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PLEA-BARGAINING & WITNESS PROTECTION: RECOMMENDATIONS, REFORMS AND REFLECTIONS**

* HON'BLE MR. JUSTICE P.P. NAOLEKAR

ABSTRACT

Lack of speedy, expedient justice dispensing system contributes to an increase in criminal activity and to an ever-increasing spiral of cynicism and crime. Inefficient criminal justice delivery mechanism has.a direct impact on the levels of lawlessness in the society. It is the solemn duty of the state to provide a criminal justice system that gives maximum sense of security to the people. Plea bargain could be a very potent factor to expedite and handle the slothful, sluggish and slumbering state of the justice delivery system.

INTRODUCTION

The **aim** of criminal law is to protect the rights of individual and the state against the intentional invasion by others, to protect the weak against the strong, the law abiding against lawless and the peaceful against the violent. It is the solemn duty of the State to protect the life, liberty and property of the citizens, which is enshrined in political-philosophical concept of *Raj Dharma* in Indian jurisprudence and various theories of the *Social Contract* in western world. An excellent criminal justice dispensation system is not only important to maintain the law and orderliness in the society but its efficiency and effectiveness are true reflections of the conditions of society, the civilization and the nation state.

Adapted and edited version of invitation lecture delivered by Hon'ble Justice P. P. Naolekar at National Law University, Jodhpur, on 14th October 2006. * Judge Supreme Court of India.

We all know that there are several hindrances that are thwarting the path of justice in this country. The growing cynicism among the people is apparent as the criminal justice system hobbles along with an appallingly poor conviction rate of about 4% and thousands and thousands of pending criminal cases, a great number of new under-trials languishing in already overcrowded Indian prisons. Noble ideas like equality before the law and equal protection to all appear only a chimera as powerful and influential easily escape from the clutches of law and make a mockery of the rule of law. Cases like *Best Bakery, Priyadarshini Matoo, Jessica Lall and Nitish Katara* are reminiscent of the major loopholes in the criminal justice dispensing system. Lack of speedy, expedient and efficient criminal justice delivery mechanism has a direct impact on the levels of lawlessness in our society. There is not an iota of doubt that such deficiencies in the system contribute to an increase in criminal activity and to an ever-increasing spiral of cynicism and crime. As mentioned before, it is the solemn duty of the state to provide a criminal justice system that gives maximum sense of security to the people.

PROBLEM OF DELAYS

The criminal justice delivery system of this nation has been mired by the perennial problem of delays. Given the kind of delays, which afflict the system, the pursuit of justice is often a painful tedious process that results in the unfortunate feeling that it is a sheer waste of time. Several Judges, Scholars and Media personalities have expressed serious concerns about the slothful, sluggish and slumbering state of the justice delivery system. Justice Krishna Iyer while dealing with a bail petition in *Babu Singh v. State of Uttar Pradesh*[1] remarked:

> *"Our justice system even in grave cases, suffers from slow motion syndrome which is lethal to fair trial whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent*

'(1978) 1 SCC 579

> *being absolved from the inordinate ordeal of criminal proceedings. "*

In *Hussainara Khatoon & Others (I) v. Home Secretary, State of Bihar*[2] with reference to the under-trial persons, it was observed:

> *"...No procedure which does not ensure a reasonably quick trial can be regarded as "reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trail, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. "*

Despite judicial pronouncements, inordinate delay and expensive litigation are still haunting the justice delivery system. However, as witnessed by us, mere judicial directives to ensure speedy trial in cases are not at all a complete solution to this multifaceted problem because the role of the judiciary is important but limited as it is a law-interpreting agency, which has a limited power under our constitutional set-up.

Any person who is associated with the criminal justice delivery mechanism is aware of the fact that in most of the cases, the prosecutions' version of cases lack desired sting. Due to prolonged and faulty investigation, lack of scientific and technical expertise on the part of the police department, accused acquires an upper hand over the prosecution.

The prosecutor is expected to marshal the facts and place the evidence before the court in a systematic manner so as to recreate the scene of crime before the court with a view to fix the identity and culpability of offender. If the prosecutor fails to place the evidence before the court in correct perspective, there is always a possibility that culprit will go scot-free with a benefit of doubt. The poor quality and incapability of the prosecutors set a stage for acquittal of majority of accused persons. Retracting, contradicting or changing versions of the witnesses, who play in the hands of the powerful, influential and rich culprits, are other

[2](1980) 1 SCC 81

major troubles, which vitiate the entire scheme of fair trial. This strikes at the very root of the system itself and is one of the main reasons for the delay and poor conviction rate. The judges, after hearing arguments of both sides reach a conclusion, which also depend upon factors like evidence on record, deposition of the witnesses and on how forcefully the prosecution has presented its case following investigations. But, being one of the most important components and actor of the justice dispensation mechanism, the courts cannot avoid their responsibility for the failure of this mechanism.

If a criminal court is to be an effective instrument in dispensing justice, the judge must cease to be a spectatoi by becoming a participant in the trial with active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. In this regard the observations of the Supreme Court in *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others*[3] are relevant:

> *"When investigating agency helps the accused, the witnesses are threatened to depose falsely and prosecutor acts in a manner as if he was defending the accused, and the Court was acting merely as an onlooker and there is no fair trial at all, justice becomes the victim. "*

It is easy to be cynical and find fault with the system; what is difficult is to come out,with practical and workable solutions. In **this regard,** several Academicians, Judges and Commissions had expressed the need of some pragmatic, practical and flexible approach for a country like ours. In the above backdrop the recommendations of the ***V.S. Malimath Committee on Reforms of Criminal Justice System*** in 2003 were noteworthy which made 158 recommendations with regard to the police, prosecution, the judiciary and criminal jurisprudence and tried to shift the focus on the victim and pointed out the loopholes in the present system regarding the burden of proof, which are weighed heavily in favour of the accused persons.

[3](2004) 4 SCC 158

PLEA BARGAINING AS A CONCEPT

With thousands and thousands of pending cases, the present situation warrants some compromises and short-cuts, which are fair, just and reasonable even if not totally in tune with conventional notions of morality and standards of public behaviour. To illustrate this point, I would like to take an example from the 142nd report titled *Confessional treatment for offenders who on their own initiative choose to plead guilty without any bargaining* submitted by 12th Law Commission of India. The report mentions about a criminal trial that culminated in an acquittal of the accused after 33 years. The accused were tried for alleged misappropriation of Rs. 12, 000, Rs. 4,000 and Rs. 2000. The Commission calculated that expenditure of about 1 crore was incurred from the public exchequer to conclude this lengthy and lethargic trial. In the light of this and considering the Working Paper No. 60 of the Canadian Law Commission of 1989 which recommended for the introduction of the plea-bargaining in Canada as *'plea discussions and agreements',* the 12th Law Commission recommended that concept of plea bargaining must be introduced in India. It was suggested that the procedure would end uncertainty of the outcome of the trial, save the cost of litigation and also relieve the anxiety.

The \4th Law Commission in its 154-/! report also made recommendation regarding introduction of the procedure of 'plea bargaining' for the offences, which were punishable with imprisonment for les* than seven years and/or fine including the offences, covered by section 320 of the Code of Criminal Procedure. It was clarified that plea-bargaining can also be in respect of nature and gravity of offences as well as to the quantum of punishment.

It was also suggested that the process of plea-bargaining shall be set in motion after issue of process and when the accused person appears, either on a written application by the accused to the court or *suo motto* by the court. In 2001, the 178th report of the Law Commission once again reminded that the recommendations made in 154th report regarding plea-bargaining should be made effective. Justice V.S. Malimath Committee Report on Reforms of Criminal Justice System-2003 had also endorsed the Law

Commission's advice to incorporate plea-bargaining in the Code of Criminal Procedure, 1973 (Cr.P.C).

I am of the firm opinion that revamping the criminal justice system is a holistic exercise and requires wide-ranging measures, which include formulating changes in laws, streamlining procedures and developing new techniques for the management of the crime problem. In this regard, introduction of the *Plea-bargaining,* as an innovative procedure to avoid expensive, unpredictable trials and potential for harassment in all small and medium crimes where the harm to society is relatively small, is the latest step taken by legislature through the Code of Criminal Procedure Amendment Act, 2005.

Plea-bargaining or mutually satisfactory disposition in criminal cases in its general sense refers to pre-trial negotiations between the defendant (accused) through his/her counsel and the prosecution (complainant), during which the accused agrees to plead guilty in exchange for certain concessions by the prosecutor. Thus, plea-bargaining can be described as an agreement by an accused to plead guilty in return for the promise of some benefit.

The concept of plea-bargaining has been in vogue in several western countries for a long period and in the United States of America for a century, where over 95% of criminal cases never go to trial because of the bargaining struck between the prosecution and the accused's attorney well before the trial commences. So much so in American Criminal Justice, plea-bargaining is the norm rathe? than an exception. This approach is not wholly new even in Indian system as the technique was in use at unofficial levels for example, in accident compensation cases as section 208 (1) of the Motor Vehicles Act, 1988 and in Lok Adalats with some minor variations.

As mentioned above, the concept is not totally alien to the Indian criminal jurisprudence, but it is definitely a distinct shift in the criminal jurisprudence of this nation as evident from a number of decisions of the Supreme Court of India where it was observed that plea-bargaining is not recognised in Indian criminal jurisprudence. *Madan Lai Ram Chandra Daga v. State of*

Maharashtra is one of the earliest Supreme Court cases, where Hiddayatullah J. opined:

> *"If the court thinks that leniency can he shown on the facts of the case it may impose a lighter sentence. But the court should never be a party to a bargain by which money is recovered for the complainant through their agency. "*

It is very interesting to note that the observations of Krishna Iyer J. in *Murlidhar Meghraj Loya etc. v. State of Maharashtra etc*\, a case involving offences of food adulteration under Prevention of Food Adulteration Act, 1954 not only reflects the position of Indian law contradistinguished from American law in 1976 but also stands true for the current amendments as *socio-economic offences* are not covered under the present provisions dealing with the plea-bargaining. The relevant observations of the Court were as follows:

> " *...Many economic offenders resort to practices the Americans call 'plea bargaining', 'plea negotiation'., 'trading out' and 'compromise in criminal cases ' and the trial magistrate drowned by a docket burden nods assent to the sub rosa ante-room settlement. The businessman culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a prison cell, ^trades out' of the situation, the bargain being a plea of guilt, coupled with a promise of 'no jail'. These advance arrangements please everyone except the distant victim, the silent society. The prosecutor is relieved of the long process of proof; legal technicalities and long arguments, punctuated by revisional+excursions to higher courts, the court sighs relief that its ordeal, surrounded by a crowd of papers and persons, is avoided by one case less and the accused is happy that even if legalistic battles might have held out some astrological hope of abstract acquittal in the expensive hierarchy of the justice-system he is free early in the day to pursue his old profession. It is idle to*

[4](1968) 3 SCR 34
[5](1976) 3 SCC 684

speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food offences, this practice intrudes on society's interest by opposing society's decision expressed through predetermined legislative fixation of minimum sentences and by subtly subverting the mandate of the law."

Similarly, in *Kachhia Patel Shantilal Koderlal v. State of Gujarat and Another'* where as the result of the plea-bargaining between the accused of the food adulteration offences, prosecution and the magistrate, the accused was let off with a nominal sentence of imprisonment till rising of the Court and a small fine, Bhagwati J., observed that:

"Such conviction based on the plea of guilty entered by the appellant as a result of plea-bargaining cannot be sustained. It is to our mind contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty on an allurement being held out to him that if he enters a plea of guilty, he will be let off very lightly... It would have the effect of polluting the pure fount of justice, because it might induce an innocent accused to plead guilty to suffer a light and inconsequential punishment rather than go through a long and arduous criminal trial which, having regard to our cumbrous and unsatisfactory system of administration of justice, is not only long drawn out and ruinous in tbrms of time and money, but also uncertain and unpredictable in its result and the judge also might be likely to be deflected from the path of duty to do justice and he might either convict an innocent accused by accepting the plea of guilty or let off a guilty accused with a light sentence, thus, subverting the process of law and frustrating the social objective and purpose of the anti-adulteration statute. This practice would also tend to encourage corruption and collusion and as a

[6]AIR 1980 SC 854

> *direct consequence, contribute to the lowering of the standard of justice."*

The Supreme Court in *State of Uttar Pradesh v. Chandrika* pointed out that legislative mandate regarding the negotiation of the criminal offences is limited as per Section 320 Cr.P.C, which provided for compounding of certain offences with the permission of the court and certain others even without permission of the court. It was also stated that neither the state nor the public prosecutor nor even the Judge could bargain that evidence would not be led or appreciated in consideration of getting flee bite sentence by pleading guilty as concept of 'plea bargaining' is not recognised and is against public policy under our criminal justice system.

It was also pointed out that the cautious approach was on behalf of the courts rather than influenced by the plea of guilt by the accused person:

> *"If accused confesses his guilt, appropriate sentence is required to be imposed. Further, the approach of the court in appeal or revisions should be to find out whether the accused is guilty or not on the basis of evidence on record. If he is guilty, appropriate sentence is required to be imposed or maintained. If the appellant or his counsel submits that he is not challenging the order of conviction, as there is sufficient evidence to connect the accused with the crime, then also the court's conscience must be satisfied before passing final order that the said concession is based on the evidence on record. In such cases, sentence commensurate with the crime committed by the accused is required to be imposed. Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty sentence be reduced. "*

"AIR 2000 SC 164

In *Harbhajan Singh* v. *State of Uttar Pradesh**,* The Supreme Court once again reiterated the deprecation of plea-bargaining. However, we must understand that these decisions were delivered in accordance with and in the light of the then existing legislation where concept of plea-bargaining was absent. More importantly, these observations are still relevant as current provisions put duty on the court to see that plea-bargaining do not result in trade of crimes.

SALIENT FEATURES OF PLEA BARGAINING

The salient features of the Code of Criminal Procedure, 1973 (Cr.P.C) amendment of 2006 which added a new Chapter, i.e. Chapter XXIA to insert Sections 265 A to L, are:

1. The plea-bargaining is applicable only in respect of those offences for which punishment of imprisonment is up to a period of 7 years.

2. It does not apply where offences that affect the socioeconomic condition of the country or has been committed against a woman or a child below the age of 14 years.

3. The application for plea-bargaining should be filed by the accused voluntarily.

4. A person accused of an offence may file an application for plea-bargaining in the court in which such offence is pending for trial. '*

5. Any court had not previously convicted the accused in any case, in which he has been charged with the same offence.

6. Once the court is convinced that the accused is participating in the plea-bargain voluntarily, it will allow time to both parties to reach mutually satisfactory disposition, which may include giving to the victim by the accused, compensation and other expenses incurred during the case.

'(2002) 9 SCC 407

7. The court may release the accused on probation if the law allows for it; if a minimum sentence is provided for the offence committed, the accused may be sentenced to half of such minimum punishment and if the offence committed does not fall within the scope of the above, then the accused may be sentenced to one-fourth of the punishment provided or extendable for such offence.

8. The statement or facts stated by an accused in an application for plea-bargaining shall not be used for any other purpose other than for plea-bargaining.

9. The benefit under Section 428 Cr.P.C of setting off the period of detention undergone by the accused against the sentence of imprisonment is permissible in plea bargained settlements as well.

10. The court must deliver judgment in open court according to the terms of the mutually agreed disposition and formulas prescribed for sentencing including victim compensation.

11. The judgment delivered by the court in the case of plea-bargaining shall be final and no appeal [except under Article 136 and writ petitions under Articles 226 and 227 of the Constitution of India] shall lie in any court against such judgment.

As mentioned above, the concept of plea-bargaining is widely popular and successful in the United States. The role of the judge under plea-bargaining in the United States is relatively insignificant and is limited to the observance of constitutional procedures. However, such a liberal approach towards the crimes and criminals is not a blessing in all the cases as it does make the correctional goal of punishment meaningless and promotes the tendency to overcharge in the hope of strengthening the prosecution side during negotiations and has been criticised by several jurists as *purchased pleas of* guilt.

In this regard, the provisions of the Indian Code have provided for significant and positive role to the courts and taken care to ensure that unfair, unjustified and involuntary elements of plea-bargaining do not vitiate the process. The courts have been given enough power to prevent such unnecessary developments. The responsibility bestowed on the courts is correct in light of the fact that the societal structure of India is quite different from the United States where majority of population is literate and aware of their rights.

