts and give false evidence with impunity. Many a times witnesses, for undisclosed reasons, resile from their earlier statements before the 10. While others, lie to the court because either of 'threats' or intimidative pressures received from, or inducements offered by, the accused themselves or through other interested persons. In either case an ultimate consequence is nothing but an acquittal of the accused as the prosecution, which always carries the burden of proving its case 'beyond reasonable doubt', fails to 'prove' its case. Accused, according to the basic canons of criminal jurisprudence, gets the 'benefit of doubt' to avoid his criminal liability.

As indicated above, unlike in other countries, we, unfortunately, do not have a law requiring either the police or the prosecution to give protection to the witnesses subject to 'threats' even though it makes the criminal justice delivery system a mockery and an utter failure. Nevertheless, we do have a few penal provisions to deter the persons who give false evidence to the police and the courts. But these penal provisions are seldom resorted to by the courts.

A statutory protection, on the USA lines, to the witnesses who are likely to lie to the court due to 'threats' to them or to their families and 'certainty of punishment' for those who, due to either 'inducement' or 'for any other reasons', turn hostile to the prosecution will certainly combat the menace of giving false evidence. Simultaneously making the existing law of perjury more definite and severe by plugging the in-built loopholes and overcoming the pragmatic inhibitions will also make our criminal justice delivery system more effective.

The Malimath Committee, with this spirit, has recommended a number of legislative, judicial, punitive, and administrative measures. Prominent among them are:

1. A law, on the lines of the laws in USA and other countries, be enacted fongiving protection to the witnesses and their family members.
2. Sections 161 and 162 of the CrPC be suitably amended to make it obligatory on part of the police to record statements of any person in the narrative or question and answer form and to make obligatory on the part of the maker of the statement to sign it and to receive a copy of it respectively so that such statement can be used both for contradicting and corroborating the maker of the statement.
3. Section 344 of the CrPC (summary trial for giving false evidence) be suitably amended to require the court to try the case summarily once it forms the opinion that the witness has knowingly or willfully given false evidence or fabricated false evidence with the intention that such evidence should be used in such proceeding. And with this purpose, the Committee feels, the expression occurring in sec. 344(1) to the effect 'if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating as the case may be, false evidence' be deleted.
4. Evidence of experts falling under sections 291 (depositions of medical witness); 292 (evidence of officers), and 293 (reports of certain government scientific experts), as far as possible, be received under Affidavit.
5. As the oath of affirmation administration to the witnesses has become an empty formality and does not act as a deterrent against making false statements by witnesses, it is recommended by the Committee that a provision should be incorporated requiring the judge administering the oath or affirmation to caution the witness that he is duty bound under sec. 8 of the Oaths Act to speak the truth and that if he makes a false statement in violation of the oath or affirmation that has

[71] 76/rf., Part - VI, para. 11.

been administered to him, the court has the power to punish him for the offence of perjury and also to inform him of the punishment prescribed for the said offence.

6. The judges should be vigilant and regulate cross-examination to prevent the witness being subjected to harassment, annoyance or indignity.
7. The punishment of three months or fine up to Rs. 500/- or both (provided for giving false evidence in sec. 344, CrPC) be enhanced to imprisonment for two years or fine up to Rs. 10,000 /-or both.
8. The High Court should impress upon the subordinate courts of their duty to resort to these provisions to curb the menace of perjury, through training and calling for periodic reports.

5.2.3. A 'fair' criminal trial - a quest for 'truth' and 'justice'

Believing that quest for the truth is the foundation of the criminal justice system and every functionary of the criminal justice system and everyone associated with it in the administration of justice is duty bound to actively pursue the quest for truth and to focus on justice to victims, the Malimath Committee suggested that Preamble to the CrPC and other relevant provisions of the Code be suitably amended to inject the spirit of quest of criminal justice in all the criminal justice instrumentalities of a State.

5.2.3.1 The adversarial or the inquisitorial system? : a search for truth - A choice

The Malimath Committee, in its quest to find the truth, after giving 'its anxious consideration' to the question as to whether the adversarial system is satisfactory or not, examined the inquisitorial system, in which investigation is supervised by the judicial magistrate and results in a high rate of conviction, feels that some of the good features of the inquisitorial system need to be adopted in the adversarial system, though it assures fairness to the accused, to: (i) make the adversarial system more effective and fair; (ii) impose the duty on the Courts to search for truth; (iii) assign a proactive role to the judges; (iv) give directions to the investigating

officers and prosecution agencies in the matter of investigation and leading evidence with the object of seeking the truth, and (v) focus on justice to victims.[n]

Charged with this spirit the Committee, *inter alia,* recommended that a provision to the effect that 'quest for truth shall be the fundamental duty of every court' be placed immediately above sec. 311 of the CrPC, and existing sec. 311 of the Code be amended to read it as under:

> Any Court shall at any stage of any inquiry, trial or other proceeding under the Code, summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined as it appears necessary for discovering truth in the case.

And the new sec. 311 be followed by the following provision empowering a Court to direct an 10 to carry out further investigation to assist it to 'search for truth. The recommended provision reads:

> Any court shall, at any stage of inquiry or trial under this Code, have such power to issue directions to the investigating officer to make further investigation or to direct the Supervisory Officer to take appropriate action for proper or adequate investigation so as to assist the Court in search for truth.

In addition to the recommended power, a Court, like a High Court, according to the Committee, be further, by suitably amended sec. 482 of the CrPC, armed with the inherent powers 'to make such orders as may be necessary to discover truth or to give effect to

[72] *Ibid.,* Part - VI, para. 5. & 6.

any order under this Code or to prevent abuse of the process of court or otherwise to secure the ends of justice.'

5.2.3.2 'Presumption of innocence' and 'burden of proof beyond reasonable doubt': a 'burden'for the 'questfor truth'?

Recalling the fact that the 'proof beyond reasonable doubt' required in criminal cases in India is premised not on the IEA but on judicial pronouncements of the Indian courts following the English precedents, and comparatively evaluating it against the so-called 'standard of proof on preponderance of probabilities', the Committee, again in its quest for truth as the foundation of criminal justice delivery system, feels that the standard of 'proof beyond reasonable doubt', presently followed in criminal cases, be done away with and it be replaced by the standard of proof which is higher than the 'preponderance of probabilities' and lower than 'proof beyond reasonable doubt' i.e. the 'standard of clear and convincing'. It accordingly recommends that the following clause be added in sec. 3 (interpretation clause) of the IEA. The recommended clause reads:

> In criminal cases, unless otherwise provided, a fact is said to be proved when, after considering the matters before it, the court is convinced that it is true.

According to the Committee, it seems, the burden on the prosecution to prove its case beyond reasonable doubt emanated from the presumption of innocence is 'burden' for the quest for truth, the prime objective of a criminal trial.

5.2.3.3 Justice to victims of crime: an integral aspect of criminal justice

The Committee feels that one of the prime objects of the criminal justice system is to ensure justice to crime victims also. But however, our criminal justice delivery system does either confer a

substantial right on, or allows a crime victim to participate in the criminal proceedings. Therefore, the Malimath Committee, like the Law Commission of India, feels that the criminal law system must also focus on justice to victims. It has made several recommendations, including the right of the victim to participate in cases involving serious crimes and the right to be compensated by the state and/or offender.

The victims' right to participate in criminal trials, according to the Committee, *inter alia,* should include: (i) to, with leave of the Court, produce oral as well as documentary evidence; (ii) to know the status of investigation and to move the court to issue directions for further investigation on certain matters or to a supervisory officer to ensure effective and proper investigation to assist in the search for truth; (iii) to be heard whenever prosecution seeks to withdraw and to offer to continue the prosecution; (iv) to advance arguments after the prosecutor has submitted arguments, and (v) to prefer an appeal, to the court to which an appeal ordinarily lies against the order of conviction of such a court, against any adverse order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate sentence, or granting inadequate compensation.