Thus, the plea-bargaining as introduced under the Code of Criminal Procedure is a device to ensure that victims receive acceptable justice in reasonable time without risking the prospects of hostile witnesses, inordinate delay and non-affordable costs. Moreover, with the change in the focus of the criminal justice towards the welfare of the victim, the concept of plea-bargaining can add significantly to the revolutionary process evolved by the Indian courts of awarding compensatory remedies not only in terms of money but also in terms of other appropriate relief and remedies as in cases like *Nilabati Behera v. State of Or is s a*[9], and *Chairman, Railway Board v. Chandrima Das* . While it does help the accused get away with lenient punishments avoiding the ignominy of adverse publicity of prolonged trials and help the police and the prosecution get higher rates of conviction with lesser use of time and resources leaving more time to tackle serious crimes.

It helps to ensure that hard crknes are not rewarded with soft justice because of the pressure of work of the criminal justice apparatus. Finally, it reduces arrears and pendency in the system by diverting a large number of crimes for alternative settlement without trial under control of the court to ensure fairness in the process and avoid fraud and coercion from either side.

PROTECTION OF WITNESSES

As mentioned earlier, another important concern that has surfaced as the cornerstone of the criminal justice system due to the

"(1993) 2 SCC 746
[10](2000) 2 SCC 465

appalling failure of the prosecution sides in sensational cases like *Best Bakery* and *Jessica hall Murder Case is* the issue of ' *Witness Protection'.* The importance of the witnesses to the trial process could be inferred from the fact that an eminent thinker Bentham once mentioned that witnesses are the eyes and ears of the justice. Highlighting the necessity of people's assistance in detection of crime the Supreme Court observed in *State of Gujarat v. Anirudh Singh"* that:

> *"// is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence. "*

Once again in *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others*[12], the Supreme Court identified the witnesses' important position with reference to the fair trail:

> *"Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."*

However, shifting testimonies by the witness due to factors like the witness being not in a position for reasons beyond control to speak the truth in .the court either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted or due to negligence or ignorance is such a pervasive problem that has undermined public confidence in the criminal justice system and contributed to an abysmal rate of convictions in India.

In the case of *National Human Rights Commission v. State of Gujarat & Others*[13], the Supreme Court observed that:

"(1997)6 SCC 514
[12](2004)4 SCC 158
[13]2003 (9) SCALE 329

> 'Wo *law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses. "*

In *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others*[14], the apex court observed that state has a definite role to play in protecting the witnesses. It has also pointed out that at least in sensitive cases, where accused persons, are closely connected with the powerful, having political patronage could wield muscle and money power, to avert fair trial, full protection to witnesses deposing before them must be provided by the state:

> *"Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to mockery.... As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. "*

And the Court further reminded the legislature about the urgency of the issue:

> *"Legislative measures to emphasize prohibition against tampering with witness, victim or informants have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with . "*

The above-mentioned observations were reiterated in *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others*[6]. Recognizing the immediate importance of the subject and taking the account of the observations of the Supreme Court in some of the above-mentioned cases, 17th Law Commission has taken up the subject *suo motto* and its 198th report deals extensively with *'Witness*

Supra note 12 para 41. [15]
Ibid., para 42. [6](2006) 3 SCC 374

Identity Protection' and *'Witness protection Programmes'*. The report mentions:

> *"The right of the accused for an open trial in his or her presence, being not absolute, the law has to balance that right of the accused as against the need for fair administration of justice in which the victims and witness depose without fear or danger of their lives or property or those of their close relatives. "*

It is important to note that the apex court has come with similar logic in *People's Union for Civil Liberties and Another v. Union of India*[17], while upholding the validity of section 30 of the special law, the Prevention of Terrorism Act, 2002 which gave powers to the special courts to hold proceedings *in camera* and to taking measures for keeping the identity of witness secret. The relevant observation of the Supreme Court was:

> " *The need for the existence and exercise of power to grant protection to a witness and preserve his or her anonymity in a criminal trial has been universally recognised. Provisions of such nature have been enacted to protect the life and liberty of the person who is able and willing to give evidence in support of the prosecution in grave criminal cases. A provision of this nature should not be looked at merely from the angle of protection of the witness whose life may be in danger if his or her identity is disclosed but also in the interest of the community to ensure that heinous offences like terrorist acts are effectively prosecuted and punished. It is a notorious fact that a witness who gives evidence, which is unfavourable to an accused in a trial for terrorist offence, would expose himself to severe reprisals, which could result in death or severe bodily injury to him or to his family members. If such witnesses are not given appropriate protection, they would not come forward to give evidence and there would be no effective prosecution of terrorist offences and the entire object of the enactment may possibly be frustrated, under compelling circumstances this can be dispensed*

"(2004) 9 SCC 580

with by evolving such other mechanism, which complies with natural justice and thus ensures a fair trial. "

PROTECTION OF WITNESSES **IN OTHER JURISDICTIONS**

'Witness Identity Protection' statutes as well as 'Witness Protection Programmes' have come into being in a number of countries. Different countries have variously addressed the conflict between the need to protect the identity of witnesses and the rights of the accused. While in countries such as Australia, courts have ruled in favour of the inherent power of courts to grant 'anonymity' to witnesses, the courts in Canada applied the principle that the law recognizes informer's privilege to anonymity, which is subject to the principle of 'innocence at stake' exception.

The Canadian Supreme Court in *R. v. Mentuck*[18]*, where* the accused was charged with second-degree murder, allowed the anonymity as to the identity of undercover police officers to prevent 'serious risk' to the 'proper administration of justice'. South African Courts have also proceeded on the case-to-case basis and tried to balance the conflicting interests to ensure proper administration of justice. In New Zealand, while courts were reluctant to accept any inherent power to accept anonymity to witnesses, the legislature intervened in 1986 to protect 'undercover' police officers and again in 1997, the law was widened to give more power to the courts to protect other types of witnesses. *

The courts in United States have held that the constitutional protection in the favour of the right to confrontation by way of cross examination, as provided in the Sixth Amendment of the Constitution, was not absolute and could be restricted for the purpose of protecting the witness identity by using a video-link and permitting cross examination by shielding the witness from the accused though not from his lawyers or court or the jury. In Germany, anonymous witnesses are not accepted in cases of offences that cause damage to individuals, but are accepted only in cases of serious organized crimes.

'2001 (3) SCR 442

Australia has a comprehensive statutory framework that deals with witness protection. Many of these Acts like the Witness Protection Act, 1996 (Australian Capital Territory), the Witness Protection Regulation 2001 (Queensland) and the Witness Protection Act, 2000 (Tasmania) do not deal with the anonymity or the screening aspect. In South Africa, the Witness Protection Act, 1998 is applicable for the purpose of protection of witnesses and an office known as Office for Witness Protection has been established.

Similarly, countries like Portugal, Canada, Hong Kong, Czechoslovakia, France, Japan and Netherlands have either enacted the Special Acts or amended their criminal procedure to accommodate the provisions to protect the witnesses. Countries like Germany and Italy have witness protection programmes which are very successful.

The Witness Security Reform Act, 1984 of United States provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organised criminal activity or other serious offence. Protection may also be provided to the immediate family of, or a person closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

The importance *of protection of witnesses has also been recognized in international law. Article 24 of the ***United Nations Convention Against Transnational Organised*** **Crime** specifically puts an obligation on the signatory state to take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by the Convention. The ***International Criminal Tribunals for Rwanda and Yugoslavia*** also formulated rules for protection of victims and witnesses.

It is not the first occasion when Indian Law Commission report has talked about the witnesses and problems faced by the criminal courts on account of their flip-flop. The 154th Report of the Law

Commission, 1996 contained a chapter on *Protection and facilities to Witnesses.* The recommendations mostly related to allowances and facilities to be made available for the witnesses. However, one of the recommendations was:

> *"Witnesses should be protected from the wrath of the accused in any eventuality. "*

However, no suggestion regarding any measures for the physical protection of witnesses was made. It was suggested that it should be made mandatory for the investigating officer to get statements of all material witnesses questioned by him, during investigation, recorded on oath by the Magistrate.

The 178th Report of Law Commission, again, referred to the fact of witnesses turning hostile, and the recommendations were made to prevent witnesses from turning hostile and suggested that in all offences punishable with ten years of imprisonment or more including offences for which death sentence may be given, the police may have statements of all important witnesses recorded under Section 164, by the magistrate. V . S . Malimath Committee on Reforms of Criminal Justice System recommended that:

> "81st recommendation: A law *should be enacted for giving protection to the witnesses and their family members on the lines of the laws in US and other countries."* *

'*' This Committee also focused on the problem of perjury and its 87"[1] recommendation dealt with it.

It has been advocated by some of the jurists and judges that more stringent and swift action for perjury is one antidote to stop the hostile witnesses. Section 344 of the Cr.P.C confers summary powers on a sessions Judge and a magistrate to try and convict a witness for knowingly or willingly giving false evidence before him. Courts could also ignore those hostile witnesses who are either unimportant or are palpably speaking falsehood as would appear from their demeanour in court. Thus, there is no legal handicap here for a judicial officer to proceed against one committing perjury. Furthermore, the legislature has recently

introduced the Code of Criminal Procedure (Amendment) Bill 2006 which provides that a witness retracting, contradicting or changing versions may be tried summarily for giving or fabricating false evidence and sentenced to at least three months imprisonment which may be extended to two years, and imposed fine.

However, the purpose of submitting the 198th report by the 17th Law Commission was to initiate public discussion before drafting the actual structure of the witness protection programme and the legislative scheme on witness anonymity.

There is no doubt about the fact that successful law enforcement is predicated on the willingness of individuals to provide information and tender evidence. Experience around the world has shown that the extent of such willingness depends on the capacity of the state to protect people from threats and ensure their safety. In my opinion, the stringent and swift action for perjury to stop the hostile witnesses will be effective and more justified only when the other aspect of the physical and mental vulnerability of the witness and taking care of his or her welfare in various respects which call for the physical protection of the witness at all stages of the criminal justice process till the conclusion of the case is supported by the introduction of witness protection programmes.

CONCLUSION

To conclude, I-^vould like to mention that all of the principles of rule of law and due process are closely linked to protection of the rights of citizens. It has to be unambiguously understood that a trial, which is primarily aimed at ascertaining truth, has to be fair to all concerned. There can be no analytical, all comprehensive, or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with always a focus on ultimate object in mind. It will not be correct to say that it is only the accused that must be fairly dealt with. The needs of the society at large and the victims or their family members and relatives are equally important. Each one has an inbuilt right to be dealt with fairly in a criminal trial.

Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Hence, in my opinion there is a need to balance the interests of the accused, victim, witnesses, civil-society and state, as this is the primary purpose of the criminal justice delivery system. I would also like to mention that mere reforms, recommendations and change in the procedural and substantive laws are not the essentials for achieving the noble goal of fair trail for all. It is a noble idea, which must be protected and preserved in the minds of the people who are responsible for delivering justice to the citizens.

THE SECURITY ASSESSMENT PROCESS AND STRUCTURE IN INDIA: LACUNAE AND IMPERATIVES

"DR. ALOK KUMAR GUPTA

ABSTRACT

Nation-state is the highest unit that ensures the security of individuals and the other communities subsumed in it. In spite of considerable growth of internationalism, the nation-state continues to be the most decisive socio-political organisation so far. All states seek to maximize their power and advance their self-interest, often at the expense of others. In general, states seem to have been unable to coexist in harmony, since the actions of one state in pursuit of its own national security may create insecurity in others. It is the underlying condition of anarchy that gives rise to the security policies of nations or states. Security in an anarchic world of sovereign states is, in the final analysis, the responsibility of individual states. Thus need for nations to depend upon self-help for security and exercise their ingenuity to optimize it within the means available to each is recognised. In the Indian context scrutiny of the security assessment structures and procedures, and its evolution in the post-independence era is needed in order to underpin the drawbacks '*and the suggestions that have arisen from different sources.

INTRODUCTION

Security assessment is of utmost importance for formulating a nation's security policy and effectively defending and enhancing the core national values. Greater the degree of accuracy about the existing and potential threats to the security of a country, more the possibility of assessments matching reality, as well as the optimality of the response. Defence preparedness and arms

* Assistant Professor & Dean, Faculty of Policy Science, National Law University, Jodhpur

acquisition apart from other means is an important instrument of policy response to meet the challenges to the security of a country. Threat perceptions and security assessment arising out of adversary's intentions and capabilities take into consideration real as well as potential threats. The perception of threats from adversary is influenced by several variables such as psycho-cultural, historical experience, geo-strategic environment, capabilities and intentions, domestic vulnerabilities and internal political dynamics of its own as well as its adversaries and also the security perceptions of its adversaries.

A number of factors are prerequisite to the process of security assessment, which in turn ensures adequate policy response. The policy response in turn leads to adequate defence preparedness and arms acquisition being one of the important means of ensuring both an offensive and defensive defence. Three different agencies or institutions perform these three different tasks of security assessment, formulation of responses, and purchase of arms. People from academics, politics and from armed forces man these institutions. Their individual task and the task of coordinating their activities among themselves are mired with numerous complexities. This is because assessing the threat to the security of a country is not complete in itself, as it also requires to be passed on to the institutions, which are supposed to decide the policy options that are available to them. Then the policies formulated are required to be put into practice for which both diplomatic and military means are adopted.

While setting out to anafyse a country's security problems, the security planners often begin initially with the identification of threats, emanating from external or internal sources. Later they move on to the evaluation of the manner and the intensity of the perceived threats. Comprehensive dossiers on actual and potential adversaries are carefully prepared highlighting the adversaries' capabilities and intentions. The justifications to maintain a certain level of force posture by a country is always based on two factors: first the perceived assessment of the adversary's intentions; and second the country's security requirements as

assessed by the planners from both the military and the government.[1]

THE PROCESS OF SECURITY ASSESSMENT IN INDIA

During the British rule, strategic decisions were jointly made by India and Whitehall. The Viceroy made the more important decisions and referred them to London. In 1938, just prior to World War II, the civil government of India and its defence was vested in the Governor-General-in-Council, subject to the direction and control of the Secretary of State for India. The Commander-in-Chief (C-in-C) was the administrative and executive head of all the three armed forces and the supreme commander of the Defence Forces in India, assisted by a Finance member.[2]

When the interim government was formed on 2 September 1946, the Commander-in-Chief was removed from the Governor General's Executive Council, and replaced by a civilian defence member, Sardar Baldev Singh. A Defence Member's Committee was set up, with the C-in-C, the Defence Secretary and Financial Adviser as members.

This committee became the Defence Minister's Committee after August 1947, with the Minister of Defence becoming answerable to the elected legislature for his portfolio. Independent commanders were appointed for the three services, now known as Chief of Staff. v

STRATEGIC POLICY FORMULATION: THE DIFFERENT PHASES 1947-1962

To assess India's defence needs post-independence, a Defence Committee of the Cabinet was constituted in September 1947, with the Prime Minister as the Chairman. Its members were the

[1] Lt. Gen. P.N. Kapthapalia, "Indo-Pak Relations: The Concept of National Security", *Indian Defence Review,* January 1989, P.l 13. Also see Arnold L. Horelick, *"Perspectives on the Study of Comparative Military Doctrine",* in Frank B. Horton III *et.al.* eds. *Comparative Defence Policy* (The Johns Hopkins University Press, Baltimore, 1974), Pp. 192-200.

[2] Stephen P. Cohen, *The Indian Army* (Oxford University Press, Bombay, 1971) Pp. 170-71.

Home Minister, the Defence Minister, the External Affairs Minister and the Finance Minister.

The first Prime Minister of India, Jawaharlal Nehru, was a far-sighted statesman, brimming with ideas, but under him formulation of India's foreign policy became a one-man affair. With this start, India could not develop a well-groomed organisation for policy-making *vis-a-vis* the national security problems. A tradition developed of taking ad hoc decisions regarding national security issues.

India's nascent democracy was born through a traumatic partition and religious strife without the economic wherewithal to support itself. The political leadership had many hurdles before it in crisis management since the institutions required to fulfil that responsibility were not in place: the Government had to manage with institutions that had been structured to administer a subject, a colonial entity. Each department analysed its specific crisis areas and planned to resolve those, simultaneously creating a need-based infrastructure.[3] There was no attempt to make a coherent integrated national policy related to security assessment. This meant unequal attention to different aspects of nation building, and growing institutional bias within departments that had created their own empires. The national security objective was confined to straightforward defence commitments aimed at deterring aggression against territorial integrity.[4]

When the Pakistan Army-assisted tribal invasion of Kashmir took place in October 1947, k was treated as a foreign policy matter rather than a national security matter. This matter was referred to the United Nations without considering its pros and cons and the strategic interests of the permanent members of the UN Security Council. A ceasefire was ordered in December 1948, even though military advice was available that the Indian Armed Forces were

[3] Lt. Gen. K.K. Hazari (Retd.), "National Interests: Formulation of National Policy and Strategic Concepts", *Indian Defence Review,* April 1994, P. 15. See also Government of India, *Standing Committee on Defence, 1995-96,* 6th Report (Lok Sabha, New Delhi, March 1996), Pp. 1-10.
[4] *Ibid.*

in a position to liberate a major portion of the territory of Jammu and Kashmir from the Pakistani Army.[5]

Similarly, recognition of Chinese suzerainty and sovereignty over Tibet was given without discussing the advantages of maintaining a buffer zone between two large nations and without obtaining a *quid pro quo* regarding the demarcation of the borders between India and Tibet. The British had also accepted China's sovereignty over Tibet, but there was a major difference: during the British regime, there had been a clear understanding that Chinese troops would remain in the northern half of Tibet and they would not be deployed on the Indo-Tibetan border.[6]

When the Chinese incursions from Tibet started in 1951, the first attempt was to keep them secret. The Chinese occupied and consolidated the disputed area by 1959. No serious attempt was made to evolve a national policy on how to deal with this delicate situation, which had suddenly turned India's northern borders into a military sensitive area. Nor was any attempt made to effectively police and safeguard these borders. Instead, India indulged in a game of one-upmanship in establishing weak and non-defensible piquet and outposts against sound military advice.[7] In fact, it was not treated as a serious military problem until the Chinese decided to precipitate the issue by a large-scale attack in October 1962.[8]

1962-1970

National strategy for ensuring security, by its very definition, lies in the domain of th^e political executive. The form, shape and nature of the organisation adopted by the political executive in a parliamentary democracy like India inevitably revolve around the Prime Minister, in close consultation with some key Cabinet Ministers—the Ministers of Defence, External Affairs, Home and Finance. The Defence Committee of the Cabinet (DCC)

Vice Admiral N.P. Dutta (Retd.), "Towards a National Security Council", *Indian Defence Review,* July 1990, Pp.140-41. See also Lt. Gen. P.N. Kapthapalia, "Indo-Pak Relations: The Concept of National Security", *Indian Defence Review,* January 1989, Pp.113-18.

[6]Dutta, *ibid.* Kapthapalia, *ibid.* Jasjit Singh, "Higher Defence Organisation in India", *Indian Defence Review,* January 1989, Pp. 73-81. ' Dutta, *ibid.,* Pp.141-42. Jasjit Singh, *ibid. '* Dutta, *ibid.*

performed this function up to 1962; it was then replaced by the Emergency Committee of the Cabinet, to be replaced, further on, by the Cabinet Committee on Political Affairs (CCPA). The CCPA was never intended to study in depth the changing security scenario.

The defence organisation in Britain from which the higher defence organisation in India has been derived was subjected to major changes in 1963 and 1965,[9] but the higher defence organisation in India, including the Ministry of Defence (MoD), has largely continued with its originally conceived structure, with posts being created from time to time[10] and some ancillary organisations established to meet new challenges.

1971-1990

India's success in 1971 was an exception to the rule that well-coordinated security planning can be done only by a properly constituted national security organisation backed by an inter-ministerial staff. The 1971 operations succeeded due to exceptional circumstances. India had a strong Prime Minister, who laid down clearly the objectives to be achieved. Its Chiefs of three Services worked jointly and spelt out clearly the methodologies for achieving the national objective, and had no truck with those who were exponents of quick results within the Government. Policy coordination was achieved in the Prime Minister's office, with able support from the Ministries of Defence, External Affairs, Home and Finance." Even so, India could not repeat its success in the western sector and resolve the ongoing problem there.[12] Admiral E.K. Menon pointed out:

[9] Defence Open Document 84/03, British Ministry of Defence, March 1994, published in *Strategic Digest* (New Delhi), May 1984, Pp. 497-502.

[10] P.R. Chari, "Reforming the Ministry of Defence", *Indian Defence Review,* New Delhi, January 1991, P. 46. In 1999 the Kargil Review Committee in its recommendations noted that the findings bring out many grave deficiencies in India's security management system. The framework Lord Ismay formulated and Lord Mountbatten recommended was accepted by a national leadership unfamiliar with the intricacies of national security management. "There has been very little change over the past 52 years despite the 1962 debacle, the 1965 stalemate and the 1971 victory, the growing nuclear threat, end of the cold war, continuance of proxy war in Kashmir for over a decade and the revolution in military affairs." See *From Surprise to Reckoning: The Kargil Review Committee Report* (Sage Publications, New Delhi, 1999) P. 252.

" Dutta, *ibid.* P. 141.

> *Our national security objective should be clear. What are our vital interests that need to be safeguarded? We knew that we have a problem on the western border. Then why was the operational directive limited to the Bangladesh-related problems in 1971? Why did we fight in the west? And if we fought, why did we stop once the Bangladesh war was over? Why did we not solve the problem then?*[13]

Ad hoc policy-making was also apparent in the induction of the Indian Peace Keeping Force in Sri Lanka in 1987. There was no serious dialogue or analysis of the problem between the Ministries of External Affairs and Defence and the Research and Analysis Wing (RAW). Decisions were taken by the Prime Minister's office based on insufficient analysis of all the relevant factors, such as the nature of the insurgency in north-east Sri Lanka, the insurgents' complete identification with the local population, the terrain, stockpile of arms and their sources of supply, the political fall-out in Sri Lanka due to the introduction of foreign troops, the feasibility of large-scale foreign military assistance to Sri Lanka and establishment of foreign military bases by other powers.[14] The execution of the decision also betrayed further lack of defining objectives and coordination of policy.

In the late 1970s, the Armed Forces set about organizing the defence policy based on long-term goals. This was done through a series of Experts^Committees, set up by individual Service Headquarters, based on security objectives each service had set before itself. In the mid-1980s, the Government brought about certain reforms to bring the entire defence planning structure under a single system. The Defence Planning Staff was instituted with the intention of placing an integrated Defence Budget before the MoD.[15]

[13] Admiral (Retd.) E.K. Menon, during an interview on 24 May 2002.
[14] *Ibid.* See also Jasjit Singh, n. 6.
[15] Lt. Gen. K.K. Hazari (Retd.), "National Interests: Formulation of National Policy and Strategic Concepts", *Indian Defence Review,* April 1994, p. 15. See also Jaswant Singh, *National Security* (Lancer Publishers & United Services Institution of India, New Delhi. 1996) P.ll.

THE 1990S: THE CONSTITUTION OF PARLIAMENTARY COMMITTEES

The cumulative effect of an unbridled propagation of nuclear weapons, dismantling of the familiar bipolar security edifice, the growing propensity for sub-national fissioning, the technological evolution, the emergence of economics as the dominant component of national power and increasing interdependence in global interaction, radically changed the parameters for security planning and management in the 1990s. The army responded by constituting an Experts Committee, the MoD set up the Committee for Defence Expenditure, and Parliament set up the Estimates Committee. The Report of the Estimates Committee was tabled in Parliament and subsequently published during 1992-93, but it did not get any analytical criticism in the media and on the floor of Parliament either through discussion or questions. The Estimates Committee concluded that a need existed for a comprehensive overhaul of the existing structures and systems.[16] During its inquiry the Committee examined:

- methodologies for identification of threats;
- formulation and management of defence policy;
- system for higher direction of defence;
- tasking of the Defence Services;
- decision-making and defence planning;
- the uncertainties*of budgetary support, adequacy of existing force levels and the suitability of the force mix and aid to civil authority.

During the inquiry, the MoD could not convince the Committee that its working was based on a defence policy. One of the Defence Secretaries said that, to the extent that he could venture to make a statement, India's defence policy from 1950 onwards "has basically been a policy to defend our territory, our sovereignty and our freedom and no more than that." The MoD

[16] Lt. Gen. (Retd.) K.K. Hazari, & Brig. (Retd.) Vijai K. Nair, "Higher Defence Planning: The Need for Debate and Reform", *Indian Defence Review,* April 1993, P. 33. See also *Asian Defence Yearbook,* 1999-2000 (Malaysia, 2000) P. 80.

equated Defence Policy to a document called the 'Operational Directive' that "seeks to bring about as clearly as possible, under given circumstances, the threat situation which has been visualized in consultation with all other agencies". In fact, the Defence Secretary issued the document to the three Service Chiefs. For a year or so, comments and perceptions were invited from various agencies and debated, and the new 'Operational Directive' was finalized.[18] The Committee noted, however, that such a document could not be equated with a policy on National Security.

THE EXISTING STRUCTURE FOR SECURITY ASSESSMENT

The Government of India is responsible for ensuring the defence of India in all its aspects. The supreme command of the Armed Forces vests in the President. The responsibility for national defence rests with the Cabinet. This responsibility is discharged through the MoD, which provides the policy framework and wherewithal to the Armed Forces to discharge their responsibilities in the context of the defence of the country. The Raksha Mantri (Defence Minister) is the head of the MoD.[19]

The Defence Secretary functions as head of the Department of Defence and is additionally responsible for coordinating the activities of the three Departments in the Ministry, namely, the Department of Defence Production and Supplies, the Department of Defence Research and Development, and the Finance Division of the MoD. The principal functions of the Departments in the MoD are as follow?:[20]

1. The Department of Defence deals with the three Services and with inter-service organisations. It is also responsible for the Defence Budget, establishment matters, defence policy, matters relating to Parliament, defence cooperation with foreign countries and coordination of all activities.

[17] Government of India, *Nineteenth Report-Estimates Committee* (1992-93) P. 3.
[18] *Ibid.*
[19] Ministry of Defence, Government of India, *Annual Report,* Year 2001-2002, P. 15.
[20] *Ibid.*

2. The Department of Defence Production and Supplies deals with matters pertaining to defence production, indigenization of imported stores, equipment and spares, planning and control of departmental production units of the Ordnance Factory Board and for defence public sector undertakings (DPSUs).

3. The Department of Defence Research and Development is headed by the Scientific Adviser to the Defence Minister. Its function is to advise the Government on scientific aspects of military equipment and logistics and the formulation of research, design and development plans for equipment used by the Services.

4. The Finance Division of the MoD is tasked with exercising financial control over proposals involving expenditure from the Defence Budget, and internal audit and accounting of defence expenditure. In the latter tasks, he is assisted by the Controller* General of Defence Accounts (CGDA).

All decisions pertaining to the defence and security of India are taken by two committees of the Union Cabinet, both of which are chaired by the Prime Minister: the Cabinet Committee on Security (CCS) and the Cabinet Committee on Political Affairs (CCPA).[21]

INTELLIGENCE ORGANISATIONS IN SECURITY ASSESSMENT

Intelligence is a first line of defence in peace, and a force multiplier in war. Developed countries accord it a place of honour in their state apparatus. Intelligence implies evaluated information gathered through various means, both overt and

[21] After a number of reorganisations and changes of name, the Defence Committee of the Cabinet (DCC) was redesignated as the Cabinet Committee on Political Affairs (CCPA) in 1971. The CCPA is an omnibus policy-making body concerned with the entire range of political and security issues. It is headed by the Prime Minister and includes the Ministers of Defence, Home Affairs, Finance and External Affairs. Other senior ministers are invited to participate from time to time. Direct military input to the Committee has been diluted by the exclusion of the three service chiefs, who attend only when invited. See *Asian Defence Yearbook,* 1999-2000 (Malaysia: 2000) P.79. Ravinder Pal Singh (ed.), *Arms Procurement and Decision Making, Volume I,* (SIPRI/Oxford University Press, Sweden, 1998) P.51.

covert, by the collection agencies so chartered. Evaluated bits of intelligence concerning different human and national endeavours are meshed to form an intelligence mosaic, which helps analysts and experts to assess likely short and long-term trends both at home and abroad.[22] Short and long-term intelligence assessments, perspectives and trends are essential for political decision-makers and policy planners for sound and timely decision making.[23]

In almost all countries, one intelligence agency is chartered to collect external intelligence on political, economic and technological trends and the geo-strategic military capability of present or potential adversaries, and another independent agency has the task of collecting intelligence on internal developments. A number of other ministries and departments of the central government also engage themselves in collecting intelligence related to their day-to-day functioning.

In India, RAW is entrusted with the collection of external intelligence and the Intelligence Bureau (IB) with the collection of internal intelligence. The MEA, Border Security Force, the Department of Revenue Intelligence and some other organisations also collect information relevant to themselves.[24] Each service of the Armed Forces has its relatively small intelligence set-up, which serve as partial increments to RAW, in so far as intelligence on defence matters are concerned.[25] Intelligence collected by RAW, the IB, the Armed Forces and other agencies is provided to a central body called the Joint Intelligence Committee (JIC) fof detailed analysis and final dissemination in the form of national intelligence assessment and estimates to the Cabinet, the Prime Minister's office, the Ministries and

^Maj Gen. (Retd.) M.L. Popli, "National Intelligence Assessments and Estimates: Whither our Joint Intelligence Committee?" *Indian Defence Review,* October 1991, P. 23. See also Jaswant Singh, n. 15.

[23]P.R. Chari, "Defence Policy Formulation: The Indian Experience", *Indian Defence Review,* vol.11, no.l, January-March 1996. Popli, n. 24. See also Lt. Gen. Y.M. Bammi, *Kargil: The Impregnable Conquered* (Gorkha Publishers, New Delhi, 2002) P. 120-22.

[24]P.V.R. Rao, "India's Defence Policy and Organisation since Independence, USI National Security Lecture (United Services Institution of India, New Delhi, 1977) P. 32. Popli, *ibid.* Bammi, *ibid.* [25]Popli, *ibid.* Bammi, *ibid.*

Departments of the Government of India, and the Service Chiefs and the Armed Forces.[26]

Soon after independence, the Government of India created the JIC as a sub-committee of the Chiefs of Staff Committee. Its composition in terms of institutional representation was similar to its present composition, except that the part-time chairman was a Joint Secretary from the MEA, while the Deputy (military) came from the military wing of the Cabinet Secretariat. A service officer served as the Secretary.[27] The JIC was then entrusted with carrying out assessments and bringing these to the notice of the Chiefs of Staff Committee and also to the Defence Committee of the Cabinet. As a body it did not meet for long periods of time and was never pulled up for its lapses.

According to K. Subrahmanyam, one-time JIC Chairman, both the senior civilian and military bureaucracy had abdicated their responsibilities and, consequently, the only articulate view was that of B.N. Mullick, who held the centre stage as the one-man intelligence system during the days of Nehru.[29] During the first 13 years of its existence the JIC could not produce any worthwhile assessments. The Chiefs of Staff hardly took any interest in building up and strengthening it as an institution of critical importance to the Armed Forces.[30] On the other hand, in neighbouring Pakistan, the government created its own external intelligence agency and assessments system under the close supervision of British service officers.[31]

Following the 1962 debacle and the outcry regarding the failure of our intelligence system, the JIC was placed under the Cabinet Secretariat. Later, this appointment was upgraded to a full-time Chairman of the level of Additional Secretary, with a Brigadier or an officer of equivalent rank from the other two services as its full-time secretary.[32] Though it was specified that the Chairman and the Secretary of the JIC should have an intelligence

[26]V.P. Malik, "Defence Planning System in India", *Amrit Bazar Patrika* (Calcutta), 19 and 21 December 1993. Popli, *ibid.,* Bammi, *ibid.*
[27] Chari, n. 25. Popli, *ibid.,* P. 25. Bammi, *ibid.*
[28] P.V.R. Rao, n. 26. Popli, *ibid.* Bammi, *ibid.*
[29] Malik, n. 28. Popli, *ibid.*
[30] P.V.R. Rao, n. 26. Popli, *ibid.* Chari, n. 25.
[31] P.V.R. Rao, *ibid.* Popli, *ibid.*
[32] Popli, *ibid.*

background, the first available ICS officer due to be promoted was made its Chairman, succeeded later by other generalist IAS officers right up to 1975.[33] Many of the IAS officers were not happy about this posting.[34]

The present JIC comprises a full-time Secretary as Chairman with a member secretary of the rank of Brigadier or equivalent from the three Services on a rotational tenure basis. Its membership consists of the Directors of RAW, the IB, the three Services' intelligence setup, and Joint/Additional Secretary level officers from the Ministries of Defence, Home and External Affairs. Officers from other ministries and departments may be co-opted according to need.[35] The JIC has a secretariat of officers from each Service, with a number of research officers drawn from various disciplines, backed by a small staff. Many experts on intelligence consider this staff strength inadequate.[36] The JIC also lacks specialists in economics, technology and sophisticated weaponry (including nuclear). It lacks the ability to produce specialized assessment, such as China and Pakistan's economic and technological levels to sustain conflicts with India, and even the rise and growth of fundamentalism both inside and outside the country having a bearing on the security of India. As a result, the decision-makers often bypass the JIC.[37]

According to K. Subrahmanyam, "the main problem in the working of the JIC is the tendency on the part of various intelligence agencies to withhold information from it and to pass it directly to the Prime Minister and other ministers." All intelligence agencies are very secretive about their operations, sources (which mafy be even common at times), and information. Among the JIC's handicaps is that the heads of the other intelligence organisations have direct access to the Prime Minister, whereas the highest access the JIC Chairman has is to the Cabinet Secretary.