The right of a crime victim to be compensated, the Committee feels, need to be recognised by a statute. And such a right be recognised in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. The 1995 Bill prepared by the Indian Society of Victimology, according to the Committee, may be used as a blueprint of the proposed statute.[73] The proposed

[73] The Fourteenth Law Commission, in its 154th Report on the Code of Criminal Procedure of 1973, recalling 'the weaknesses of the existing provisions for compensation to crime victims in the criminal law' and disapproving the idea of compensating victims of crimes linked with, and limited to, 'fines, penalties and forfeitures realised', asserted that the State Governments should render its assistance to victims of crimes out of its funds in all cases regardless of the fact whether an accused is acquitted or the perpetrator is not traced (but the victim is identified). The Law Commission, with this zeal, in its proposed sec. 357-A, suggested a comprehensive victim compensation scheme to be administered, on

compensation law should, by creating a Victim Compensation Fund, preferably by pulling together fine recovered; funds generated by the justice system and public contribution; assets confiscated and forfeited in organized crime and financial frauds, to be administered by authorities created under the Legal Services Authority Act of 1987 and providing for the scale of compensation in different offences for the guidance of the Court & specifying the offences in which compensation may not be granted and conditions under which it may be awarded or withdrawn, be made comprehensive.[74]

6. CONCLUDING REMARKS

The *raison d'etre* of a criminal law system, comprised of substantive criminal law and procedural laws, is to protect life, limb and property of an individual as well as to ensure law and order in the community for peaceful and harmonious co-existence. Dominated by this philosophy a criminal law system obviously creates a required mechanism for 'investigation' of commission of a crime, prosecution of a 'suspect' and for 'determination' of guilt of the wrongdoer, who has caused some 'harm' to the community as well as to his victim, whose rights are invaded by him. Thus, here comes the establishment of interrelated institutions - investigatory; prosecutory and adjudicatory- and the processes associated therewith. The administration of criminal law system involves a three-party-chain, namely the state, an offender and a crime victim. A criminal justice delivery system, is, therefore, required to insure that the 'interests' of one component of this chain are not jeopardized by that of the other. In other words, a criminal law system must provide a sufficient safeguard to the accused so that his rights and freedom are not unnecessarily curtailed by the mighty State and an innocent is punished. At the

recommendations of a trial Court, by the Legal Services Authorities constituted at the District and State levels under the Legal Services Authorities Act, 1987. See, Law Commission of India, *One Hundred and Fifty-fourth Report on the Code of Criminal Procedure,* 1973, *supra* note 67, chapt-XV. [74] *Supra* note 65, para. 6.

same time the system has to ensure that real culprits are not left unpunished. In the process, a crime victim, another partner of the so-called 'penal-couple', should also not be neglected by the system. A criminal justice delivery system - police prosecutors, and criminal courts - thus, is expected to be 'fair' and 'just' to all the partners - society, offender and crime victim - associated with the criminal law regime. A slight tilt in favour of either of these 'associates' of 'criminal law process' makes the whole system 'unfair', 'unjust' as it invariably leads to 'miscarriage of justice' and thereby it makes the criminal trial a 'farce' and the criminal law system a 'mockery'.

However, a look 'at', and 'through', the 'burnt' Best Bakery case reveals that our criminal justice delivery system, by clever 'manipulations' and deliberate 'collusion' between the investigatory and prosecutory state-functionaries, with or without inadvertent or advertant or callous connivance of trial court, can be turned into an 'unfair' and 'unjust' system of 'justice delivery'. The Best Bakery 'handling' at all the stages of the administration of criminal justice - investigation, prosecution and trial- unquestionably demonstrates that: (i) a credible administration of criminal justice system requires an upright investigation, politically as well as ideologically independent public prosecutors and judges of impeccable integrity who inspire confidence of witnesses for 'free', 'fearless' and 'true' depositions as well as of victims of crime in particular and of the community in general in the 'just' and 'fair' administration of criminal justice; (ii) sensitive investigations, especially in cases of mob violence with political overtones, are often guided by considerations other than upholding the 'rule of law[5] and 'justice'; (iii) investigators, who are obliged by the law to carry effective investigation and gather legally sustainable evidence, exhibiting their political masters, carry a sort of 'tailor-made investigation' to ensure acquittal of the 'suspects'; (iv) witnesses, in connivance with the police and the public prosecutor, are 'allowed' or 'compelled' to turn 'hostile' to the prosecution; (v) sometimes public prosecutors, who are ideological akin to their political masters, turn their blind eye to the hostile witnesses and thereby further ensure acquittal of the 'suspects',

and (v) judge can be made a helpless and mute spectator watching witness after witness turn hostile to the prosecution.

A look 'beyond' the 'fire' of the Best Bakery, however, makes us to take a pause to ponder upon as to whether the so-called 'unfair' trial leading to 'miscarriage of justice' is because of some pertinent 'weaknesses in our legal system' or because of 'weaknesses' and 'prejudices' of those who make our criminal justice system work. Our considered response probably lies somewhere in between the two set of 'weaknesses'. In other words, a criminal trial becomes 'unfair' trial leading to 'miscarriage of justice' partly because of 'weaknesses' in the criminal law system and partly because of 'weaknesses' and 'prejudices' of those who operate the system.

As demonstrated in the preceding pages, our criminal law system adequately takes care of 'hostile' witnesses and effectively arms the investigatory, prosecutory and adjudicatory functionaries of State to find 'truth' as well as to 'penalize' those give false or fabricated evidence consequentially leading to 'miscarriage of justice'. However, these state functionaries, for undisclosed reasons, plausibly due to their 'weaknesses', have hardly resorted to their powers in quest for 'truth'. Nevertheless, our existing criminal law system exhibits some 'weaknesses' leading to 'miscarriage of justice'. Prominent among them are: (i) partial and unscientific investigation; (ii) no protection to witnesses carrying the risk of being intimidated, or coerced or induced to give 'false evidence' by resiling from their earlier statements made to the 10, and (iii), no concern for, and intense insensitivity to, victims of crime. However, emerging contours of 'fair trial' and of 'criminal justice' warrant a reasonably independent and impartial investigation, effective protection to witnesses and victims of crime and a well-designed institutionalized compensatory scheme and mechanism for compensating victims of crime.

The suggestions of the Malimath Committee about the independent and insulator investigatory mechanism by separating the Investigatory Police Wing from the Law and Order Police Wing; statutory protection, on the USA lines, to witnesses & victims of

crime; strengthening the law of perjury to desist and deter witnesses from turning 'hostile' to the prosecution, and the compensatory scheme for compensating victims of crime, are most welcome. However, its suggestions pertaining to the manner of recording of statements by the police; the standard of proof required [i.e. the 'standard of clear and convincing'] for convicting 'suspects', and the court's authority to direct further investigations till 'truth' is discovered, require, in the interest of justice, a serious reconsideration and review before they are implemented.

Keeping in view the illiteracy among the people and the ill-famous notoriety of the police in India for 'using' and 'abusing' their powers for 'doing' and 'undoing' anything, the suggestion of the Malimath Committee that sec. 161 of the CrPC be amended to make it obligatory to record statement of witness and to require the witness to sign it to admit that the statement is correct and its use for subsequent corroboration and contradiction, in the present submission, seems to be not viable for, at least, three reasons. *First,* the statements when narrated by a witness and reduced to writing by 10 may not always be accurate and may not be in the manner narrated by the witness. *Secondly,* an over-zealous 10, by abusing his authority and power, may record such a statement against will of the witness. *Thirdly,* even if statements made to 10 are made admissible as evidence and usable to corroborate and contradict the subsequent statement, the proposed suggestion may not be useful particularly when a witness turns hostile because of 'threat' to him or to his family.[75] To make the suggestion more pragmatic and viable, it may be supplemented or supplanted by making mandatory for 10 to send all the material witnesses during the course of investigation to the nearest Magistrate for recording their statements on oath.[76]

[75] Such a recommendation, in the present submission, will be more pragmatic and effective if it is supplemented by criminalizing an act of intimidating or inducing a witness through inserting an appropriate section in the IPC.

[76] The Law Commission of India in its 41st Report, such a recommendation. It seems that that the Central Cabinet is more impressed by this recommendation when it recently, in wake of the Best Bakery case, approved an amendment to the CrPC requiring a compulsory record of statement before a Magistrate. And if

The suggested 'standard of clear and convincing' proof for 'convicting' accused, if accepted, will not only alter the foundation of our criminal justice system and undermine the basic principles of criminal jurisprudence but will also lead to a set of hitherto unknown hardships for all, an accused, witnesses, and prosecutors.

Similarly, the Malimath Committee's suggestion for authorizing courts to direct further investigations till 'truth' is discovered, in the interest of justice, will introduce tremendous 'subjectivity' of a trial judge in determining complicity of an individual and hardships for the IOs, trial courts as well as witnesses. Probably, it will lead to further delays in disposal of cases. It is significant to recall here that we do have such a provision, in the form of sections 173 (8) & 319 of the CrPC, in our criminal law system.

Nevertheless, the Best Bakery unequivocally illustrates that our contemporary administration of criminal and penal justice is not sound and it deserves an urgent attention. The system, which ensures protection of rights of the accused - constitutional and statutory - and which is dominated by the idea of reformation and rehabilitation of offenders, is not only unjust and inequitable from the point of view of victims of crimes and their competitive claims of reparation but is also negation of *rule of law* and the concept of 'justice'. It is needless to emphasise here that it is prime need of the hour to give serious consideration to effective and equitable reparation of victims of crime with a view to doing justice to them and to making the contemporary administration of criminal justice 'just' and 'equitable'. Otherwise, we would be proving ourselves worst than our uncivilized ancestors and be guilty of unjustified perpetuation of anti-thesis of victimology and negation of *rule of law*. It is difficult to resist reminding Barnes and Teeters, who observed:

a witness goes back on the recorded statement, the charge of perjury can be leveled against him. See, *The Hindu,* New Delhi, August 12, 2003 (9).

> Our barbarian ancestors were wiser and more just than we are today, for they adopted the theory of restitution to the injured, whereas we have abandoned this practice to the detriment of all concerned. Even where fines are imposed today, the state retains the proceeds and the victim gets no compensation.[77]

How long and on what justifications, legal or moral, can we afford to neglect victims of crime and their reparation and undermine their right to be compensated? Should we, in the interests of victims of crime and their equitable right to be re-compensated for 'loss' or 'injury' caused by commission of an offence, and 'just' administration of criminal justice, not look back to the ancient and medieval times in which victims of crime were not that neglected and look at the current legislative trends and developments in other jurisdictions exhibiting equal concern to crime victims and the Law Commissions' proposals for reforms, to update the law governing payment of compensation to victims of crime in India and to make it more effective, equitable and comprehensive? Should we, in the 21st Century, not remind ourselves that victims of crime deserve to be treated with human dignity and respect in our criminal justice delivery system to make the system more 'fair' and 'just'?