"Ibid.
[54] Malik, n. 28. Popli, *ibid.* Chari, n. 25.
[35] Singh, n. 21, P. 54. Popli, *ibid.*
[36] See "Higher Defence Organisation in India", *USI Journal* No. 10 (United Services Institution of India, New Delhi, 1991) Pp.23-27; Popli, *ibid.* P. 26.
[37] Popli, *ibid.* P. 27. L.P. Singh, "Be Forewarned: The Role of Intelligence", *Indian Defence Review,* January 1991, Pp. 54-56.
[38] Popli, *ibid.*
[39] Since the formation of the NSC in 1999, the JIC has been merged with it.

In 2000, following the recommendations of the Kargil Committee, a Group of Ministers (GoM) was constituted to scrutinize India's security setup. One of its recommendations was the revamping of the intelligence set-up. Accordingly, a Defence Intelligence Agency (DIA) was set up, with the decision being approved by the Cabinet Committee on Security (CCS) on 11 May 2001.[40] The DIA is a part of the CCS Secretariat. A Service officer of the rank of Lieutenant General or his equivalent, who will report to the CCS, will head the proposed setup. He may have under him two or three Major Generals or their equivalent from the Navy or the Air Force. The main objective of the DIA would be increased coordination and intelligence sharing among the three Services, which will continue to have their own intelligence gathering under DG, Military Intelligence, Director Naval Intelligence and Director, Air Force Intelligence.[41] An Intelligence Coordination Group (ICG) is also being set up to look after "systemic intelligence oversight" at the apex level, while key technical agencies, now with the military, would function under the control of the DIA.[42]

ESTABLISHMENT OF THE NATIONAL SECURITY COUNCIL (NSC)

Since independence there have been attempts to establish an institutionalized structure called the National Security Council, as a structured organisation to formulate national security policy, but all such attempts have been purely ad hoc, and these bodies lasted only so long as the Government that created them existed.

In August 1990, one such National Security Council was set up to enable a consideration of all aspects of national security in a coordinated and comprehensive manner, taking into account linkages between the evolving external situation in political, military and economic fields both at the regional as well as world level and India's domestic situation. It was to formulate medium-and long-term security assessment, which would serve as a tool

[40] Lt. Gen. R. K. Jasbir Singh (Retd.) (ed.), *Indian Defence Yearbook 2002* (Natraj Publishers, New Delhi, 2002) P. 284.
[41] *Ibid.*

for shaping Government policy. The composition of the NSC was, however, not delineated by the MoD. The existing apparatus for higher direction of Defence Management was based on the periodic ministerial meetings with the Chiefs of the three Services and senior civil servants. The confidentiality clause was carried to such ridiculous levels that whatever discussion took place within the ministry was not recorded.[44] Such meetings could hardly be "expected to either serve as a viable national security apparatus or provide inputs necessary for appropriate direction of defence management. However, when a parliamentary estimate committee asked whether the present system of decision making, particularly in the light of the organisation of the MoD, was geared towards achieving optimal efficiency or not, the MoD replied that "by and large, the decision making system is satisfactory."[45] The MoD did admit, however, that:[45]

1. The process of decision-making could become more effective if realistic defence plans were formulated on the basis of clearly defined security objectives/military aims, leading to proposals being examined on a somewhat general basis.

2. An absence of clarity in long-term financial commitment vitiates against optimization of resources.

The MoD had contended that the force levels of the Services were determined by the dynamic perspectives of the security scenario coupled with th£ overall availability of resources within a plan period, competing demands from other prioritized sectors, the technological developments and other systemic inputs.[47] It clarified, however, that it was onlyjJuring 1963-71 that, for the first time, the Government entered into calculations based on

[43] Government of India, Nineteenth Report-Estimates Committee (1992-93), P. 10. See also A.P. Venkateswaran, "What Role for a National Security Council", *Indian Defence Review,* January 1991, Pp. 43-45. The NSC remained defunct after the fall of the V.P. Singh government, till it was reconstituted in 1998. During the time, the advocates of NSC were unable to articulate how or why an NSC would be more efficient than existing processes. For a discussion on the NSC see also Lt. Gen. Ashok Joshi (Retd.), *Restructuring National Security* (Manas, New Delhi, 2000) Pp. 304-10.
[44] Government of India, *ibid.* P. 8. Venkateswaran, *ibid.*
[45] Government of India, *ibid.* P. 14. Chari, n. 25, Pp. 46-53.
[46] Government of India, *ibid.* P. 15.
"Ibid. P. 1.

threat scenarios, adversary capability and related factors to derive a military capability which would enable it to respond effectively to an external threat. From 1972 to date, the approach to force structuring had been based on medium/long-term perspective plans.[48] The MoD clarified, however, that some important recommendations of the Army's Expert Committee set up in 1975 had not been processed for lack of resources, even though the Government accepted these. The second Army Expert Committee was constituted in 1989. The Report was submitted in 1990. Yet the Defence Secretary told the Estimates Committee in 1991 that this report was awaited. He volunteered the view: "I think it requires speedy handling."[49]

On 20 November 1998 a six-member NSC was constituted under the Chairmanship of the Prime Minister to undertake a strategic defence review and decide on long-term security and defence policy options. The Prime Minister approved the establishment of the NSC after he accepted the recommendations of the three-member task force, which had earlier been set up under the Chairmanship of former Defence Minister K.C. Pant. In the current setup, the Principal Secretary to the Prime Minister is the National Security Adviser and is the channel for servicing the NSC. The other members of the council are the Union Home Minister, the Defence Minister, the External Affairs Minister, the Union Finance Minister and the Deputy Chairman of the Planning Commission. Other Ministers will be invited to attend when required. There is provision for other members, who are nominated according to their expertise in matters related to defence and security.

The back up for the NSC structure comprises three elements. The first is the Secretariat, which is the JIC refurbished. The second is the Strategic Policy Group (SPG), which consists of the Cabinet Secretary, the three Service Chiefs, the Foreign Secretary, the Union Home Secretary, the Defence Secretary, Secretary Defence Production, the Union Finance Secretary, Secretary (Revenue), Governor of the Reserve Bank of India, Director, IB, Secretary of the Cabinet Secretariat's Research and Analysis Service, Secretary of the Department of Atomic Energy, the Scientific

Ibid. P.200.
Ibid. P. 36.

Adviser to the Defence Minister, Secretary (Space) and the Chairman of the JIC.

The third element of the NSC is the National Security Advisory Board (NSAB). This consists of persons of eminence from outside the Government covering expertise in external security, strategic analysis, foreign affairs, defence, the armed forces, internal security, science and technology and economics. The board meets at least once a month. Its principal function is to provide long-term prognosis and analysis for the NSC and recommend solutions. The fact remains, however, that though five out of seven points on the Charter of the NSC concern national security, the Armed Forces Chiefs are not a part of the high-powered decision-making set up. They are part of the unwieldy SPG, which is only an informatory body.

ARMS PROCUREMENT AND DEFENCE POLICY

Speaking of the lacunae in defence purchases, the Standing Committee of Parliament on Defence reported in 1999-2000:[50]

- Every project is approved/cleared after subjecting it to a multi-agency cum multi-tier decision making apparatus, thus, leading to inordinate and unaffordable delay.
- The delay causes time and cost overruns and sometimes results in technological obsolescence.
- It provides leverage to the armed forces of the region and the neighbouring countries. It also gives advantage to navies of other countries in the Indian Ocean region for makingtleaps in modernization/acquisitions, thus widening the gap between the Indian Navy and the other navies.
- It sometimes forces the Government to abandon projects midway.
- It affects the morale of the Indian forces adversely.
- Frivolous proceedings and unsubstantiated allegations against personal and institutional integrity also lead to vacillation.

The most important lacuna in the entire process of security assessment and formulation of responses is that the organisational structure of the MoD is inherently defective, with no co-relation

Ibid. Pp.8-9.

among the various agencies to make the process sharp and swift.[51] At least the agencies involved in the process of security assessment and formulating responses must be integrated with the agencies involved in the supplies and procurement of weapons. As of now, the agencies involved in the mechanism do not understand the urgency of the demand and situation.

The problems in the Indian defence procurement decision-making can be divided into four groups: (a) the lack of integrated, long-term planning; (b) deficiencies in the defence organisations themselves; (c) the absence of independent oversight or scrutiny; and (d) behavioural factors.

LACK OF INTEGRATED, LONG-TERM **PLANNING**

India has no comprehensive policy document that gives long-term direction to national security priorities. A formal defence policy document to guide the development of long-term integrated planning has even been explained as unnecessary by the MoD in view of the defence policy debates in Parliament, the MoD annual reports and even the operational directives issued by the Secretary of Defence to the Chiefs of Staff.[52]

The defence planning mechanisms in place are only partially effective. The seventh five-year defence plan, to have been effective from 1986 onwards, was approved too late to be of any use, and the eighth was never approved.[53] The fact that the annual budgets do not include financial commitments for more than one year ahead further hampers the coherent planning of arms procurement. Operational priorities are therefore tailored to

[51] There have also been cases where two wings of the MoD have been negotiating separately with the same manufacturer for the same equipment. Jasbir Singh n. 40.
[52] In fact, these directives are traditionally drafted by the three chiefs and forwarded for approval to the MoD, which routinely approves and returns the document. The operational directives have often remained without approval for long periods, while older versions remained in use. Chari, n. 10, P. 28. See also *Ministry of Defence: Defence Force Levels, Manpower, Management and Policy,* 19th Report (Lok Sabha Secretariat, New Delhi, August 1992) Pp. 2-3. The Standing Committee on Defence has asked the Government to examine the feasibility of preparing a formal national defence policy document to be placed before Parliament. "Decide on Agni Introduction Soon, Parliamentary Panel Tells Government", *Times of India,* 11 March 1996, P. 1.
[53] A.K. Ghosh, *India's Defence Budget and Expenditure Management in a Wider Context* (Lancer, New Delhi, 1996) P. 214.

match weapon systems, which match available financial resources.[54]

The military tends to focus on scenario-based planning rather than long-term capacity building. Plans are easily upset by factors outside national control. The tendency of security bureaucracies to exclude the military from gaining broader external security policy experience further restricts the military's understanding of security alternatives. Perspective planning by the armed services is also handicapped by the absence of specialized research capabilities and long-term forecasting methods.

DEFICIENCIES IN THE DEFENCE ORGANISATIONS THEMSELVES

Major deficiencies in the monitoring and review mechanisms of the organisations involved obstruct the development of an efficient, regulated decision-making process. For example, the CoSC works on the basis of consensus and shies away from contentious issues, to the detriment of integrated defence planning and coordinated arms procurement. While the DPS does not integrate threat assessments with major arms procurement plans that could affect all three armed services, the ISEPC does not function as intended, if at all.[55]

The fact that the armed services formulate the 15-year perspective plans and the annual plans while the MoD formulates the five-year plans indicates planning inconsistencies and obstructs the development of linkages between the armed forces' philosophy papers and defence policy priorities.[56] Threat

^*Ministry of Defence: Defence Force Levels, Manpower, Management and Policy,* 19th Report (Lok Sabha Secretariat, New Delhi, August 1992), P. 9. At a meeting in the Defence Minister's Office attended by the three chiefs of the armed services in 1993, the Minister of Finance suggested reductions of Rs.5000 million (c. $160 million at the time) in defence spending to meet other requirements. He listened to the difficulties of the three chiefs, went back to his office and reduced the defence budget as he had intended nevertheless. Lt. Gen. S.K. Bahri, "Chinks in the Armour", *The Statesman* (New Delhi), 27 February 1996.

[55] Based on interviews conducted by the author with K. Subrahmanyam, and P.R. Chari in May 1996.

[56] The Government acknowledges such limitations. "The absence of clearly defined national security objectives/military aims, leads to proposals being examined on a somewhat general basis. Similarly in the absence of clarity in long-term financial commitment, proposals/cases having financial implications cannot be decided in an optimal manner." *Ministry of Defence: Defence Force Levels, Manpower, Management*

assessment and planning by the three services are largely independent of each other. The difficulty of integrating their plans clearly increases the likelihood of different threat perceptions developing between them, allows lobbies to develop in the ministries and in the media to promote their own points of view, and creates inter-service rivalries. Political threat assessments, meanwhile, are carried out by the MEA and the JIC,[57] but routines for reporting them are not formalized. According to a former Foreign Secretary, formal MEA assessments are not considered in the course of the military's threat assessment.[58] A counter-criticism is that MEA representatives do not participate in meetings on threat assessment.[59]

ABSENCE OF INDEPENDENT OVERSIGHT OR SCRUTINY

In Parliament, participation in, influence on and even examination of long-term arms procurement planning are nonexistent. The lack of published policy documents is a major weakness. According to Jaswant Singh, Parliament has never appointed a defence commission or sought independent professional advice.[60] The absence of parliamentary supervision results in such absurdities as a five-year defence plan with no corresponding financial commitment.[61]

BEHAVIOURAL FACTORS

The procedures and details of military expenditure are treated as confidential and information is not publicly available. This helps the government to withhold or release information according to

and Policy, 19th Report (Lok Sabha Secretariat, New Delhi, August 1992) P. 9. As quoted in Ravinder Pal Singh, n. 22. P. 69. " Chari, n. 25. P. 27.

[58] Ravinder Pal Singh, n. 21. P. 69. Based on the author's interview with A.P. Venkateswaran in July 1995.

[59] *Ibid.* Based on the author's interview with P.R. Chari in May 1996.

[60]Jaswant Singh, "Legislative oversight in arms procurement decision making process". SIPRI Arms Procurement Decision Making Project, Working Paper no.14 (1995) Pp. 6-7.

[61] Jaswant Singh, *ibid.* V.S. Jafa, "Arms Procurement Budget Planning Process", SIPRI Arms Procurement Decision-Making Project, Working Paper No.12 (1995) P. 8.

its perception of its own interests. Excessive confidentiality leads to: (a) insufficient examination of the rationale for weapon system procurement; (b) greater likelihood of corruption in arms procurement; (c) inefficiencies, because of inadequate analysis; and (d) damage to public confidence in the armed forces, which are consequently subjected to needless controversies.[63]

ARMS PROCUREMENT DECISION-MAKING PROCESS

A modern national military establishment requires that arms procurement[64] decision-making processes be based on considerations of military strategies, threat assessment, the defence budget, military accounting and auditing, testing and evaluation, military industrial production, and so on. A rational and coordinated arms procurement decision-making process will increase a nation's military deterrence and security capabilities.

The history of arms procurement procedures in India can be roughly divided into three phases:

(a) Independence to the early to mid-1960s. It is characterized by off-the-shelf procurement through import, predominantly from France and the UK.

(b) The mid-1960s to the mid-1980s.[65] During this phase efforts were made to build up domestic defence production, mostly through assembly under licence from the Soviet Union and the UK.[66]

(c) The mid-1980s to the Kargil War in May-Junel999. The third phase started with large purchases by the then Prime Minister Rajiv Gandhi's Government (1984-89), while gradual improvements were made in R&D and systems integration for assembly of weapons within the country itself.

[62] K.P. Nayar, "Elite motivation and domestic considerations in arms procurement decision-making", SIPRI Arms Procurement Decision-Making Project, Working Paper No.l 1(1995) P. 2.

[63] Jaswant Singh, n. 92. P. 18.

[64] Procurement includes arms acquisitions from both foreign and domestic sources. However, the term as used in this text applies to those elements of the supply process that relate to Government purchasing—essentially the placement of contracts for arms imports.

[65] RavinderPal Singh n. 21. P. 49.

[66] *Ibid.*

[61] *Ibid.*

After independence, in the first two months, the Defence Committee of the Cabinet (DCC) was established as the supreme security decision-making body. The Prime Minister presided over it attended by chiefs of the three services. This arrangement allowed the military's unfiltered advice to be directly available to the Prime Minster in isolation from other national concerns.[68]

The 1962 war with China prompted India to initiate systematic defence planning by introducing a system of five-year defence plan in the mid-1960s. The main objective of the defence plan was to strengthen the in-country production of most of the sophisticated arms, which India was buying then. The first (for fiscal year (FYs) 1964/65-1968/69) proposed the building of a defence production base in order gradually to reduce external dependence.

Today, the MoD Planning Cell draws up the five-year defence plan for approval by the Defence Minister and the CCPA. The annual plans of each of the armed services must be in conformity with this plan. Long-term plans with a 15- to 20-year time frame, called perspective plans, are also drafted by the armed services.[69]

The Committee on Defence Planning (CDP), created in 1978, is chaired by the Cabinet Secretary and includes the Prime Minister's Secretary; the three service chiefs; the Secretaries of Defence, Finance, External Affairs, Defence Production and the National Planning Commission; and the Financial Advisor to the Defence Minister.[70] The CDP's main responsibility for such defence planning is:

(a) periodic review of long-term intelligence assessments of geo-strategic developments which has a bearing on national security;

(b) review of national defence planning; and

(c) the balancing of competing interests in the economic, technological, foreign policy and defence fields in order to optimize the national defence efforts.[71]

Ravinder Pal Singh, *ibid.* P. 51.
Ibid. P. 54.
Malik, n. 28.
Ravinder Pal Singh, n.21. P. 54.

The Directorate General of Defence Planning Staff (DG-DPS), an inter-service organisation, provides inputs to the CoSC[73] on matters pertaining to defence planning, which includes: (a) international and regional security affairs; (b) defence policy; (c) weapons and equipment; and (d) financial planning.[74] The DG-DPS was designed to be a multi-disciplinary group with representation from the three services, MoD, Ministry of Finance, MEA and the DRDO. The organisation deals with major issues pertaining to strategic defence planning such as threat assessment/analysis and possible responses to these threats, recommends balanced force structures to achieve military aims and conceptualizes and evolves defence plans.[75]

THE ROLE OF MILITARY IN THE ARMS PROCUREMENT PROCESS[76]

The formal process in the Indian Army for assessing the requirements of, and procuring major weapon systems starts with the preparation of Philosophy Paper, which identifies the characteristics and advantages of new weapons system in broad terms.

The next step involves the General Staff Equipment Policy Committee (GSEPC). Chaired by the Vice- or Deputy Chief of Army, it includes representatives of the MoD, the DDR&D, the DDP&S, the Finance Division of the MoD and other 'agencies. The GSEPC formalizes weapon and equipment requirements in policy statements biased on data from the Army's Directorates of Military Operations, staff duties, and weapons and equipment. These policy statements serve as guidelines and are forwarded to

[72] The Defence Planning Staff (DPS) was set up by the Government of India in 1986 is a multidisciplinary body consisting of representatives from the three armed services, the Ministries of Defence, Finance and External Affairs, and the DRDO. Ravinder Pal Singh, *ibid.*

[73] The CoSC, comprising the three service chiefs and chaired by the one with the longest tenure, provides a direct channel for conveying professional military advice to the Defence Minister and the Prime Minister. The CoSC coordinates broad military aims and strategy, which are later approved by the Defence Minister. See Ravinder Pal Singh, *ibid.* P. 53.

[74] P.V.R. Rao, n. 26. P. 32.

[75] Ministry of Defence, Government of India, *Annual Report,* Year 2001-2002, P. 16. See also Ravinder Pal Singh n. 21.

[76] *Ibid.* This section is largely based on *Report of the Joint Committee of the Indian Parliament to inquire into the Bofors Contract.*

the DRDO for comments as to the feasibility of indigenous development. On the basis of the Philosophy Paper and the DRDO's assessment, the MoD then examines the feasibility of indigenously developing or importing a system. If import is the option chosen, defence attaches at Indian embassies are asked to identify potential suppliers, who are then asked to present proposals.[77] These proposals are sent to the DRDO, the DDP&S and the Finance Division of the MoD for comments. Depending on the amount of foreign exchange involved, the Financial Advisor to the Defence Minister or the Secretary of Expenditure at the Ministry of Finance must approve the transfer.[78] The MoD either gives its approval for trial evaluations of the weapon system in India or sends its study teams abroad. Trials are usually conducted on a 'no cost, no commitment' basis.

A Technical Evaluation and Negotiating Committee, examines the technical aspects of the proposals against the requirements identified by the armed forces. If this committee finds the proposals technically acceptable they are forwarded to the Price Negotiating Committee (PNC) for commercial negotiations.[79] Both are MoD committees,[80] but the PNC also has a representative from the Ministry of Finance and can invite revised quotations from competing suppliers during the negotiations.[81] Contracts for purchase may include an agreement for or commitment to license production, which is signed by the DDP&S. Corresponding credit arrangements, can also be negotiated simultaneously. For common user systems, the Inter-Service Equjpment and Policy Committee (ISEPC) coordinate the requirements* of the three services.

[77] R. Bedi, "Doing Business between the Lines", *Jane's Defence Weekly,* 11 December 1993, P. 28.
[78] Ravinder Pal Singh, n. 21, P. 56.
[79] *Ibid.*
[80] *Ministry of Defence: Defence Force Levels, Manpower, Management and Policy,* 19' Report (Lok Sabha Secretariat, New Delhi, August 1992) Pp. 9-10.
[81] Other issues discussed by the PNC, which also includes legal experts, are the financing arrangements; payment terms; range and costs of spares and components; cost of technology for licensed manufacture; and repair and overhaul arrangements. See Jafa, n. 93. P. 12.

ARMS PROCUREMENT AND DECISION-MAKING APPARATUS

Various committees and organisations related to the defence of India have recommended from time to time urgent restructuring of the current defence decision-making apparatus to form a single integrated Board of Defence Approvals. The board would have two modules: one headed by the Defence Secretary aided by the officers in the MoD, top servicemen and technocrats from DRDO and outside, if necessary; the other module would comprise a Cabinet Committee aided by the Cabinet Secretary.[82]

The Standing Committee on Defence noted in 2001 that the GoM had proposed setting up a Defence Procurement Board, which would integrate the Armed Forces and the MoD in the area of defence purchases.[83] The committee recommended that the Government should also ensure that there should be separate agencies of Price Negotiation Committee (PNC) and the Defence Procurement Board and there should be no needless duplication of work. The Government subsequently accepted these recommendations. A Defence Acquisition Council (DAC) was accordingly set up on 31 August 2001, headed by the Defence Minister.[84]

The Defence Acquisition Council's decisions are to be implemented by three boards, namely the Defence Procurement Board headed by Defence Secretary, Defence Production Board headed by Secretary (Defence Production and Supplies) and Defence R&D Board headed by Secretary (Defence R&D).[85]

However, the establishment of the Defence Procurement Board has not improved the situation in arms purchases, because of the excessive scrutiny involved in each purchase. The Board's structure does not include a representative of the DRDO and

[82] Report of the *Standing Committee of Parliament on Defence,* Government of India. 1999-2000, 8th Report, 13th Lok Sabha, P. 2. See also Ravinder Pal Singh, n. 22. P. 57.
[83] Government of India, Standing Committee on Defence 2001, 13th Lok Sabha, 11.h Report (Lok Sabha, New Delhi, 2001) P. 13.
[84] Government of India, *Ministry of Defence Annual Report 2001-2002* (Ministry of Defence, New Delhi, 2002) P. 21. Also see Jasbir Singh n. 42. P. 287.
[85] Government of India, *Ministry of Defence Annual Report 2001-2002* (Ministry of Defence, New Delhi, 2002) P. 21.

lower acquisition organisations in the Services headquarters are not included within the Board's span of control.[86]

DEFENCE RESEARCH AND DEVELOPMENT

The Defence Science Organisation (DSO) was set up in May 1998 with the appointment of a Scientific Advisor to the Defence Minister. It was expanded and reorganized by merging a number of service and technical institutions and renamed the DRDO in 1958 with a network of nine laboratories. However, the DRDO had no separate budget and functioned as a division of the MoD Department of Defence Production. In 1980 defence R&D became the responsibility of a separate MoD Department of Defence R&D.[87]

The DDR&D oversees the work of the DRDO, which currently has a network of 50 laboratories and establishments, and that of the Aeronautical Development Agency (ADA), established to develop the light combat aircraft (LCA). It also cooperates with 70 academic research institutions, 50 national science and technology centres and 150 companies in the public and private sectors. R&D is also carried out at select universities under grant-in-aid.[88] The DRDO has also initiated 10-year self-reliance in defence procurement from 30 to 70 per cent, using a three-pronged approach: (a) indigenization of vital spare parts; ..(b) upgrading of existing systems and equipment life-extension programmes; and (c) indigenous design and development of high-technology weapon systems.[89] Representatives of the user

[87] N.K. Jaiswal, "Growth of Military Operational Research in India", *Defence Science Journal,* vol. 44, no. 3 (July 1994) Pp. 215-16; Report of the Comptroller and Auditor General of India for the year Ended 31 March 1994, no. 8 (New Delhi: 1995) P. 206; S.K. Sen, "Some Aspects of India's Defence Industrialization", *USI Journal,* vol. 124, no. 516 (April-June 1994), P. 157; and Indian Ministry of Defence, Annual Report 1996/97 (Ministry of Defence, New Delhi, 1997) P. 9. As cited in Ravinder Pal Singh, n. 21. P. 57.

[88] Government of India, Ministry of Defence, *Annual Report 1993/94* (Ministry of Defence, New Delhi, 1994) P. 33.

[89] D.V. Kalra, "Building National Arms Industrial Capacities", SIPRI Arms Procurement Decision Making Project, Working Paper no. 10 (1995) P. 11; A. Kalam, "Combating the Technology Control Regimes", USI National Security Lecture (United Services Institution of India, Madras, December 1996). The DRDO plans to raise the indigenization levels to 70 per cent if its current share of around 5 per cent of the defence budget is doubled by the year 2000. Ministry of Defence: Defence Research and

services carry out the advisory function for R&D quality control, but non-MoD/DRDO experts carry out neither technology quality assurance nor evaluation. The organisational principle of providing external checks and balances is thus neglected.

CONCLUSION

The institutions created for security assessment and the study of threat perceptions so far had been lacking in a number of things, such as:

- a well-established secretariat exclusively meant for the purpose;
- permanent staff to maintain relevant information and intelligence on permanent basis;
- proper coordination among political executive, bureaucratic officials and military officials;
- adequate mechanism for the coordination of the various departments and ministries of the Government to process the procedures related to formulation of policies on all aspects of defence and security of the country.

The Indian security establishment has, over the years, not managed its arms procurement decisions efficiently. It suffers severely from lack of harmonization between security assessment and arms procurement decision-making. A major lacuna flows from lack of centrality. There is a pressing need to review this aspect within the MoD and the various establishments under its control. The functions of different layers of command are not very clear and recognizable.

The Estimates Committee Report of 1992-93 points out that defence planning is dependent on *adhocism* rather than on well thought out long-term changes in plans. Military structures and

Development—Major Projects Fifth Report, 1995/96 (Lok Sabha Secretariat, New Delhi, August 1995) P. 6. Even though it has taken almost four decades of DRDO service for India to achieve a military technology indigenization level of 30 per cent, there has been r.o debate on how it will ensure that the level of indigenous production increases to 70 per cent. See Ravinder Pal Singh, n. 22. P. 57.

creation of defence capability have fairly long gestation periods. The country must have a clear idea of what it would need in the years to come and initiate steps in time to attain the desired structures and capability for a better coordination between security assessment and arms procurement. Weapons and equipment development and induction are also prone to unusually large gestation periods.

Therefore, no worthwhile and cost-effective planning in military-related matters can be undertaken unless it is done on a long-term basis and with clear objective in mind. The recently constituted Defence Procurement Board so far has not proved its worth and effectiveness. So long as defence procurement procedures are not expedited and made foolproof as an important instrument of formulating responses to the emanating threat perception, the country's defence forces would continue to suffer.

DEMOCRATISATION OF ENVIRONMENTAL GOVERNANCE: THE EMERGING CONCERNS IN VIEW OF RTI ACT

"A.P. SINGH

ABSTRACT

Environmental Law making in India has never been a natural process springing from either a felt need or homespun wisdom. It has invariably been either a legacy of the colonial rule in India or the result of the need to fulfil our international obligations. Environmental laws have been so designed as to leave very little scope for popular participation in essential environmental maintenance functions or resource management. At a time when the democratisation process is gaining momentum and the long cherished ideals like right to information are getting realized, the lack of democratic elements in environmental governance appears to be some kind of an anathema in the democratic governance process. This paper is an attempt to articulate these emerging concerns of democratisation in environmental governance process, which continue to be the penumbral areas of our democracy.

INTRODUCTION «•

Democracy is a political method by which every citizen has the opportunity of participating through discussion in an attempt to reach voluntary agreement as to what shall be done for the good of the community as a whole.[1] It resolves itself in practice into a continuous search for agreement through discussions and compromise and action on the basis of which maximum measure of agreements is obtainable. Availability of information about governmental activities as such, is a pre-requisite for effective

'Assistant Professor, Faculty of Law, National Law University, Jodhpur.

[1] V.D.Mahajan, *Indian Democracy and Governance,* (Asia Publishing House, Bombay, 1988).

participation in governance process. Right to Know underlines the fact that people have a right to access information about the activities and decisions that affect their lives. At the most basic levels, people are shut out of decision-making and are not able to participate effectively because access to information is denied to them, with little realization of the fact that the governments do not own the information that they create and collect; it is not theirs, to be controlled and hoarded. Government information belongs to the public - it is created with public money by public servants paid by the public treasury. It is a national resource.[2]

Right to Information serves three basic purposes in a democratic form of governance, it strengthens and deepens democracy;[3] it is a tool to ensure consistent and desirable rate and direction of development and it helps in eradication of corruption.[4] Despite the fact that we adopted the democratic form of governance, based on parliamentary form of democracy, it remains a conundrum, why the right to information which has got into the constitutional systems of Scandinavian countries long back was not given place in our constitutional scheme of fundamental rights. However the Judiciary has constructed this right in a number of cases[5] and finally the right has been given legislative recognition under The Right to Information Act 2005 after a long and teething struggle by the people at large all over the country. Despite all limitations to which this author shall be turning to in the later part of this paper, one thing has to be conceded that this is one of the most advanced legislations in the democratic world, aimed at strengthening and deepening democracy.

Another point to be taken note of at the outset itself is that we Indians are acutely aware of this fact that the important rights,

[2] Dr. A.P.Singh, "Right to Information Under Right to Information Act and Beyond", 2006. (Paper presented in the National Convention on "One year of RTI ", at Vigyan Bhavan, New Delhi, 12-14* October 2006.

[3] A Resolution "Access to Information Strengthens Democracy" was adopted by the plenary session of General Assembly of United Nations, on 6 June 2006.

[4] P.C.Alexander, in the Introductory Speech delivered in the first technical session of the National convention on "One year of RTI", at Vigyan Bhavan, New Delhi, 12-14th October 2006.

[5] *Bennett Coleman & Co.* v. *Union Of India* AIR 1973 SC 106, *Indian Express Newspapers Pvt Ltd* v. *Union of India,* AIR 1978 SC 1137 *State of UP.* v. *Raj Narain,* AIR 1975 SC 865, *S.P. Gupta* v. *Union of India* AIR 1982 SC 149, *Dinesh Trivedi* v. *Union of India* (1997) 4 SCC 306, *The Secretary, Ministry of I & B* v. *Cricket Association of Bengal,* AIR 1995 SC 1236

constitutional or statutory are not the end in themselves. They have to be realized and experienced in the consciousness and commitment of the people. The ramparts of these rights are to be built in the hearts of the people, as Justice Khanna put it in the famous dissent of *ADM Jabalpur* v. *Shivkant Shukla.* Justice Learned Hand put it in a beautiful manner, "Liberty (rights) lies in the hearts of the men and women, when it dies there, no law, no constitution or no government can save it."[7] We have sought to realize a number of rights in the post-independence period through the instrumentality of law, but they have remained the chimera to be chased[8] as they have not been realized and experienced in the hearts, consciousness and commitments of the people. And therefore it must be taken note of that passing of the Right to Information Act, 2005 has not made the right to information secure and effective and in the very first year of its existence it has faced a major attempt to scuttle it by way of excluding the file-notings from its purview. Therefore, the passing of the Right to Information Act is just a beginning. A lot more is required to be done in terms of fixing, realizing and experiencing this right in the hearts, consciousness and commitments of the people. Here this author would confine himself to one of the penumbral cases, which is a major area of our democratic governance, and this right is required to be ingrained in this area as well and into area of environmental governance.