Barnes and Teeters, *New Horizons in Criminology* (Prentice-Hall, New Delhi, 1966), at p. 288.

NATIONAL LAW UNIVERSITY: HISTORY AND PHILOSOPHY

1. A BEGINNING

Rome was not built in a day. In inner message of the proverb is that philosophy and history of no institution can be built in a day. The National Law University, Jodhpur (NLU) has been established by the National Law University Act, 1999 (Act XXII of 1999) of Rajasthan. How can one write history of such a newly born baby? Surely, it has the present but not the past. After all, history lies in the past. Naturally, any exercise of writing history of NLU would be futile. Of course in conceiving any institution there remains a saga of untold story, many sacrifices and debates of conflicting interest. NLU is no exception. Sometimes, we find that the development of philosophy of an institution lies deep in this untold story of the birth pang of the institution. Tracing that saga of untold story could, then, really throw light on the institutional growth. Knowledge of that love-labor is important to the progeny in the institution for perspective-development, of course if one could compose the untold story until it gets buried down the memory-lane.

2. BEGINNING OF THE BEGINNING: THE SAGA OF UNTOLD STORY

In 1994 the then Dean and Head of the Department of Law of Jai Narayan Vyas University, Jodhpur (JNV University), Dr.S.R.Bhansali visited National Law School of India University, Bangalore (NLSIU), and was immediately impressed with the development and the experiment on five years' integrated legal education in India by a few personalities under determined academic and executive leadership. Dr. Bhansali with his teaching and administrative experience of almost three decades was touched by the sincerity of purpose, excellence in quality education and

dedication in the experiment. He thought for a while, why not such an experiment in North India and why not in Jodhpur! He came back to Jodhpur with complete determination. A Society was formed and registered under the Societies Registration Act, 1860 for the establishment of Indian Institute of Legal Education and Research in Jodhpur in 1994 Dr. S.S. Bhandawat, a senior advocate of Rajasthan High Court, was made President and Prof. S.R. Bhansali himself became its General Secretary. In 1994 the Society planned to establish an Indian Institute of Legal Education and Research in Jodhpur. Simultaneously they continued to lobby with the Bar Council of India to sponsor the second National Law School in the line of NLSIU, Bangalore.

The untold story of anxiety, ambition, aspiration and approaches during 1994 to 1999 is really very touching. A day of hope was dashed next day by equal degree of despair! The team under Dr.Bhansali was not only fighting against all other states for having the second National Law School of the Country but was also fighting for Jodhpur. An uproar of initial success was there in 1996 when Chairman, Bar Council of India on principle agreed to have a Law School in Jodhpur, but before the methodology was ready the news broke out in 1997 that Andhra Pradesh was getting ready with the proposal of housing the Second Law School. As a matter of fact starting late in 1997 Andhra Pradesh and Madhya Pradesh got the distinction of having second and the third National Law School of the country respectively. It was both a pleasure and also pain to experience that later efforts succeeding in AP and MP though effort started earlier in Rajasthan dashing hope against hope. The fight however continued. At times some even felt the proposal was lost in the dark-hole!

In 1997 the Society got the patronage of a NRI donor, Mr. Bhandawat, younger brother of the President of the Society, who came forward to promise a donation of rupees one crore immediately had the University been named after his father. This was tremendous ray of hope at the end of the dark-hole. The members of the Society also drafted a Bill for a full-fledged University in the pattern of the NLSIU, Bangalore. There was a shot in the arm of the members of the Society when the then Chief

Minister informally declared the University in the name of the father of the donor, who deposited the amount in the Bank immediately. But intra-conflict continued to zoom large notwithstanding a decision in favor of Jodhpur. Rajasthan lost the battle for getting the second or third Law School, can Jodhpur win for the fourth? That was the question. Experience in Hyderabad and Bhopal motivated some other states also to come forward. Gujarat and West Bengal now came up to propose a Law University in the same pattern. But again Rajasthan remained in the maze of conflict about the site and the Government of Rajasthan was not ready to resolve the dispute. Meanwhile Government of West Bengal came out in the middle of 1998 and marched ahead with the fourth institution. Every day the members of the Society spent in utter distress looking at the incapacity and indecisive nature of the Government to pilot the Bill.

Meanwhile the Society secured the approval of Chief Justice of India to adorn the position of the Visitor of the University and Chief Justice of Rajasthan High Court to be the Chancellor of the University. The historic contest between Jaipur and Jodhpur was having dampening effect. Leading personalities were involved. There is no evidence to show that the real debate of determining a site for a national or world standard institution to be established has ever been discussed on merit. A national and international level institution requires good links for locomoting national and international level faculties and attract new faculties from far and wide, quick transportation of students community and their family members, good municipal governance with standard public goods abundantly available, quick mobility of elites from the community of members from the Bar and the Bench and adequate provision of land and other infra-structural needs of the University. No one argued anything on that, no project report could be traced in the file, no debate was generated where could the institution be ideally located. There is no trace of any project planning and project finance that had been articulated. Somebody wanted to provide some finance, somebody some land and somebody could see a vision! Is it sufficient to give birth to a national institution leave aside, international!

3. FORMAL STEP

Meantime a new government took over the administration. There was new energy with which a new waive of demand was made for a National Law University. The new government wanted to consider the project. Dr. M.K. Vyas, Associate Professor, Faculty of Law of JNV University was nominated by the Vice Chancellor of JNV University to be the Project Officer. The Project Officer consulted the Executive body of the Society. The project report only comprised the proposal with a draft legislation, which was submitted to the Government. There were several rounds of discussion with groups of teachers and senior citizens of the city. Ultimately the government came out with a Bill and passed the National Law University Act, 1999. The notification was **made** on June 19, 2000 for the establishment of National Law University, Jodhpur (NLU). Eventually, Mr. Ratan Lahoti, a senior member of the Rajasthan Administrative Service was posted as OSD to take preliminary steps to establish the University in September 2000 Mr. Lahoti started his task from the Office of the Divisional Commissioner, Jodhpur.

By the end of 2000, the government of Rajasthan and the Chancellor of the University, the then Chief Justice of Rajasthan were trying to search for a right academician and a proven visionary and an excellent academic planner who could establish and develop the University. Professor N.L.Mitra who retired from his assignment of Directorship of the NLSIU, Bangalore, was ultimately requested to take the mantel of the University as its founder Vice Chancellor. Prof. Mitra took his office when it was agreed between all the parties concerned that (a) the Institution would be truly national, (b) it would be completely autonomous and (c) there would be complete independence and accountability of the University for curriculum design, setting up of university administration and bringing the institution as an institution of excellence.

4. FOUNDER VICE-CHANCELLOR TOOK OVER: A FEW IMMEDIATE STEPS

Soon Dr. Mitra occupied his office in March 2001 several immediate steps were taken, (i) The action of Mr. Lahoti representing the University to take up the Administrative Block of JNV University on rent for housing the University for initial years was finalized, (ii) The land allotment at Mandore was given effect to. (iii) City Administrative Office of the University was established in the rented premises in Paota Road, Jodhpur and office started functioning with a first few office staff in March 2001. (iv) Decision to start the academic program of the University from the year 2001-2002 was taken commencing from July 2001. (v) The proposal of renting the Administrative Block of JNV University was finalized, (vi) Course designs for the first academic year were provisionally drafted and announced, (vii) A proposal of National Entrance Test (NET) was announced to take place at nine major cities of the country on last Sunday of May 2001. (ix) All preliminary steps were taken to hold the test, (x) Steps were taken to assemble the first batch of faculty in Management, Policy Sciences, Language, Science and Law. (x) Founder Architect of the University was appointed and (xi) Construction Company was appointed.

Prof. Mitra announced his vision statement immediately. The vision statement was published in the Prospectus 2001, as follows.

5. THE VISION STATEMENT

THE UNIVERSITY: A LEARNING MODEL

National Law University is an institution of excellence devoted to multidisciplinary study and research relating to legal sciences. The concept, jurisprudence, really means the prudence or wisdom of the class of people who really decide. In a society people are the real power holders. As such, the wisdom of human being lies in making individuals in the society understand the basic mechanism that ought to regulate interpersonal relations as well as individual relations with the society that makes the society a better place for

living. Law and justice administration is a cultural process, which emanates from the entire body of knowledge. In this sense, law is seen as dharma, that holds the society. This University shall involve itself in the development of this holistic approach towards understanding law and justice from a multidisciplinary standpoint. A Law University of this nature is essentially different from a law school. A law school has to deal exclusively with the process of sharpening legal skills and legal knowledge. This University shall try not only to achieve excellence in skill learning and its application, but also shall examine and research in the broad spectrum of human nature and habitation in the context of which skills ought to be applied. In this pursuit of multidisciplinary knowledge on the bedrock of which only skills are to be applied, is really a fascinating social experiment in which law develops as an instrument of culture and management of public and private affairs. The University shall develop in a phased manner, the following schools in which legal principles, application of law, law as an instrument of public administration and management, shall be developed critically and reviewed periodically. These twelve Schools shall provide inter-disciplinary inputs in legal education in the undergraduate level. These Schools, as such will not float any undergraduate courses of their own. The legal education thus obtained is the synergy of knowledge and skills. The Schools might float postgraduate programs independently or in conjunctions and develop fundamental and applied research. Ultimately these Schools would be autonomous excepting their working in the undergraduate program, which is a co-operative and synergy product.