ENVIRONMENTAL DEMOCRACY: AN EVOLVING CONCEPT

The concept of ^'Environmental Democracy", which is now taking hold slowly in the academic world, reflects increasing recognition that environmental issues must be addressed by all those affected by their outcome, not just by governments and industrial sectors. It captures the principle of equal rights for all those in the environment debate - including the public, community groups, advocates, industrial leaders, workers, governments, academics

[6] AIR 1976 SC 1207

[7] As quoted by Mr. P.C.Alexander, in the Introductory Speech delivered in the first technical session of the National convention on "One year of RTI", at Vigyan Bhavan, New Delhi, 12-14* October 2006.

[8] A number of social reform laws passed in the post-independence period, like the Dowry Prohibition Act, Sati Abolition Act, Child Labour Prohibition Act etc have not been realized in the real sense of the term, as the same have not been realized, experienced in the hearts and consciousness of the people.

and health care professionals. For those whose daily lives reflect the quality of their environment, participation in environmental decision-making is as important as in education, health care, finance and government. Access to environmental information for all who choose to participate in such decision-making is integral to the concept of environmental democracy. The policy of Right-to-Know, provides the foundation, and advocates provision of basic information to the public. Informed with basic facts about the quality of their environment, citizens can become active participants in identifying and resolving issues at both local and national levels.

PARADIGM OF ENVIRONMENTAL DEMOCRACY IN THE U.S.

In the United States, the Right-to-Know programme provides key information on specific facilities to the public since 1988. Its citizens have broad access to information on over 600 toxic chemicals, which routinely enter the environment. Captured in a database called the Toxic Release Inventory (TRI), the information includes the amounts of the chemicals released to air, land and water, the amounts shipped off-site for treatment or disposal and the amounts managed by recycling, incineration, etc. United States citizens have used this to understand their local environment better, to work with local facilities to reduce harmful releases where possible, and to develop local planning requirements that reflect recognition of potential accidental releases.[9]

The concept of Right-to-Know and programmes like the TRI, that build upon this powerful principle, are rapidly emerging at all levels of government. Building on the experiences of countries like Canada, the United Kingdom and The Netherlands - as well as the United States - national Right-to-Know programmes are being developed in such countries as Mexico, Japan and the Czech Republic. In other nations, like Australia, programmes are being designed and implemented at state level, to reflect differing industrial and agricultural patterns across the country. In the United States, as the experience with the TRI has grown, states have developed their own Right-to-Know programmes to reflect

[9] Dr. Susan Hazen (Reported in New York Times 28th September 2006) Dr. Susan is Director of the Environmental Assistance Division, Environmental Protection Agency, Washington, D.C.

their individual needs. And local ordinances collect the even more individualized data needed to understand fully the specific industries and activities in local communities.[10]

Right-to-Know programmes provide both an opportunity to participate in environmental decision-making and a responsibility to understand and assess the meaning of the data fully. Information on releases is not enough, by itself, to characterize the impact a facility may have on a community. It must be combined with information on exposures and hazards to assess whether there is a potential risk; and additionally, more sophisticated data must be collected and assessed to identify the risk's magnitude. The obligation to use information responsibly is crucial to the programmes' continued success.

The concept is evolving: what we now see is but a glimpse of what we will see in years to come. Just as consumers have demanded clear identification of what is in the food they eat and the medicines they take, so the public is now expressing its right to know what is in the air it breathes, the water it drinks and the land upon which it lives and plays. As it becomes more sophisticated in understanding the environment and the key interactions, which shape the quality of communities, it will demand a more complete accounting. Communities are asking to know exactly what chemicals are being shipped along their roads, placed in their landfills, or stored for future use. There is a demand for information on the exposure of workers as well as on releases to the environment. Governments are being asked to account for activities that may affect the environment: all United States Government facilities must provide TRI information, just like industry.

The concept has been hotly debated and will continue to be so. Clearly, Right-to-Know is an effective tool in empowering communities and citizens' groups to approach industry on an equal footing - and to question and, if need be, challenge industrial and governmental decisions on environment quality. This new approach to identify and solve environmental problems involves a change of culture for many in government and industry. Change is always a challenge and will take time to complete. But what is clear is that Right-to-Know programmes

[w] *Ibid.*

have opened the door for the public to influence decisions affecting their well being. The door will not be closed: it will need to open even wider as providing basic data leads to requests for more specific information. Together the new term of environmental democracy and the established concept of Right-to-Know can lead all nations to a healthier, sustainable environment.

ENVIRONMENTAL DEMOCRACY: THE INDIAN PARADIGM

As regards Indian Experiences of Environmental Democracy in view of the Right to Information Act, this author divides the whole discussion into two parts. In Part-I, we would talk about the interface between the Right to Information Act and Environmental Laws in general and in Part II which is further subdivided into two parts, we talk about the specific systems of environmental governance wherein either there is a complete absence of the right to information or if at all there is one, provided under some statute, that is merely in the form and not in substance and thus amounts to a major democratic deficit.

RTI AND ENVIRONMENTAL LAWS INTERFACE

As regards the interface of RTI and Environmental laws, there appears to be nothing in the Right to Information Act, 2005 which precludes a stakeholder from claiming a particular piece of information from an authority established under any of the environmental statutes. Thus for example a member of a common citizenry, having been deprived of a certain right to environment, intends to approach the Pollution Control Board for the purpose of obtaining a particular piece of information about a particular industry, the Pollution Control Board being a "public authority" within the meaning of section 2 (h)[11] of the Right to Information Act, 2005 cannot afford to deny that piece of information to the claimant.

[1]"Public authority" has been defined by section 2 (h) of the Right to Information Act, 2005 as "any authority or institutions of self government established or constituted by or under the constitution, by any other law made by Parliament, or by any other law made by state legislature or by notification issued or order made by appropriate government and includes any body owned, controlled or substantially financed or Non governmental organization substantially financed, directly or indirectly by funds provided by appropriate government.

However, there is a rule of statutory interpretation, which provides that *"expressio unius est exclusio alterius."* i.e. mention of one thing is to the exclusion of the other. This rule, rules out any possibility of RTI becoming applicable to environmental laws and governance. RTI is by far a genera! legislation and environmental statutes, like Air Act,[12] Water Act,[13] and Environment Protection Act[14] etc are the special statutes dealing with specific areas of the governance system. It is therefore a safe conclusion that RTI is not applicable to environmental statutes and environmental governance in general and therefore for any kind of information seeker has to take resort to the general machinery of environmental governance.

FRAME OF ENVIRONMENTAL LAWS (DEMOCRACY) IN INDIA

Turning to the rudimentary form of environmental democracy and the form of right to information under environmental legislation, there is a whole range of stakeholders which include the public, community groups, advocates, industrial leaders, workers, governments, academics, health care professionals and so on. Let us take the example of common citizenry and that of the tribals, who are the worst affected people by the process of development. They are now more commonly known as environmental refugees. They are the people whose lives have been decimated by developmental projects, or the tribals or other communities who have been deprived of their right to property for the purpose of what euphemistically is called the "public interest".

COMMON CITIZENRY: THE MOST VISIBLE FACE

Common citizenry, as a claimant of environmental information is the most affected group of stakeholders. They are the consumers of environment which is a trust in the hands of the incumbent governments[15] and therefore just as consumers have a clear cut right to demand what is in the food that they are eating, and the medicines that they are taking, similarly these consumers of

[12] The Air (Prevention and Control of Pollution) Act, 1981 (No. 14 of 1981, 29 March 1981).
[13] The Water (Prevention and Control of Pollution) Act, 1974 (No. 6 of 1974, 23 March 1974).
[14] The Environment (Protection) Act, 1986 (No. 29 of 1986, 23 March 1986).
[15] The Supreme Court in *M.C.Mehta* v. *Kamal Nath,* has held environmental resources as a trust for the people in the hands of the governments, (1997) 1 SCC 388

environment have a right to know what is in the air that they are breathing, what is in the water that they are drinking and what is in the land upon which they live. As the process of awareness grows amongst these consumers, they shall be asking more complete accounting as to what chemicals are being shipped along their roads, placed in their landfills, or stored in for future use. It is only by being informed with basic facts about the quality of their environment; citizens can become active participants in identifying and resolving issues at both local and national levels.

In the face of these evolving rights of the common citizenry, what is the structure of governance that is provided in the environmental laws of our country? We know that there are pollution control boards exclusively meant for the prevention and control of water and air pollution and regulation of industrial activity that result in pollution of air and water. These boards are exclusively nominated bodies, which have the representatives from the governments, (Central, States and Union Territories) industries, and a very small amount of representation from agriculture and fisheries as well[16]. They have been empowered to advise the governments on environmental matters i.e. concerning the prevention, control and abatement of pollution of air, water and land, conducting training programmes of the personnel involved in environmental administration, inspecting sewage or trade effluents and emissions, works and' plants for the treatment of sewage etc, laying down or modifying various standards of effluents and emissions and most important of them all, to administer the consent procedure for regulation of industrial activity in a given jurisdiction,.[17]

Under the Environment Protection Act, 1986, which was passed in the wake of Bhopal disaster, the central government has assumed upon itself, very comprehensive and sweeping powers, "subject to the provisions of this Act, the central government shall have power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and

[16] Chapter II and III of the Water Act, 1974, ss 3-15 and, chapter II of the Air Act, 1981, ss.3-15.
[17] Chapter IV of the Water Act, 1974, ss 16-18, and chapter III of the Air Act, 1981, ss. 16-18.

abating the environmental pollution"[18]. This is a very sweeping power, perhaps found only in wartime regulations[19]. Obviously, this legislative move meant business. The power to protect and improve the quality of environment is a constitutional commitment stated to be one coupled with duty.[20] This makes it necessary to take up environmental protection measures on a war footing.[21]

What about the citizens' rights? Section 19[22] provides for citizens' suit provisions, which have also been introduced later in Air and Water Act, by way of an amendment in 1988.[23] The section bars the cognisance of any offence under these Acts except on a complaint made by central or state government or any officer authorized by it, or by central or state pollution control boards or any officer authorized by it. At the same time a citizen has been authorized to make a complaint after giving 60 days notice to the Central Government or the Pollution Control Board concerned, for the purpose of furnishing to him any statistics, accounts, and such other information. However it has also been provided that the board or such officer who has been authorized to provide such information may refuse to make any such report or information available to such citizen, if the same is, in his opinion, against public interest[24].

Further the period of 60 days that is provided to the board and consequently to the industry concerned against which certain information may have been sought for, may mend the ways and remove the traces of violation of any of the provisions of the stipulated law or r,ules. This makes the right of the citizen to obtain information from the stipulated authority a farce, since the same is not exercisable and is a mere show of citizens' power. It is for this reason that these laws have been described by critics as

[18] Section 3 (1) of the Environmental (Protection) Act, 1986.
[19] The Essential Commodities Act, 1955 giving such power (section 3) is an illustration of a peace time legislation which had its origin in the post World War II period.
[20] To a meeting of experts in August 1986 in Ahmedabad, just after the Environment (Protection) Act, 1986 was passed, it was clear that this power is one coupled with duty and that mandamus will lie if nothing was done. (Indian Law Institute Environmental Protection Act: An agenda for implementation, New Delhi, 1987) P. 13.
[21] Section 3 (2) of the Environment (Protection) Act, 1986.
[22] The Environment (Protection) Act, 1986.
[23] Sec 49 of the Water Act, 1974 and Section 43 of the Air Act, 1981.
[24] Sub section (2) of Section 49 of the Water Act, 1974 and sub section (2) of section 43 of the Air Act, 1981.

fangless cobras or toothless tigers, which seldom punish the offending industry or authority for not providing a piece of information to the empowered citizen.[25]

There are provisions under the environmental statutes, which make simply a show of empowered citizenry, providing nothing in substance. Another such example that can be given is section 21 of the Water Act and section 26 of the Air Act, which provide for sampling provisions. These provisions read with citizens' suit provisions[26] may appear to be empowering a citizen to take a sample and initiate an action against the offending industry or authority in a court of law. But that is not the case. Section 21 (2) of Water Act and section 26 (2) of Air Act, provide that the result of any analysis of a sample of effluent or emission taken shall be admissible in evidence, only if the same has been taken by complying the provisions of subsection 3 and 4 or the aforesaid two sections. These sub sections provide a particular procedure that can be undertaken only by an officer or person authorized by the board; meaning thereby that the common citizen though may take sample and get it analysed, but the result of such analysis shall not be admissible in evidence in the proceedings that the citizen might initiate. This simply means that the citizen has the right to initiate an action against an offending industry or authority, but no right to pursue or support his case in a court of law. This also makes mockery of citizens rights, for without providing a right to furnish evidence to support the case, providing a right to initiate an action is nothing less than a fraud on the citizens' rights.

Further, it has been noted above that the pollution control boards that have been constituted to administer the consent procedure to regulate industrial pollution are exclusively nominated bodies with very heavy representation of governments and a very thin representation of a few interests like, industries, agriculture and fishery and no representation of the common citizenry[27]. It may be argued that in the ultimate analysis the members nominated by the central and state governments are the representatives of the

[25] Shyam Diwan and Armin Rosencranz, *Environmental Law and Policy In India,* (Oxford University Press, New York, 2004)
[26] Section 19 of the Environment (Protection) Act, 1986, Section 49 of the Water Act, 1974 and Section 43 of the Air Act, 1981.
[27] Chapter II and III of the Water Act, 1974, ss 3-15: Chapter II of the Air Act, 1981, ss.3-15.

people themselves, because it is the people who elect these governments. But when the governments run industries have the representatives of these industries as well in the board there appears to be a very thin line dividing the role of the government as an industrial entrepreneur and the representative of the people. This may perfectly create the confusion of roles and objectives for the government representatives in the board.

The last but not the least point that needs to be taken note of is that of consent administration. The consent administration as it has been provided under Water and Air Act, is not at all transparent [8]. Consent orders very often impose conditions of volume, nature, composition, temperature, rate of discharge or effluent or emission and as per the procedure laid down they are required to be noted down in a register. Incidentally this register is not open for public scrutiny. As such even here the right to obtain information about so many things that affect the rights of common citizens are not made available to them. Without access to this basic information, how could a citizen be expected to participate in the decision-making processes on environmental matters that affect his rights and the rights of coming generations closely and comprehensively?

Further there is no role assigned for the common citizen in consent administration at all. After 1997 some kind of public hearing process was introduced by way of notification,[29] making it compulsory to hold public hearing before sanctioning a project having a bearing on the local environmental resources and environmental cleanliness. Another important initiative was a compulsory Environmental Impact Assessment[30].

However, the way, such processes are administered leave little scope for affecting the granting of consent in any substantial manner. For example environmental impact assessment is to be done by the project promoter and at his cost. How can, in human terms, one expect the expert, who is involved in preparing an environmental impact assessment report, to prepare a report that goes against the interests of the person who is paying for the

Section 24-28 of the Water Act, 1974 and Section 21 of the Air Act, 1981.
S.O. 318(E) 10 April 1997. S.0.85 (E) 29 January 1992.

preparation of such report?[31] This once again appears to be a chimera of public participation in the processes that affect the common citizen closely and comprehensively.

ENVIRONMENTAL REFUGEES: THE MOST AND WORST AFFECTED

The second group of stakeholders are environmental refugees. They are the forest dwellers and tribals of this country, who constitute nearly 6 percent of the entire population,[32] have been living in and around forests for generations and there exists a kind of spatial and symbiotic relationship between the forest dwelling communities and forests and biological resources in the country. They are integral to the very survival and sustainability of the forest eco-systems, including wildlife.[33] However the treatment they have been given in post independent India speaks of a system that can be characterised anything other than democratic. The rights of these communities have not been properly and adequately recognized, so much so that, it has resulted in historical injustices to these communities[34].