The School of Constitutional Governance (SCG)

This is the first School in the country for study and research on governments. Principles of Public Administration, role of Government in a society, the place of civil society in governance and policy dimension in various public services and principles of good governance as a vehicle of modern civilization - all these are subjects of study and research in this School. There shall be emphasis on research and development of human resources for good governance both at the fundamental policy-making level as

well as at the functional level. The School shall have specialized Centers on Human Rights Studies, Local Self Government, Population Studies, Civil Society, Media and the Law, Legislative drafting, Environment studies, Clinical Education, Studies on Big Projects and Project Displacements, Sustainable Development, Macro Economic Management and Taxation Studies and Resource Management. These centers shall also develop an integrated research program for advising the Union and the State Governments as well as other interested groups on matters relating their subject of research. The Government of Rajasthan has already approached the Center for Taxation studies for its suggestions on some taxation issues. This School has been now named after Dr. L. M. Singhvi.

The School of Administration of Justice (SAJ)

It shall research and review as well as develop skills of delivering justice - economically efficient, structurally communicable and effective. That is what a modern society requires. The School shall develop its theory of justice looking at social context and complexity, design clinical and training course for students, young lawyers and judges to effectively deliver justice. Judicial administration shall be researched into so as to systematize the mechanical aspect of procedure and develop a system for making justice reach in time.

The School of Policy Science (SPS)

The School shall develop multidisciplinary knowledge essentially necessary to appreciate and apply legal skills in the context of social values. It shall also develop policy choices and options in administration of social and economic justice. The School shall emphasize research on various policy dimensions, understanding of economic principles, application of historical perspectives and social values in developing the foundation of legal reform. The Departments in the School are Department of Economics, Political Science, History, Sociology, Psychology and Philosophy.

The School of Science and Technology (SST)

The School has to provide knowledge in various physical and Life Sciences including Electronics and telecommunication, information technology, food technology, biotechnology and agricultural sciences. The present development of the knowledge society essentially brings us face to face with science and technology. Law and administration of justice are required to keep pace with the development of science and technology. Such a rapid development of technology and progress of human race towards a knowledge society throws new challenges to law and legal principles. To hold the society and yet allow the society to develop multicultural, multi-linguistic and multi-religious is one of the biggest challenges to a modern society. The understanding of science and technology shall not only emphasize scientific and rationalistic way of life, but shall also strengthen the Rule of Law. In the modern world, if law has to be a successful instrument of social engineering, it has to be based on protective, prohibitive and preventive understanding of science and technology. Naturally, science and ethics interface is constantly a pursuit of knowledge, which strengthens the basic fabric of the justice delivery system. Knowledge of science enhances the appreciative values in the people. Legal principles in this sense are to be universal and science and technology enable their universal application. Forensic Science is the alternative to colonial way of fact finding. The skill of forensic science is the surest way of analyzing a fact in the knowledge society with e-governance. In an electronically operative system of trade, commerce and industries the knowledge of science is of basic importance. The knowledge of forensic science is, thus, fundamental to rule of law. Departments in the Schools are Physics, Chemistry, Life Science, Information Technology, Forensic Science and Biotechnology.

The School of Administration of Criminal Justice (SACrJ)

The School is primarily concerned with the management of society based on certain basic human understanding. The School shall develop research competence on systemic analysis on the management of a society. Criminology, Criminalistics, Criminal

Psychology; International Criminal Law and Justice, Terrorism and Drug trafficking, Police Science, Art and Science of Investigation and Fact Finding; Comparative Criminal law and procedure, Prison administration, Law and Medicine - all these branches of knowledge are too important for the students and social scholars. Similarly, social offences and economic offences are presently the areas of interest to the public administration. The School shall research to acquire systematic knowledge and develop expertise for managing the society. There shall be training and instructional courses for the institutions to achieve greater, competence to manage the society. It will have specialized centers on Law & Medicine, International Crime and International Criminal Court, Police Science, Prison Administration, Juvenile Justice, Women and the Law and Social Offences.

The School of Management Sciences (SMS)

The School shall develop insight in understanding the skills of management necessary for various sectors of production, distribution and services.. The School shall develop interdisciplinary courses on management, human resource development, management technique in public and private administration, appreciation of basic principles and values of management science in the context of law, financial management, standardized accounting practice and marketing management. The management skill added to the corporate lawyers coming out of the institution would match the world standard of lawyers' skills.

The School of Law & Agriculture (SLA)

The School shall endeavor to develop intensive fundamental research in the area of systems of land dialectics and land management with land use and farming. It shall also look into the complex dimension of agricultural marketing, marketing instruments and system of settlement of contracts. The rationale of agro-finance being separated from the industrial finance is to be researched into in the context of country's strength and weaknesses. It is urgently necessary to fine tune agricultural laws in the country in the context of technology and its upgradation. The

School shall also develop techniques of dissemination of essential knowledge to the agriculture administrators and farmers. It shall develop critical insights into the system of law and justice concerning global understanding and development of rules in International Trade under the World Trade Organization so that the role of India in this multipartite world body is constructive and simultaneously, protective of national interest. The school shall develop course on law and practice in the area of agriculture for sectoral management, public administration and farm management. Training and educational courses shall be designed based on future needs of the country.

The School of Business Law (SBL)

The School is concerned with law and governance, which are basic infrastructure for growth and development. Unfortunately, there has never been a holistic approach towards law and management especially keeping in view the development of trade, industries and commerce. The country now faces critical challenges for developing a rule based contract society, replacing the present arbitrary bureaucratic system. Any commitment towards the School of Law requires law to be seen as the basic iristrument of management. We require rapid development of infrastructure system for global technology and investment. But we do not have lawyers worth the name to structuralize domain-based contract, such as pipeline contract; or metropolitan multi-transport mode contract, shipping contract etc. on the principle of rule of law. We want rapid development of investment market with foreign players to participate but we still do not have a strong rule based regulatory system, a chain of multi-facultative public lawyers and a good brand of corporate lawyers capable of developing market instruments. We are now facing challenges in the arena of intellectual property in both national and international spheres. We have a very little expertise in patent specification writing, drafting protocols and do not have a brand of lawyers who can defend indigenous knowledge and culture and protect intellectual property in various other fields. India is both strong and week in the domain of intellectual property. In some places we are global players in industries such as cinematograph, music, dance and

drama, software and a host of traditional knowledge. We are a developing country in industries. Naturally industrial property protection is important subject of public interest. We are extremely weak in protecting farmers' and breeders' rights, developing and protecting data bank Obviously we have not developed an economic diplomacy based on wider participation of the civil society and interested groups. Often our national interest is seen contradictory to the interest of developing countries. But we have not yet had a brand of good lawyers who can participate in the international policymaking and also protect Indian scientists, technologists and managers. We talk about corporate governance but did not build up a system of good governance with people capable of becoming independent directors and also add value to governance.

This Business Law School, the first of this kind in India, will try to develop closely in association with various management schools, institutes of technology and investment institutions multi-facultative advocacy and research skills blending appropriate legal scholarship with infra-structural input of the knowledge society. The country is now in the process of opening up all sectors of investment but without having human resources adequately trained to run our insurance, banking and other corporate sectors based on principles of rule of law.

The schools shall have various specialized centers like Center for Labor Studies, Center for Small Scale Industries, Center for WTO Studies, Center for Intellectual property Rights, Center for Corporate Governance, Center for Information Technology, Center for Mines and Minerals, Center for Insurance studies, Center for Banking and Investment system, Center for Financial Market Management. The School shall build up an agenda for quickly developing human resources through training and educational courses. It shall also develop a strong fundamental ongoing research center. All these cannot be built up in a day but without these the country's future is certainly going to be weaker on account of lack of legal environment as a basic input of good governance in a liberal democratic political framework.

The School of International Legal Studies (SILS)

The two modern currents of globalization and universalization have brought fundamental changes in the concept of development in International Law. Whereas the requirements of humanity for life and liberty universalize the basic rules of governance, technology globalizes international activities in production and distribution. Someone said that if United Nations is a success in one singular area, it is in the area of development of International Law and model national law prepared by various agencies of the UN in the last fifty years. It is understandable that Rule of Law is not the only objective of India's game plan in determining international relations in the last fifty years. There are several other competing interests. Lawyers, law academicians and legal scholars did play only a marginal role in India's participation even when the task was of international law making. It is time we develop a school of excellence in International Legal Studies in order to develop research skills on norm building and appropriate human resources in the field. Though India can certainly boast of a few giant legal scholars in the field of International Law and practice including, Syed Amir Ali, Radhabinod Pal, Dr. Nagendra Singh, most of them had the privilege of learning International Law and relations in the corridors of British Universities. This will now be an effort to develop a systematic branch of knowledge here in India. The School shall have various specialized centers such as Center for European studies, Law and Diplomacy, Law and International Relations, Drafting of Treatises and Conveyance, Humanitarian Law, International Human Rights, International Trade Law, Refugee Studies, Oceanography and Ocean Resources and Center for Air and Space Law. These centers shall research on development of law in contextual relations and ground realities. A third movement in the International Law is rationalization. There shall be specialized centers for study of European Union, Organization of African Union, ASEAN and SAARC in order to learn from each other's experiences.