Prior to the onset of British system, the cultural traditions of India have been such wherein the human race lived in harmony with forests and wildlife and preserved it for future generations. Nature as a whole was considered to be a big eco-system,[35] consisting of many smaller eco-systems. Man was an essential part of nature, but simply because he was endowed with reason, he did not enjoy a privileged position; rather he owed a big responsibility towards the eco-system[36]. There was in short a kind of symbiotic relationship between nature and human beings. Man for the purpose of his sustenance had to derive something from nature, but he used to take it with a sense of indebtedness and a

[31] Paragraph 4 (III) of EI A notification, 29 January 1992.
[32] *Supra* note 25.
[33] Madhav Gadgil and Ramchandra Guha, *This fissured land: An ecological History of India,* (Oxford University Press, New Delhi, 2005) >
[34] Even the Technical Support Group, constituted for the purpose of formulating the Draft Bill on Scheduled Tribes (Recognition of Rights) Bill, 2004, have accepted the fact that the tribal communities have been subjected to historical injustices. The Statement of Object and Reasons formulated in the said bill reiterates the same.
[35] Shrimadbhagwadgeeta, chapter III, verse 16.
[36] Dr. Sarvapalli Radhkrishnan, *Indian Philosophy, vol.-I,* (Oxford T/Iniversity Press, New Delhi, 2003)

sense of gratitude. That's how Shrimad Bhagvadgeeta, talks about five kinds of debts that a human being owes, wherein *Bhootrin,* that is the debt towards nature and wildlife was considered to be an important debt and therefore many traditions were nurtured for the sustenance of the vegetation, forests, and wildlife.

With the onset of British system there started a period of plunder and loot of natural and forest resources. The emphasis shifted from the sustainable use of forests to exploitation of forests for earning more and more revenues and since the local communities were the communities that had maximum stake in the forests, they (local communities) were deprived of their rights over forests, which were not more than livelihood rights. The system that came to be established has shown complete indifference to the needs of the conservation of forest and eco-systemic resources.[38] The demands of the timber for military purposes (Building of ships of British navy), extension of agriculture for earning more revenues, demand of wood for sleepers for expansion of Railway network and export of teak and sandalwood set in motion a fierce onslaught on India's forest resources.

The forest dwellers were naturally the people who would be the worst sufferers. In the name of the doctrine of eminent domain, the forests started being reserved for the more systematic exploitation of them for purposes of the state. The process started with the reserving of Malabar Teak reserves in 1806. In 1865 the Indian Forest Act was passed which expanded the powers of the state over forests and closed the forests for the people living in and around forests. The forest dwellers were deprived of their rights to derive sustenance from forests and penalties were imposed for any transgression of the provisions of the Act. The Act established the claim of the state to the forests it immediately required.

This also resulted in the loss of traditional practices of conservation of forests that were developed by the forest dwelling communities rather painstakingly. The Forest Conservation Act, 1927 was brought in for the more systematic exploitation of forest and wildlife resources.

Shrimadbhagwadgeeta, chapter III, verse 13, and, Ishavashyopanishad, verse-1.

Independent India relied on the British model of Forest and natural resource management and the first forest policy of 1952 laid down that the claims of the communities living in and around forests should not over-ride National Interests. The destruction of forests for construction of roads, irrigation and hydroelectric projects industries and other projects was justified in the name of national Interests. Ramchandra Guha and Madhav Gadgil, explain it in their "Ecological History of India". "The continuity between the forest policies of the colonial and independent India is exemplified by the National Forest Policy of 1952. Upholding the fundamental concept of its predecessor, the forest policy of 1884, it reinforced the right of the state to exclusive control over forest protection, production and management".[39] With the induction of various princely states into the Indian union the forest department expanded its activities.

Now India of the 21st century, aspiring to become the developed nation by 2020 and the engine of growth of Asian region, unfortunately, continues to rely on the same policies that were the stronghold of a colonial governmental structure, with little or no traces of democratic form of governance, not to talk of right to information which is comparatively a new entry into the legislative books. In the name of developmentalism, the. tribals and forest dwellers are still displaced; the planners continue to disregard with contempt the democratic rights of these people.

Institutions like World Bank sanction millions of dollars for projects Hke Narmada, with no advance analysis of what kind of an impact it may be having on the oustees and the displaced and later withdraw from such commitments when it turns out that there are no plans of the government to provide drinking water, the authorities still turn a blind eye to the innumerable number of sugar mills that are prohibited on the banks of the Narmada projects, but are coming up with the connivance of authorities[41] and no right to information is respected when NGOs and common people seek to obtain one.

[40] Arundhati Roy in Lloyd I Rudolph and John Kurt Jacobsen's, *Experience the State,* (Oxford University Press, New Delhi, 2006)
[41] The Hindu (New Delhi), 28 November 2006.

CONCLUSION

Such examples can be multiplied under India's environmental governance wherein there is complete lack of democratic element of governance and Right to Information is one such right, which is a complete casualty in it. Either it is not provided at all or if provided, that simply makes a show of it as has been shown above. Environmental governance, as such, has turned out to be the penumbra of India's democratic governance. It is scandalous that governments are so reluctant to provide the public with access to the huge amounts of valuable information that they produce as part of the routine discharge of their duties.

What is the way out? To our understanding a complete overhaul of the environmental administration in general and environmental justice administration in particular is the need of the hour. And as has been the experience, the legislature moves very slowly in these matters and therefore the Judiciary, the Media and the NGO sector owes a big responsibility towards the common citizenry of this country, specially the people belonging to a comparatively less privileged section of the society, the tribals, the forest dwellers and there lies ahead a challenge for all these leading sections of the society to usher in a new era of peace and prosperity without discrimination based on democratic ideals which have been enshrined in our constitution as well. Openness and accountability once introduced into the system, would weed out corruption, lubricate administrative functioning and improve the quality and delivery of governance. Open government and information sharing also contributes to national stability. One must remember that openness weakens perceptions of exclusion from opportunity or unfair advantage of one group over another. It effectively reduces the distance between government and people and combats feelings of alienation.

HISTORICITY AND MYTH OF SCIENTIFIC FORESTRY IN THE COLONIAL INDIA

*0M PRAKASH

ABSTRACT

Due to increasing railway tracks the demand for the wooden sleepers has increased manifold. When demand of specific species of trees exceeded supply, then areas of Sal forest witnessed unprecedented exploitation especially in the northern and central India. The notion of rotation and reproduction of timber was hardly practiced and it took a heavy toll on the forests of the region. Whatever modifications positive or negative the British did in the Indian forest it had its inherent motives i.e., maximization of profits, exploitation of forest resources and keeping the raj intact. Their efforts had hardly any philanthropic aim.

INTRODUCTION

The notion of afforestation and importance of plantation is well acknowledged in India since ages. The efforts made by Mauryan emperors especially Chandragupta and Ashoka in the field of plantation are well known. They appointed officials to take care of the forests and plantation activity. Such efforts more or less continued till Gupta period. The Mughals showed more interest in gardens and their development. Akbar ordered the planting of trees in various parts of his *kingdom. Jahangir was well* known for laying out beautiful gardens and planting trees.[1]

* Lecturer in History, Faculty of Policy Science, National Law University, Jodhpur.

[1] The gardens of Shalimar and Nishad in Kashmir are well known for their natural ambience and beauty.

A group of scholars believe that the British were largely responsible for the introduction of scientific forestry in India and before that there existed no such practice and that the British helped in the saving and preservation of biodiversity in India. This research paper attempts to probe into a number of issues such as, whether the so-called scientific forestry was actually scientific with a genuine desire for nature conservation or did it have some commercial and imperial motives; was there any connection between the aspect of deforestation and climatic change in the Northern India; did the British forest policy affect the local tribal population; whether the British government made any modification and manipulation in the production of forests which had its short term and long term impact on the forest ecology?

THE MAKING OF THE COLONIAL POLICY: MOTIVES AND PRACTICE

When the timber source in North America was closed after 1770s, Britain turned to India, Australia and South Africa for exploitation of such resources.[2] In 1805, the Court of Directors of the East India Company instructed the Bombay Government to conduct an inquiry into the teak forests in the presidency in order to ascertain the status, composition and extent of the forest for its viable exploitation in future.

The recorded history of deforestation goes back at least to the beginning of the 19th century. In 1800, a commissioner was appointed to look into the availability of teak in the Malabar forests. In 1806, the Madras government appointed Captain Watson as the commissioner of forests for organizing the production of teak and other timber suitable for the building of ships. Thomas Munro, the governor of Madras, abolished this position in 1823 in the belief that if timber supplies ran low, the law of supply and demand would stimulate private afforestation. No plantation effort was made over the next four decades. The establishment of the *Calcutta Botanical Garden* meant to cater to

[2] After the conclusion of American war of Independence in July 1774, the British were deprived from the rich resources of North America. This was the time when it paid its attention for colonization in Asia, Africa and Australia.

the need for growing Burma teak on the bank of river Hoogly for the purpose of shipbuilding.[3]

The revolt of 1857 was a great reminder for the colonial government to invest in the larger infrastructure projects such as railways to safeguard the interest of the Raj in the long run. As part of the military policy, the British government invested massively in the development of railways.[4] Due to increasing railways track the demand of the wooden sleepers increased manifold. Each mile of track required about 1760 sleepers.[5] Only three species of trees were fit to be used for the purpose as they were durable, termite and fungal resistant and were strong. They were *Sal* and *Deodar* tree in northern India and *Teak* in southern India. When demand of these species exceeded the supply, then those areas of Sal forest witnessed unprecedented exploitation especially in the northern and central India. Davidson observed the way trees were cut and recklessly felled:

> *"Great number of forests, the undisputed property of Government, had been so carelessly treated and so wastefully denuded of timber; that the reports of the conservator are filled with statements regarding the reckless way in which timber is being felled, and the difficulty of resuscitating ruined tracts, where once rich and extensive forest, with an abundance of teak or Sal timber, had flourished. "*[6]

Besides construction, the wooden sleepers were also required for the maintenance. The life span of a Sal sleeper was normally seven to fifteen years. So there was steady demand for replacement. The pathetic condition of the Sal forests in northern United Province shows the disinterest of the colonial government in the poor or virtually non-existent forest conservation:

[3] Deepak Kumar, "The Evolution of Colonial Science: Natural History and the East India Company," in J M Mackenzie (ed.), *Imperialism and the Natural World,* (Manchester University Press, Manchester, 1990) Pp. 51-66.
[4] R. P. Tucker, "The Forests of the Western Himalayas: The Legacy of the British Colonial Administration", *Journal of Forest History,* vol. 26, 1982, Pp. 112-23.
[5] E. Davisdson, *The Railways of India: With an account of their Rise, Progress and Construction,* (Davis and Dickson, London, 1868) P. 101.
[6]/Wrf. Pp. 108-09.

> *"The whole area had been devastated by fire and by unregulated felling. The forest was burnt over every year by the Tharus to clear the undergrowth for hunting, and by the graziers to obtain a crop of young grass...The best had thus disappeared, and the forest was full of fallen timber and of trees tapped either for extraction of resin or to verify their soundness. "*

The forests were brought under the control of the government to cater to the ever-increasing demand of the British Empire. The British did not recognize the communal ownership of* the forests and the forests became state property. Commercial forestry was introduced and the process of conversion of natural forests into commercial teak plantations was started. The introduction of commercial forestry resulted in a conflict over natural resources and the 'right' of the people to use the resources became 'privileges'. The government classified the forests into reserved forests (large parts of which were used for commercial forestry), protected forests and minor forests, where the local people were allowed access to meet their survival requirements.

Colonial system in India had a strong commitment for autocratic control over the forests in India. It was observed, "History has proved that the preservation of an appropriate percentage of the area as forests cannot be left to private enterprise in India, so that forest conservancy in that country has for some time past been regarded the duty of the locals."[8] Schlich argued that it was only the state that could appreciate the importance of the indirect benefits of the forests in the long term.[9] In March 1868, teak *(Tectona grandis),* Sal and Shisham, the vital timber vegetation, were declared protected even on the private lands. The Government claimed teak as a royal tree. Large scale tree felling required the permission of the tehsildar. This was done seeing the use of such trees for the colonial interest.

[7] S. Eardley Wilmott, *Forest Life and Sport in India,* (Basil Anderton, London, 1910) P. 20.
[8] Schlich, *A Manual of Forestry, vol.1,* (Oxford University Press, Oxford, 1889) P. 95.
[9] *Ibid.* Pp. 89-96.

In Central provinces civil authorities were criticized for increasing revenue through destructive exploitation of forests under their charge. Revenue generation was the real principle on which their performance was going to be evaluated so there was severe exploitation of forest resources at the cost of destruction of biodiversity. The notion of rotation and reproduction of timber was hardly practiced and it took a heavy toll on the forests of the region.

The 1878 Forest Act divided forests into reserved, protected, and village/communal.[10] It gave foresters power to manage forests and provided for control, not only of state owned lands but also over forests and lands not belonging to the state." The local peoples aspirations and demands were not considered. The legitimate demands of the local communities were considered as wasteful and environmentally profligate. Thus the traditional right over the forest of these communities were curtailed. Local rights and privileges permitting use of forest products were considered a threat to the long-term supply of timber to the colonial state. Shifting cultivators were permanently displaced from their ancestral habitat.[12]

The British saw the subsistence strategies of Indian tribes like shifting cultivation as dangerous to their conservation measures. Such efforts for conservation were aimed for long-term economic interest. They also realised that the tribes should be pressured into changing from using common lands to settling down and working individual, or privately owned plots. The economically marginal local populations, lost the privilege of access to forests, which had traditionally provided them large, and small timber, firewood, fodder, forest produce and famine foods*. Some of the restrictions of 1878 Act, which were intended to protect reserved forests from degradation, were later contradicted by the provisions of the 1894 *Land Use Policy* document encouraging

Protected forests legally had less protection in compare to reserved forest. Its purpose was to supply wood products for the local market. The notion of reserved forest was also linked with the maximization of revenue.

" B. Ribbentrop, *Forestry in British India,* (Government Press, Calcutta, 1900) P. 109 [12]J. S. Singh and S. P. Singh, "Forest Vegetation of the Himalayas", *Botanical Review,* vol. 53, 1986. Pp. 80-195.

direct forest clearance for agriculture. This further deprived the local population.[13]

The Forest Act, 1878 enabled the colonial government to annex vast area of land, about one fifth of the land area of India. Since all government forests in the central provinces were reserved forest, no rights of private land users were recognized.[14] Activities forbidden in these forests were felling, girdling, lopping, tapping and burning of the trees, and stripping them of bark or leaves.[15]

In some areas careful thinning was prescribed to ensure that the teak trees could acquire the right proportions for use as timber. Cattle grazing were banned so that teak can grow without any hindrance thus the livelihood of the forest dweller was not taken into consideration.

> *"Forests were considered as an obstruction to agriculture rather than otherwise, and consequently a bar to the prosperity of the Empire. It was the watchword of the time to bring everywhere more extensive forest area under cultivation, and the whole policy tended in that direction ".*

The revenue officials repeatedly argued that it would be more profitable to transform forest areas into agricultural one. The debate over rights of exploitation continued, however, and the claims made by villagers that they were the real forest owners or that they had rights to privileged use were not considered. The

[13] G. F. Taylor, "The Forestry/Agriculture Interface: Some Lessons from Indian Forest Policy", *Commonwealth Forestry Review,* vol. 60, 1981. Pp. 45-52.

[14] Mahesh Rangarajan, "Production, Desiccation and Forest Management in the Central Provinces 1850-1930" in Richard H Grove, Vinita Damodaran and Satpal Sangwan (eds), *Nature and the Orient: Environmental History of South and Southeast Asia,* (Oxford University Press, Calcutta, 1998) P. 581.

[15] According to the 1878 Act, the State was recognized as sole proprietor of classified forestlands. State forestlands were loosely defined as lands that did not fall under 'continuous' cultivation or 'permanent' settlement. Traditional forest practices, including grazing, forest-based gathering and forest-based rotational agriculture were rejected as a basis for private property rights. Previously defined rights of access and use were to be redefined by the government as 'privileges' for specific tribes, castes, villages and organizations.

terminology used by foresters when discussing the problem of village rights and privileges are revealing: "adverse," "injurious," "pernicious," "foul", "cancerous," "obnoxious," etc. What made the situation especially difficult was the fact that these claims were usually undefined and vague. It was thus incumbent on the government, foresters believed, to define clearly what rights and privileges the states were willing to maintain in the long term interest of the state.[17]

The region of Dang in Western India is worth mentioning here, which highlights the instance of restriction imposed upon the tribal people of the region. After the year 1844, the restrictions on forest use were severe in Dang. The area was rich in teak vegetation, which attracted such restriction. The teak forest was about 40 percent of the total forest wealth. This teak was valuable for construction of boats and ships. The extension of agriculture was denied to the locals. In 1855, comprehensive sets of rules were framed by the British to restrict the forest use by the Dangis. The tribal heads were given specific orders not to burn spots where it is thickly covered with the teak or other timber. Valuable trees were reserved for the forest department. Shifting cultivation was banned. The practice of burning bamboo near forests or cutting down teak trees to reap the crop of beans grown under it were discouraged. The selling of teak, *Sissoo, Khair* was also prohibited. The manufacture of Kath, used for betel leaves, and made from *Khair* tree were banned.[18] Other restrictions include hunting and *mahua* collection since both include use of fires.