The School of Oriental and European Studies (SOES)

The School shall develop investigative and comparative studies and research on various oriental and occidental legal systems in regulating the state, society and family relations. The School shall also develop studies of comparative jurisprudence in oriental and occidental systems. The understanding of jurisprudence as a science and philosophy of law is based on a strong appreciation of a society and the behavior of individuals in the society. SOES is going to play a significant role in the development of research and academic curriculum in the area of sociology of law, comparative jurisprudence, comparative family relations and host of contemporary enquiries in areas such as euthanasia, infanticide, feticide, patricide, surrogate motherhood and adoption.

The School of Languages (SoL)

Law and Culture are closely interrelated with language of a society. In spite of the fact that some languages have become international media of communication, national languages do play a significant role in making jurists to understand comparative nuances of a national legal system. A successful jurist and a lawyer is also found to be an excellent material for language learning. The School of Languages shall gradually develop several language learning systems. It may also develop understanding of some national languages side by side with major international languages gradually and encourage students to take both credit and non-credit courses in languages. Each student of National Law University shall be encouraged to take at least one more international language from widening chain of options.

The School of Economics (SE)

A Supreme Court Judge in the US once commented that a lawyer without any knowledge of Economics is a social enemy. At no time in the past this statement was felt more appropriate. There are reputed schools in Law and Economics in the US, UK, Germany and France. Unfortunately in India, there has never been an attempt to arrange a marriage of Law and Economics. As a result,

we have very sectional understanding of this cross-border knowledge. Law and Economics interface is now a distinct branch of knowledge where legal principles are tested in the parameter of economic interest (American way of understanding Law and Economics is evaluation of cost effective nature of the legal instrument and institution.). Economics as a science of policy option and appreciation requires constant support of legal regime and comparison of legal analysis. This cross-border understanding is at least as old as Marshalian Scissors and Benthamite Utilitarianism, if not as old as India's oriental concept of Rajadharma. The School shall develop various research and academic courses to see the market driven interface as well as public interest issues. The School shall also run training courses for various policy-holders and power addressee and disseminate information to the civil society.

Civil Society and the Institution

Such a multidisciplinary University focusing on application of legal skills in many walks of life cannot be developed by or contribution of a State only. It requires public and private participation in resource building. Schools and Centers and the professorial chairs can be dedicated by endowments. The cost of education, in spite of making best efforts, to be affordable by lower middle class, cannot but be reasonable and obviously comparable to educational expenses at centers of excellence like IIT's, IIM's and national level Law Schools. It is, therefore, necessary that leaders of the profession and eminent citizens may come forward to make such educational investment possible and aid meritorious students from poor families under the annual scheme of 'Each one Reach one', which shall provide adequate scholarships for able students. Our motto should be that no student selected on the basis of national competitive examination be deprived of this excellent education because of financial inability. The University shall make an effort to develop a scholarship fund, the income of which can supplement private resources of the guardians/parents. The University shall also arrange for bank loans with some Scheduled Banks, which will be made known to students in the course of time.

6. MANDORE: THE NEW NAME OFTAKHSHILA

About fifty acres of land at Mandore was given possession to the University and transferred to the University by the Government in July 2001. The foundation stone of the University was laid down by the Chief Justice of India (CJI) on August 26, 2001 in the presence of the Hon'ble Chief Minister of the State of Rajasthan. The University Architect was appointed. The agreement was entered into in September 2001 with the Rajasthan State Road Development and Construction Corporation Limited for the campus development in phases. The first phase included the boundary wall, three Halls of Residence, students' welfare complex including the Cafeteria, School of Science and all other incidental facilities. The Halls of Residences would have single seated rooms with LAN facilities and direct Internet connection. Each students of the University would have complete exposure to the information technology. This is the first University of the country where student computer ratio is 1:1. Dr. L.M. Singhvi, Member of Parliament from Jodhpur in *Rajya Sabha,* himself a leading constitutional lawyer and scholar of the country and a successful diplomat, who was the Guest of Honor of the Inaugural function, promised to help the University in all respects every year so long he remained the MP to see its infrastructure growth.

7. HOW DID THE JOURNEY BEGIN?

The University proposed to establish the School of Constitutional Governance in the name of Rajasthan's own all time famous constitutional scholar, Dr. L. M. Singhvi. Incidentally this would be the first School on Government studies- in the country. The construction of the School of Science and Technology and School of Constitutional Governance was started in January 2002. Each of the 12 Schools that the University is going to build up in course of time on the NLU campus would be centrally air conditioned to provide maximum facility for learning and research for 280 days a year. This is the first University of the country, which has the teaching-learning and research calendar of 280 days in a year.

8. UNIVERSITY BODIES

Four faculties were established at the beginning in September 2001. These were Law, Management, Policy Science and Science. Each of these faculties are headed by the respective Dean. Various bodies of the University were constituted by May 2001 and the inaugural assembly of these bodies took place in the Meeting Hall of the High Court under the chairmanship of the Chancellor. Various amendments to the statutes were suggested, approved and notified.

9. THE FACULTY

The first batch of faculty members was assembled in different disciplines in June 2001 and 16 faculty members joined the University at the beginning of July 2001. They were inducted through a 15 days' orientation course. 42 students were admitted from more than 600 applicants in the first batch in July 2001. Five students were admitted in two masters degree program in Law and Management and Constitutional Governance. The University had to take on lease two residential buildings comprising 16 flats and other covered facilities extending to about 6000 sq. feet in 'Lav Kush' apartment complex in Choupasani. Arrangement for classes was done at the JNV University Administrative Block and at Chaupasani during forenoon and evening respectively. Residential flats were fully furnished by the University for the students and the faculties. Thus was the journey of the University started, a small but determined step quickly taken to announce that it has arrived! When the second batch of students was taken in 2002 session, the University rented another complex of 16 flats in 'Mahavir Palace' at the heart of the city. Now in third academic session, 2003-2004, there are 230 students in Under-graduate program and 26 students in three Masters Degree Program in IPR, Finance, Insurance and Management with Law housed in the University's own Halls of Residence at Mandore. Presently, the teaching faculty comprises of 46 members in the faculties of Science, Management, Policy Science and Law as against 230 students. It is a unique teacher student ratio of 1:5, the best in India at present. Of course the figure has to stabilize by 2005-6 at the ideal figure of 1:8. There

was introduced a regular evaluation system for teaching learning by students, self and peer group. These assessments were taken into consideration in constant updating of the courses.

10. THE TOTAL EXPERIMENT ON CONVERGENCE OF KNOWLEDGE AND SKILL BASED EDUCATION

This innovative experiment of integrated multidisciplinary legal education centering the Rule of Law and attempting to integrate knowledge base in all disciplines of knowledge with legal skill learning is not only unique in India but also in whole of Asia. The Fifth National Law University, thus, has become the first in India to provide the leadership in totally integrated legal learning, where students learn law with science, or with policy science, or with technology, or with management. Such a centrality to 'rule of law' education is based on the philosophy that law as *dharma* is in every walk of life. Lawyers, administrators and judges of tomorrow have to come from all walks of life and all branches of knowledge. Thus, NLU Jodhpur started the latest experiment in legal education to match challenges to excellence in the science of learning.

11. TEACHING-LEARNING METHODOLOGY

Faculty members undergo regular courses at the beginning and end of each semester on methodology of designing courses, various types of methodologies of teaching-learning, and evaluation system. The learning system suitably incorporates various methods of teaching-learning, like individual research and self-learning, case-study, regular courtroom exercises, cooperative teaching with association of faculties, tutorial and seminar. Senior students also conduct academic support service for the quality improvement of the junior batches.

12. THE ACADEMIC PROGRAM

The program is truly a reflection of convergence of knowledge and legal acumen. At the undergraduate level there were three programs of integrated legal education. The first program was on

Law and Policy Science. The policy sciences like philosophy, sociology, political science, economics and history providing various options are punctuated with legal studies that leads to integrated five year law program of B.A., LL.B (Hons.). Most of the public legal process and institutions prepare lawyer with proper understanding of the people and society. The second program was designed collapsing management sciences with legal studies that would lead to B.B.A., LL.B. (Hons.). The whole corporate sector of tomorrow requires managers having legal awareness and lawyers with management and finance awareness. The third program is the combination of science courses and with legal subjects leading to B.Sc, LL.B. (Hons.). The world is progressing towards knowledge society. More and more science and technology issues would arise in the legal conflict and conflict resolution. It would be essential for a modern lawyer to appreciate facts and evidences, which would have high science and technology orientation. A modern lawyer would be a burden to the society who cannot appreciate evidences from fact around us. Advancement of electronics and telecommunication, information technology, biotechnology or food technology would necessarily indicate development of law and justice. Post-Graduate courses would also have such convergence. The first two programs for post-graduate were on (i) six-semester course on Law and Management leading to MBA.,LL.M., and (ii) four-semester course on government studies. The course on government studies is a course first time introduced in India looking to the importance of public services at the Union and the State level. The Constitution of India mandated the mechanism of justice delivery system suitable to provide social, economic and political justice. For that reason a new generation of public service and public servants would be necessary. This course was designed in view of the need of those services and servants. Gradually, the University is planning to introduce double and triple Honors courses, and courses on technologies in the under-graduate level. The University has already introduced post-graduate courses on Intellectual Property Rights and on Insurance Studies.

13. EVALUATION SYSTEM

The faculty designed a continuous system of assessment. There is a regular system of appreciating the pathology of a class and design appropriate evaluation system comprising measurement of information level, application ability, and evaluation of faculty improvement. Classroom participation, daily, weekly, module-based, monthly tests comprise continuous format of the test. There is snap as well as notified tests to evaluate different basis and level of quality assessment. Project assessment is often made with public presentation.

14. THE LIBRARY

The heart of a Teaching-Learning institution of excellence lies in the Library. A modern Library is a *sine qua non* for an institution of learning aiming excellence. The University promptly established the University Library under Assistant Librarian in charge. The library and the computer laboratory developed an integrated system with Internet access through Lexis-Nexis, West Law, Manupatra, SCC online and the like. The University LAN is connected to its own access. The computer center with about 20 sets with its server and LAN was established in October 2001 with personal assistance from local MLAs. The Library has by now more than 1500 titles of text books, 2500 back volume of national and international journals and connected with major Libraries of the world through Westlaw. Presently the University has wireless to wire connectivity with all student rooms and in the research stations.

15. SPECIALIZED CENTERS OF RESEARCH STUDIES

The University established various Centers of Excellence namely Center for Criminal Law and Criminology, Center for Studies in Agriculture, Center for WTO Studies, Insurance Studies, Banking and Finance, Intellectual Property Right Studies and Center for Human Rights Education and Research. A Director or an Executive Faculty administers each of these Centers. Each Center consists of besides a Director or an Executive Faculty to coordinate

the activities some research Scholars and assistants. The lists of research work of these Centers are also impressive. The Center for Studies in Banking and Finance has carried out research projects on Securitisation and Regulatory Framework, Security lending instruments and legal framework, Lenders' Liability, E-Commerce and Sales Tax, Financial Fraud and Regulatory Mechanism. Center for Agriculture is working on a project for the Minister of Agriculture, Government of India on 'Agricultural Produce Marketing Reforms'. The Center has proposed draft legislation - 'Secondary Agricultural Produce Marketing Bill'.

The Center for Human Rights Education and Research has organized a four-day workshop in October 2002 on 'Human Rights Education and Conscience'. NGO's, Academicians and Experts, Senior Police and Army personnel attended the workshop. The first endowment for creating a chair on Insurance Studies was created by the New India Assurance Company in December 2001 at the presence of the Hon'ble Finance Minister of the country at the end of a three days course conducted by the Center for Insurance Studies.

16. A NEW STAR, A NEW HORIZON

It has now been an established fact that this institution of learning is unique in character and it has started its journey with its vision of learning, convergence of knowledge and legal skills for the purpose of using rule of law as the ultimate life-support system.

Y.K. Tiwari

' Professor of Law & Dean, Faculty of Law, National Law University, Jodhpur

BOOK REVIEWS

TRADE AND ENVIRONMENT ISSUES AND OPTIONS FOR INDIA (2003) Edited by Veena Jha,. United Nations, New York. Pp.296. Price: Not Mentioned).

Can the relation between trade and environment be assessed through identification of linkage between development and environment? Asserting positive on this question, the present book under review[1] endeavours to propose policy through a number of write-ups suitable for developing and least developed countries. It tries to assert that in developing countries with a weak industrial base, a rapid and sustained rise in the levels of income depends on increasing investment. Most often than not, development in such situation and capacity may have very high requirement of import content, which could be directly proportional to natural endowments of export earning.

The book under review explores the generic linkage between trade and environment on the one hand and consequential impact on liberalization and development on the other. It claims to lay down guidelines for policy formulation at the level of governance and its 'trickle down' effect on the governed. The book has tried to find a mechanism that can balance the challenges and opportunities for reconciling trade and environment policy in the Indian context. It, however, doesn't look into all the nuances of environmental consideration and its sequential consequence on development of a country getting impetus through trade.[2]

[1] Veena Jha, (ed.), *Trade and Environment Issues and Options for India* (United Nations, 2003).

[2] Some of the issues rose elaborately in the book, e.g. ISO issues, investment and sustainable developmental concerns, technology transfer and environmental performance are contemporaneous to the extent that questions are raised but solution and policy making mechanism could not be identified. *Ibid.,* p. 38 *et seq*.

The jurisprudence of environment finds a place in the editor's introduction. The acumen of the writer is visible through the issues of equity and equitable consideration in relation to environmental standards. The post-modern trend of environmental jurisprudence wherein inner morality of law propagates through policy identification and realization rather than the 'rights' theory, appears all around the book as an epitome of sustainable development piercing through the veil of trade and development. Herein identification of corporate responsibility in perpetration of environmental standards and its. consequence on trade, development and social growth are the features of the book.

However, one may generally feel at places that policy option could have been, at the best localized ones, identified on regional lines because developed, developing and least developed countries can not be equitably treated on the same footing.

Rene Vossenaar[3] has vehemently, argued on ISO 14001 certification and standards. He says,that these are standards for environmental management system, s These have^ generated considerable interest in developed, developing as well as least developed countries. According to him trade development could be directly related to environment standards because environmental bottlenecks are so swamped that a certification system removes the barriers to the trade: Empirics provided in his paper are well supportive of: his arguments. But ISO certification as wanted (Article 13 para.l of TBT Agreement[4] and pursuant Ministerial decisions are *prima facie* not sufficient) is utterly inadequate and may not be acceptable under Sanitary and Phyto-Sanitary Agreement in the absence of a multilateral agreement under WTO. This point has not been thoroughly investigated in his paper though he has achieved the accuracy of raising ISO issues at the global

[3] *Supra* note 1 at pp. 38-59.
[4] Pursuant to Article 13 para 1, see Ministerial Decision on Review of the ISO/IEC information centre publication and decision on proposed understanding on WTO-ISO standards information system.

platform. It could be seen through the paper that in many developing countries in Asia, trade considerations seem to play an important role in the use of ISO 14001. In these countries, governments and companies are concerned largely with the perceived adverse trade implications of not getting certified. ISO 14001 might be looked from the perspective of a barrier to trade for companies that find it difficult or costly to obtain certification. The article also gives the other side of the story wherein companies want to use environmental standards to improve their environmental performance for obtaining economic benefits and also for improving trade or to enhance their corporate image. Notwithstanding the Korean evidence by the author that might boost his argument on different reasons for using ISO 14001, generalization on case-to-case basis does not look sound as far as developing or least developed countries are concerned. The division of reasons for ISO certification into three categories,//rs/, environmentally sensitive industries (e.g. chemical industry) seeking to improve their environmental image; *secondly,* export-oriented industries (e.g. electronics) preparing to deal with potential trade barriers; and *thirdly,* large firms committed to maintaining high environmental standards and meeting shareholders' expectations, is credit worthy and appreciable

The idea developed in the paper as to ISO and its *de facto* status as a trade barrier may help India to take pre-emptive steps to mitigate the porcupine structure of ISO standards in the long run. Herein the paper suggests that domestic policies could be formulated to take up such issues at ease because national policies play an important role in preventing ISO 14001 from creating barriers to trade. This could be effectively done by formulating priorities based on objective information and analysis so that future problems in relation to ISO could be settled with impunity. Though writer points out on identification of baseline policies for developing infrastructural requirements in the developing countries in case ISO becomes customary international trade standard for export, yet the paper fails to consider the other side of the story that is, why not national standards be taken up by the government for approval of the WTO to act as the sufficient certification standard for exportable commodities. The writer is more emphatic on touching

upon the lopsided area when it is said that potential trade effects tend to be a key factor in determining the appropriate timing and sectoral priorities in implementing national standards and promoting the wider use of EMS (Environmental Measures) in developing countries. Anyway, the apprehension of ISO becoming a non-tariff barrier as seized in the paper has substantial reason and the paper attains its objectivity.

Another study on the implementation of ISO 14000 in India by Pranay Lai[5] has an added valuable empirical basis on the apprehension raised by Rene Vossenaar. His study, based on interviews and some published data, reveals that the response of firms to ISO 14000 certification in India in comparison to other developing Asian countries has been moderate and mostly certified firms in India are private firms with domestic and captive shareholding and local management.[6] He observes that by and large, Indian firms of comparable size and investment, generally, exhibit better environmental performance as compared to foreign-based Trans-national Corporations (TNCs) operating in India. He highlights that efforts and energy spent in compliance with ISO standards leaves little room for innovation, product and process stewardship and enhancing environmental and overall performance. This requires policy intervention so that ISO certification procedure must be made industry friendly. Firms in India are aware of the fact that environmental costs of production are high and will increase in the future owing to export regulations and external pressure that falls on the entire industry. But different players are affected differently. So asking the industry as a whole to tackle the environmental issue with ISO certification might amount to a 'bull in china shop'. Looking at the entire gamut of ISO certification and future of Indian industry *vis-a-vis* governmental policy the writer seems to' be correct in his observation that quantification of trade benefits owing to ISO certification would be a premature conclusion.

[5] *Supra* note 1 at p. 60-76.

[6] According to this survey, most PSUs (14 of the 23) have sought the ISO 14000 series certificate to improve their corporate image in the global market. The other nine Companies reported that ISO 14001 certificate would bring them some regulatory relief. *Ibid,* 62.

Vijay Sharma and Veena Jha in their joint article[7], highlight the indirect portfolio investment consequences of high concentration of technological leadership in a few developed countries with some regions. Further more a warning on diffusion parenthesis in the light of trade and environment is also forecasted owing to paucity or ill equipped market, inadequate skills and poor infrastructures. However, the projection put forth in the paper in relation to an equitable sharing of the global environmental space and its consequential proportionality with equitable sharing of global economic resources does not hold ground because equity has never been the basis of Multilateral Agreements. The better deal in such situation could be reinforcement of Principle 7 of the Rio Declaration coupling with it a mandatory technology transfer regime administered through Multilateral Environmental Enforcement Agency (MEEA) instead of calling for common but differentiated responsibility under the Rio Principle. However, the authors seem more vigilant on rhetoric of environmental considerations, which increases the challenge of international cooperation in environmental policy making. These authors seem to be too ambitious when they rope in 'principle equity' by way of corporate and social responsibility so as to make Foreign Direct Investment (FDI) work for sustainable development and equitable reward for traditional and indigenous knowledge.

Next in the line is Ghayur Alam's investigative study[8] that explores the link between Intellectual Property Rights (IPRs) and India's access to environmentally sound technologies. He has looked into international conventions like Convention on Bio-Diversity (CBD), Montreal Protocol, and Convention on Climate Change (CCC) to identify that in most of the cases, the relevant technologies have been developed and are owned by firms in developed countries, and have to be imported from these countries. That is invariably a difficult and costly affair, unless developing countries have been assured of preferential transfer of Environmentally Sustainable Technologies from developed coun-

[7] Supra note 1 at p. 19-36.

[8] supra note 1 atp.78-124.

tries. His paper implicitly refers to the cost of Intellectual Property (IP) involved in suitable technology transfer needed for meeting environmental standards.[9] The writer also creates doubt on the efficient adherence to international commitments in light of Montreal Protocol. He refers to unhappiness of Indian firms in relation to Montreal Fund, which failed to facilitate the transfer of technology on reasonable terms. Alam refers to the Convention on Climate Change and also the constraints on India's developing and importing, energy efficient and environment friendly technologies in industries. He categorically emphasizes on boiler technology, which reveals the limitation of the study in order to develop a generalization on the shortcomings of CCC, although remarks could be envisioned in his paper on other technologies relevant to making the power industry environment friendly. Heavy reliance on India's manufacturing of power plants on foreign technology opens up the pandora box wherein environment friendly technology and IP cost in technology transfer could be more meticulously analysed.

It could be seen through his paper that almost all the new plants built globally during the 1990s incorporate generally environment friendly technology. The concern of developing countries is the high cost of technology transfer and difficulty in pricing. This paper indicates that the role of IPR is predominant in preventing Indian firms from imitating or developing protected technologies and components.

[9] Referring to Montreal Protocol the study shows that in the case of Hydrocarbons (HFC, 134a), foreign producers contacted by Indian firms showed no interest in transferring technology. The reason for such non-action has been largely protectionism practiced by these firms in order to disallow and prevent the entry of newcomers owing to high intellectual property stakes in development of such technology. He adds up that by reiterating the HFC 134a production technology as process patent the bargaining power of the owners has become very strong. It acts as entry barriers so that the technology owners can have the monopolistic edge. In order to mitigate such situation his reference to a project to develop HFC 134a technology indigenously by the Indian Institute of Chemical Technology (IICT) in 1991 opens up hope and means to counter hardship of intellectual property cost in transfer of environmentally sustainable sound technologies. *Ibid,* pp. 81-85.

His reference to CBD touches upon yet another sensitive and vital area of global concern precisely in relation to developing and least developed countries having particular reference to transgenic plants and biotechnology. Owing to the importance of biotechnology and transgenic plants an apprehension is raised that it is unlikely that firms having the expertise will be prepared to transfer technology to developing countries. He asserts that while some of the leading biotechnology firms have entered India in collaborations with local firms, the arrangement does not normally include transfer of technology. The arrangements merely provide for the marketing of transgenic plants developed by the foreign firms. The reason for such apprehension is that most of the technology owners in these industries are also the producers of plant and equipment and they are likely to be unwilling to transfer technology because of the reason of losing market stake. This could be seen as an aspect of liberalized and open economy, which the writer has not deliberated upon.

The paper, however, fails to lay a policy option on this issue in the wake of multilateral commitments under the WTO. The writer states that in the past, when import of cement and power plants to India was restricted, these firms saw technology transfer as the only way to benefit from the Indian market. It would appear that the writer providing an option of closed market to induce technology transfer indicates a major drawback in appreciating open market and comparative cost strategy of liberalized market regime. Another generalization appears in the paper on the aspect of product patents. The writer asserts that process patents do limit the number of potential technology suppliers and it can be inferred that these patents have added to the difficulties and cost of technology import by Indian firms. But the other side of the story is equally material because such IP regime does not prevent Indian firms from developing technologies indigenously.

The study proposes setting up of a technology development fund that should finance the purchase of intellectual property rights, so that developing countries will be free to develop and use proprietary technologies. But it is also true that a Technology Development Fund cannot entirely meet the requirements of

indigenous technology development efforts. One more option could be to allow growth of competition among the suitable technologies by vigorous liberalization and market development. A competitive market has the potential to bring down cost of cutting edge technology owing to demand and techno-superiority required to sustain in the market. Another suitable option could be to find out necessary policy options through governmental deliberation at the level of Multilateral Agreements on Technology Transfer under the auspices of World Trade Organization.

Another connecting article on *FDI and technology transfer* is by Ashok Kumar Mahopatra[10] who examines joint ventures with public sector companies. Herein he identifies Joint ventures (JVs) as important vehicles for technology transfer and FDI. In comparison to Alam's study this study favours liberalized cooperative economy, which brings easily technology and FDI. This study examines the issue of environmentally sustainable technology transfer through JVs and its possible consequences. This paper touches upon quality issues of technology conception, its distortion and further proliferation, which are based on the capacity of the recipient industry.

It may happen that technology transfer could be blocked for the reason that the recipient industry is not competent to utilize the technology or has no capacity to sustain the user of such technology. The writer identifies such issues to elaborate possibility of environmentally sustainable technology transfer regime. He highlights that the leading global technology holders have not agreed to transfer technology to certain Public Sector Enterprises (PSEs) in the past, even under technical collaboration agreements, until they established their technology-absorption capacity. Furthermore the reason of JVs as identified by the writer is predominantly technology transfer, he puts up the case of public sector companies who seek to form JVs principally for the purpose of getting higher technology, and they seek the best technology-

Supra note 1 at pp. 125-157.

givers. The writer has examined three cases in relation to companies that were technology leaders in their respective fields.[11]

Looking in contrast to earlier paper[12] this paper harmonizes the need of 'new and cutting edge technology' with the market opening up, in which role of market becomes appreciable in bringing quality technology in JVs without the rigours of intellectual property and allied considerations. The study concludes by providing a sound policy option, which states that the JV favours the technology giver in the transfer of technology and equally meets the need of recipient industry. The Policy option for the government is that the Government adopts policy measures that mandate the JV to transfer technology to local companies. However, it is important to appreciate that in order to get state-of-the-art " technology transferred to a company in a host country, capacity must be built up otherwise the host country may receive garbage and obsolete technologies, which might not be environment friendly.

Under what circumstances investment strengthens environmental standards and when can the issue of environmental standard hamper investment? Answers on such issues are investigated by Veena Jha, editor of the book, in her article[13] wherein she

[1] The first case deals with a system related technology concerning Plant Performance Improvement (PPI) programme. In the last two decades, the thermal power plants so designed and manufactured with this company's technology forming the backbone of thermal Power generation in India. The domestic partner has a widely acclaimed capability to absorb, modify and innovate on foreign technology. The technology transfer from global technology leaders to this domestic partner was facilitated by its high absorption capacity. In this sector, the foreign firm transferred the latest technology to the JV. The fact that the MNC (Multinational Company) was using the same technology elsewhere proves that the latest available technology is being used by the JV. Subsequently in two further cases the writer has tried to establish the hypotheses he conceptualised in relation to technology transfer and JV. The third case which relates to government collaboration in automobiles reveals that role of the market also becomes important in order to attract environmentally sound technology to fall in the JV. *Ibid,* at pp. 132-135 & 145.

[12] *Supra* note 8.

[13] *Supra* note 1 at pp. 158-176.

examines the possible link between investment liberalization and environmental performance. The question that is examined by this paper is whether TNCs are spreading environmentally beneficial practices to the local industry and whether their practices are leading to comparable local firms adopting better environmental standards and performance. Although the writer has not followed the econometric analysis to investigate the question but a number of environmental concerns have been voiced about the operations of TNCs. Referring to Civil society's concern she points out that NGOs believe that given the high fiscal deficit as a proportion of total GNP, the government of India would be reluctant to control the operations of TNCs, thus, leading to ecological disasters. However, empirical studies indicated that it is difficult to generalize the environmental behaviour of TNCs.[14]

The study concludes that environmental practices of TNCs in India have so far had both negative and positive effects on the environment. TNCs are expected to generate higher standards of performance with respect to environment. The Civil Society such as community groups, grass-root NGOs, voluntary organizations can only work better than Government if they play the watchdog role for TNCs to strictly adhere to environmental compatible technology. It is true that overall environmental performance of TNCs is difficult to judge. This could in part be attributed to the fact that cases of environmental violation generally receive more publicity than positive practices. Environmental performance of TNCs is not uniform across borders, partly because environmental standards are not uniform across borders.

[14] The most striking positive examples are the activities of TNCs in environmental services such as the provision of solar power, waste management and water cleaning projects. TNCs have also been active in testing and certification, including certification for environmental management. There is however, an equal number of, if not more companies which were violators of environment. TNCs have had a much more decisive influence in setting volun tary standards rather than mandatory environmental standards. *Ibid.,* pp. 165-167.

[15] After the inception of the WTO and concerns arisen in *Tuna* /United States-Restrictions on Imports of Tuna (Tuna/Dolphin I), GATT B.I.S.D. (39th Supp.) at 155 (1993) (unadopted); *United States -Restrictions on Imports of Tuna (Tuna/Dolphin II),* DS29/R (June 16, 1994) (unadopted); and *Hormones*

The article by J. Bandyopadhyay, R. Sengupta, A. K. Sinha and S. Chaudhuri[16] questions the concept of environment friendly products and its intricate linkage in the market economy. Notwithstanding the commendable consumer trends towards green products, there is a constant apprehension in developing countries that, the emergence of international environmental standards of not only products but also production processes and methods, would mean an imposition of the environmental standards of the North on the South. Besides being costly, this could reduce market access for the export products from the South. An important principle underlying the emerging world trade regime is increasing market access. It is in the background of the emerging and complex relationship between international trade and environment that the discussion on market access and environment friendly products should take place. The study makes a case for promoting the diffusion of biotechnology based environment friendly products, especially in agriculture and food technology, environmental biotechnology and industrial biotechnology. Biotechnology has developed options of using renewable plant materials for obtaining several industrial raw materials, which can replace similar raw materials, like, petroleum derivatives. In terms of pollution intensity, bioprocessing is introducing products or replacing processes, to reduce the pollution intensity index of the existing products. The major contribution of biotechnology is not in developing the final products as such, but in developing eco-friendly processes. The study concludes by stating that faster penetration of market by such eco-friendly biotechnology products and processes may also demand review of IPRs and patentability of genetically engineered life forms.

Yet another connected matter of international trade and growing concern for environment could be seen from the initiation of

(WT/DS26, WT/DS39, WT/DS48 also WT/DS58, WT/DS61; cases, it has been a consideration all around the world to identify a most effective mechanism, which facilitates promotion and proliferation of environmental considerations and sustainability without hurting international trade. [16] *Supra* note 1 at pp. 175-189.

Gasoline[11] case. It is seen now that market access could be denied in the guise of eco non-friendliness. At the level of Multilateral Trade Negotiations, such things have not yet been conclusively crystallized but these might be used as a non-tariff barrier to trade. Such concerns could be identified in the paper written by Atul Kaushik and Mohammed Saquib[18] wherein they argue that developing countries are more vulnerable than the developed countries to the adverse effects of environmental measures on market access and competitiveness. Environmental policies, standards and regulations can have varying impacts on the competitiveness of developing and developed countries. The effects on Small and Medium Enterprises (SMEs) are particularly significant, on account of the significance of the sector in exporting goods.

Studies show that in certain sectors, existing market access is being eroded on account of environmental measures or on apprehension of such measures. The cost of compliance may be high. The study lists a number of factors, which have resulted in market displacements in the fisheries sector. In the case of spices, different quality standards for export and domestic products add to the problems.[19]

India needs to face this challenge and improve the environmental safety measures of its exportable goods. One possible way is to tighten control over the export of products not meeting standard, by cracking down on exporters who ship such products. An intensive exercise should be undertaken to study indigenous processes and their effectiveness for product quality, safety and

[17] See generally World Trade Organization: Report of the Panel in United States-Standard for Reformulated and Conventional Gasoline and Like Products of National Origin, WT/DS2/R, Jan. 29, 1996, & World Trade Organization Appellate Body: Report of the Appellate Body in United States-Standards for Reformulated Conventional Gasoline, WT/DS2/AB/R, May 20, 1996.

[18] *Supra* note 1 at pp. 190-294.

[19] For example (Hazard Analysis Critical Control Point) HACCP requirements assume that there is only one standard both for exported and domestic food. It does not contemplate the situation in India, where the standard and regulatory agencies are different for imported and domestic food.

standards . The technology that has been or is now 'imported' for adoption here should be tested so as to be compatible with standards expected. Thereafter, if the exporters face market access problems, 'equivalence' should be negotiated with the trading partner(s) in that market.[21]

In conclusion this study states that HACCP creates virtually prohibitive cost for the small and medium scale sector. Where standards in India differ from standards in the buyers market, equivalence may be attempted, particularly where harmonization is not possible because of domestic constraints or where foreign standards are unsuited to local conditions. Even in the case of exports of environment friendly products, non-tariff barriers may be a major constraint. Quotas (for example, on mushrooms) and price preferences to competitors are relevant issues for the Government to take up with concerned foreign governments for redressal, particularly where the export of environment friendly products could provide India a 'win-win' situation. So the study suggests that there may be several non-tariff barriers for products, which comply with environmental norms, and these need to be redressed too.

Appreciating the book in its present form is not too difficult a task; identification of contemporary issues in the wake of Cancun Ministerial conference and its failure is an attempt to kill two birds with one Stone. At one level the book identifies the rigours of

[21] This is what author suggests; see WTO ministerial decisions on application of environmental standards to get an opinion that unless negotiated under the framework of Multilateral Environmental Agreement it would be hard nut to crack for the National Governments, see also: Decision on Proposed Understanding on WTO-ISO Standards Information System and Decision on Review of the ISO/IEC Information Centre Publication. Several exporters also point to the fact that these standards may be *de facto* non-tariff barriers to trade. As for example, peanut exporters feel that developed countries put non-tariff barriers on their exports of agricultural products in order to bid down prices of imported products. Exporters may be forced to make distress sales when buyers refuse shipments, based on domestic import standards. Each test costs Rs.6000 or US$120. The implementation of the European Union (EU) Commission's proposals would endanger the export of peanuts to the EU member countries. *India.,* at pp. 217-220.

various environmental related issues and at the other it succeeds in formulating a suggestive pattern of policy options for the policy makers in developing countries more precisely India.

The editor of the book under review in her concluding and recommendatory remarks shows an immaculate editorial capability of a person well versed with the subject. She feels that FDI inflows and sustainable development have a generic linkage with the trade development of any country. She asserts that apparent inconsistencies perpetrate through multilateral trade agreements under WTO unless environmental considerations are symmetrically maintained through technology transfer. The concluding observation has touched upon very hot issues, which might have a relationship with friendly environment and trade development. Although not much has been said in the book relating to traditional and indigenous knowledge acting as species of the genus trade, development and environment, yet issues have been raised.

The book has tried to obtain a synergy through identification of issues and making a claim as to proliferation of policy guideline. But one may find that the essays appearing in the book end up as essays without any fruitful policy outcome which could be tested on regional parameters of development. All in all, the entire book offers deep insights to most of the trade and environment problems of the Indian economy. In view of the importance given to environment in the Doha Development Agenda (DDA) and the post Doha work programme in the light of the failure of Cancun conference at the WTO, this book would be most useful to negotiators, the civil society and to other interested groups including academia and researchers.

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THE HELL FIRE

Oh! The scores of human figures;
caged, slated and clogged against each other,
like the litters of waste in a sack.

The odorous stifling bodies,
crushing ,knocking and deporting each other,
like the frenzied camels;
tumbling the baby begs,
in a hysterical race,
in lands of Arabia.

The faces carry the eternal curse, the
eyes wear the punished guilt, the tongues
display the thorny parch, the legs trot
forever splayed. A hungry race! A thirsty
race!

Eh! Where are the prophets of peace,
the philosophies of the East?
Where do I get the eternal bliss?
No faith calleth me.
No cross bears.
No love holds me in embrace.

The hell fire engulfs me.
Shall dust in me return to dust?
Nay, I shall rise again from the ashes,
To self I retreat.
And in self I shall find,
the abode of reigning peace.

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