The colonial forest officers preferred fodder cutting to grazing for cattle. But it was highly inconvenient and costly to the local to let the cattle graze than to cut the fodder and bring it to them. Sometimes the. insistence on grazing increased to such an extent that the British had no option but to allow grazing with a control on the kinds of cattle to be allowed and the rates to be charged.[20]

[17] H. H. Presler, *Primitive Religion in India,* (Christ Literary Society, Madras, 1971) Pp. 9-10.
[18] Rules For the Forest of Dangs, BA, PD 1856, vol.48, Comp.l 104
[19] Nature and the Orient, *Ibid,* P. 582.
[20] C. A. Malcom, "Some Problems in Connection with Grazing", *The Indian Forester Records,* vol. 43, 1917. P. 11.

Access to land for grazing or cultivation and the control of trees and imperial control on the timing of extraction of forest products were the issues on which foresters faced opposition from the villagers.[21]

By the last decade of the 19th century the pressure for revenue and increased output of forest products had led the government to intervene strongly in the regulation of trees and land use on malguzari and zamindari lands. Economic exigencies rather than ideology or principles dictated forestry practice. In the Nimar division of Central Province, the working plan provided only for the removal of the unsound teak trees, but by 1913, the rise in demand had led to heavy felling.[22] The same department violated the instruction of rotational felling which was responsible for implementing it. In Sonwani range, the rotation period was shortened from thirty years to twenty-five years so as to meet the increased demand for timber.[23]

Forest department during the colonial period sought to maximize the revenue at the cost of trees. Forests throughout the country were overexploited to provide timber and fodder for military use between 1914 and 1918, the First World War period. During World War I forest resources were severely depleted as large quantities of timber were removed to build ships and railway sleepers and to pay for Britain's war efforts. Between the two World Wars, great advancements in scientific management of the forests were made, with many areas undergoing regeneration and sustained harvest plans being drawn up. Sadly, emphasis was still not on protection and regeneration but on gaining maximum revenue from the forests. The extent of exploitation was more severe during the period of 1940-44, the Second World War period.[24] Annual outrun of Sal during the Second World War has been estimated as 283, 000 cubic meters.[25] World War Second

[21] R. Chambers, N. C. Saxena and T Shah, *Other Hands of the Poor: Worker and Trees,* (Oxford and IBH, New Delhi, 1989) Pp. 210-14.
[22] Working Plan Report for the Reserved Forests of the Nimar District in the Central Province, Nagpur, 1913. P.13.
[23] *Ibid.*
[24] J. B. Lai, *India's Forests: Myth and Reality,* (International Book Distributors, Dehra Dun, 1989) P. 32.
[25] H. B. Joshi (eds), *Troup's: The Silviculture of Indian Trees, vol. 2,* (Cosmo Publications, Delhi, 1980) P.21.

made greater demand on the forest than First World War had done.

Railways contractors encouraged widespread felling of teak in anticipation of restrictions on access in near future.[26] In the plateau districts of Seoni, Betul and Chhindwara in Central Province, timber forests were reduced to mere scrub to meet rural demand for timber and fuel.[27] Profits and the incentives inherent in timber harvesting, mining and power projects are the underlying causal factors of deforestation.

The British began to regulate and conserve. Teak plantations were raised in the Malabar hills and acacia and eucalyptus in the Niligiri Hills. In Bombay, the conservator of forest, Gibson, tried to introduce rules prohibiting shifting cultivation and plantation of teak forests. From 1865 to 1894, forest reserves were established to secure material for imperial needs. From the 18th century, scientific forest management systems were employed to regenerate and harvest the forest containing valuable timber.

The market for land created by the British laid a value upon the soil making it a tradable commodity. Whilst there had been some limited private property in pre-British times, land had not been a marketable asset. These two prerequisites put in place by the colonial rulers set the ecological catastrophe in motion. For the peasants, a vicious circle of revenue and debt payment, cash crop plantation and permanent acquisition of new land was created just to meet the new demands. Forests were cleared to gain new land for cash crops, whilst cultivation of food was increasingly marginalized. Ever greater demands were put upon the soil, hardly leaving time for its regeneration and in many parts of the Doab, but particularly in the Agra Division in the second half of the 19th century, it was totally exhausted. This change was completed within more or less 25 years (1805-1830). The devastation of the ecology of the Doab, which manifested itself so appallingly in 1837-38 led to the impoverishment both of large sections of the population and of the region.

[26] J. Forsyth, *The Highlands of Central India: Notes on their Forest and Wild Tribes, Natural History and Sports,* (Chapman and Hall, London, 1889) P. 213.
[27] *Ibid.* P. 34.

The British dealt with not only timber forest, but also the non-timber resources shabbily. During 1890-95 the forest department sold approximate 251,000 bamboos. Since bamboo cutting was given on the contract basis to the traders, they hardly took care of the sustainable methods of cutting. The haphazard and destructive cutting of the bamboo was reported but no attempt was made to correct the wrong.[28]

In the early 1850s deodar *(Cedrus deodara)* forests were already being exploited for public works in Punjab, and the fuel shortage at Simla had become acute; on the other hand in Sind, enclosures against grazing by camels and goats were enabling valuable species, notably babul *(Acacia arabica)* to regenerate themselves. Great numbers of railway sleepers were cut in the decade 1865-75: deodar from Punjab and Garhwal areas, sal from Oudh and Kumaon, and even chir *(Pinus longifolia)* from the latter. Arising out of the demand for fuel for locomotives and river steamers in Punjab, the Changa-Manga irrigated plantation was started in the plains near Lahore in 1866-88, but this didn't come into full bearing till 1881.

Lord Dalhousie, the great modernizing governor-general of the 1850s, saw the threat clearly and brought a German forester, Dietrich Brandis, to India. In 1855, Lord Dalhousie framed regulations for conservation of forest in the entire country. As India's first inspector-general of forests, Bfandis oversaw the implementation of a Forest Act in 1865; recruitment began the following year for positions in the country's new forest department. Senior positions were reserved for Britishers, while Indians filled the lower ranks as rangers, foresters and forest guards. Another decade went by, however, until forest reserves began to be set-aside on a large scale. Bombay had already created some reserves in 1860s in the evergreen forests of the Western Ghats.[29]

[28] G. S. Hart, *Report on the Forests Comprising the Kangra Forest Division with a working plan for their Management for Twenty Years, 1903-4 to 1922-3,* (Government Press, Lahore, 1904) Pp. 18, 25-26.

[29] Under the Indian Forest Act of 1878, the presidency government went much further, creating over the next generation the essentially modern pattern of forest reserves covering about 30,000 square miles, or a fifth of Bombay's territory.

Madras instituted a similar policy a few years later and by 1911 had set aside 20,000 square miles of forest. Mysore and Hyderabad, the largest native states of South India, soon created reserves and forest departments of their own. Since villages generally claimed the reserved lands, the process of creating reserves was more complex.

REACTION OF THE TRIBALS ON BRITISH POLICIES

All such above-mentioned factors were enough to generate discontentment and protest in the tribal people. After 1882, when the 1878 Forest Act was properly implemented, then such protests became more manifested. In the region of Thana in Western India, two organizations; *Thana Forest Association* and *Poona Sarvajanik Sabha* took the cause of the people. They protested against the existing forest laws and wanted it to be amended or repealed. The demands include restoration of forest rights and draconian measures for the violators of the forest laws.'[0] In the year 1885 some of the nationalist leaders like Dadabhai Naoroji, Pherojshah Mehta etc. met the British officials to apprise regarding the hardship and sorry state of affairs faced by the tribal people and requested for the temporary suspension of the forest rules and probe into the matter by a commission of inquiry.[31] The British government had no other option but to appoint a commission of inquiry. The Commission suggested some measures to slacken the forest rules and the tribal were allowed limited use of the forest products.[32]

ECOLOGICAL CONSEQUENCES

The selective manipulation of forest by the British not only altered the biodiversity but also caused long-term ecological problems. Certain species except teak were important for the colonial rulers so they increased control over it. The following instances are notable:

[30] Richard Tucker, "Forest Management and Imperial Politics: Thana District, Bombay, 1823-1887", *The Indian Economic and Social History Review,* vol. 16, July-September, 1979. P. 3.
[31] Maharashtra State Archives, *Revenue Department,* Bombay, vol. 105 A, 1885. P. 3.
[32] *Ibid.*

1. Superior tree species like *Sal, Saj* and *Bijasal* were promoted at the cost of not so useful one like *Amaltas {Cassia fistula)* and *Palas {Butea frondosa)P*

2. Certain species with some local use like *Mahua {Basia latifolia)* and *Tendu {Dio spyrus melonoxylon),* which had some commercial value, were not systematically eliminated. Since *mahua* fruits were used for eating by the locals and *Tendu* leaves were useful for making Bidi (rural cigarettes). Tendu trees were also protected for use as pit props in collieries and as cart axles. *Mahua* was also an important source of revenue for the government despite the fact that it was a subsistence product being used extensively by the people.[34]

3. Colonial foresters tried to eliminate bamboo to assist timber trees, even though bamboo was essential for artisanal production. Since bamboo was a subsistence species which was used extensively by the local especially the baigas tribals for basket making, hut making and other works so it had no adverse impact as far as the struggle between the colonial government and tribals was concerned but it had long-term negative impact.

4. Access to and control of teak trees was a point of dispute between foresters and villagers. The issue was how much wood was to be removed and what size of teak trees ought to be cut. The same problem was regarding several other species for example *Saj* and *Haldu* were to be cut only if over 50 inches at breast height.

5. *Harra tree {Terminalia chibuld)* was protected on account of its importance as a source of dyes.

6. The British considered the broad-leaved species as an impediment to commercially valuable pure conifer forests, even though the former was vital to the village economy.

[33] A. Smythies, Working Plan Report Bijeragogarh Reserves, Jabalpur, Central Province, Nagpur, 1875, Pp. 14-16.
[34] Crosthwaite, *Jabalpur Land Revenue Settlement,* Jabalpur, 1912. Pp. 41-42.

> Peasant's use of forest was downsized to maximize the timber output.[35]

Agricultural development in the Ganga-Yamuna doab region, since the British established their rule in 1801, brought dramatic changes, harming the soil, the water supply, plants, animals and people. The sensitive ecological system of doab particularly the part south of Delhi as far as Kanpur, was permanently damaged during the first thirty years of the 19th century. The move from food crops and sustainable subsistence farming to soil intensive cash crop production, and the clearance of large areas of forest and grass jungle to extend the crop area were decisive. Ravaged agricultural areas, salinisation and serious erosion led to desertification in large parts of doab.[36]

Before 1820, the northern part of Aligarh district in Uttar Pradesh was covered with thick *Dhak* forest. The British cut down most of these forests in the next three decades in the name of agricultural expansion. By 1880, there were hardly any trees left outside the properties of the talukdars. During mid-1820s there was thick belt of Dhak forest around Bharatpur. Several miles wide jungle belt disappeared within a decade of the arrival of the British.[37] Around 1850 there was no forest in the area except a small patch south of Bharatpur. The forest in the Aligarh district extended to Mainpuri, Etah and Etawah. Here they were about 30 km wide. By 1850 they had shrunk and by the end of 19th century, barring smalr patches forest vanished.[38] The Dhak forest in the doab, which extended beyond Kanpur was also chopped down during the first half of 19th century since Kanpur and Allahabad region were to develop as cotton producing areas.[39] The peasants were encouraged and also compelled to occupy these cleared areas.

[35] Ramchandra Guha, *The Unquiet Woods: Ecological Change and Peasant Resistance in the Himalayas,* (oxford University Press, Delhi, 1989) P. 50.
[36] Michael Mann, "Ecological Change in North India: Deforestation and Agrarian Distress in the Ganga-Yamuna Doab 1800-1850", in *Nature and the Orient, ibid.* P. 403.
[37] W. H. Sleeman,'- *Rambles and Recollections,* (Gutenberg Publishers, London, 1844), vol. I. P. 75.
[38] *District Gazetteer of the United Provinces of Agra and Oudh,* vol. 10, Mainpuri. P. 23; and *Report on the Settlement of the Mainpuri District,* Allahabad, 1875. P. 10.
[21] *District Gazetteers of the United Provinces of Agra and Oudh,* vol. 19, Cawnpore, (Allahabad, 1909) Pp. 13-14.

Further demographic pressure also made it necessary to occupy these areas.[40]

The British often established their authorities over the newly cleared land by forest cutting. Large areas of jungles were destroyed to deny bandits hiding place.[41] Such clearance of forest also destroyed a number of species and wild life, especially, tigers.

When the estates of rebellious zamindars were seized and put to auction, hardly were there buyers for the same. So the British officers were ordered to chop the trees and sell it. The British also imposed a ban on the production of mango trees in order to facilitate more and more clearing of forest for agricultural purpose as the region of Doab had rich fertile lands. Sleeman reports:

> *"Our government has, in effect, during the thirty five years that it held the dominion of the North Western Provinces, prohibited the planting of mango-groves, while the old ones are every where disappearing. In the resumption of the rent -free lands, even the ground, on which the finest of these groves stand, has been recklessly resumed; and the proprietors told, that they may keep the trees they have, but cannot be allowed to renew them, as the lands are to become the property of government. "*[42]

By the middle of 19th century about 70 percent of the forest of Doab was destroyed by the British and the land was used for agriculture purpose. Even this unrestricted exploitation of the land had serious climatic, agrarian and medical consequences.

The first instance of climatic change was observed after about 30 years of British rule in Doab. In the region of Oudh, the temperature rose and precipitation became irregular. In 1849, first time hand made fans were introduced in the British barracks due to increasing temperature which was earlier considered

[40] *Ibid.*
[41] *Report on the Settlement of the Mainpuri District.* P. 10.
[42] Sleeman; *ibid.* P. 177.

unnecessary. Soon it came into general use.[43] The wind intensity increased and the hot wind (loo) and dust storm increased.[44]

The rise in temperature and the increased heat wave further got strength due to decreasing rainfall.[45] The dry years of 1830s, which finally led to the drought of 1837-38, were caused due to cumulative manmade and natural factors. The continuous deforestation and inability of natural regeneration of forest caused havoc.

The heat wave and dust storm eroded the surface layer of soil. Further these soils were left unprotected to be washed away by the monsoon precipitation. The canal erosion took place in the headwaters of rivers and streams, which finally dried up the springs.[46] Due to the continuous drought condition, the layer of subsoil crucial for the storage of water also dried. An observation of the Collector of Mainpuri in 1850 is worth mention here:

> *"The soil of the Mynpoorie District doesn 't contain the same depth of moisture which it did prior to the year 1837, and that this is proved by the fact that the Esun Nadee, which always contained a considerable body of running water throughout the hot season, before the year, has since become nearly dry, two months after the rainy season. "*[47]

The rise in temperature caused heat related deaths in the month of May and June.[48] In the beginning of 19th century the forested part of Doab were free from Malaria but this situation changed due to deforestation. Due to increasing temperature, the water bodies in tank, lakes etc. received more sunshine and water evaporated and these places became the breeding ground for the mosquitoes.

[43] A. F. Corbett, *The Climate and Resources of Upper India,* (Blackwell Synergy, London, 1874) Pp. 6-7.
[44] *Ibid.*
[45] D. Butter, *Southern Districts ofOudh,* (Government Press, Calcutta, 1839) P. 23.
[46] *Ibid.* Pp. 22-23.
[47] *Selections North West Provinces,* vol. 3, pts. 12-21, 23, Note on the Decrease in the Number of Wells since the settlement under the Regulation IX of 1833, in the district of Muttra, Agra, Mynpoorie and Etawah, in the Agra division.
[48] A.F Corbett, *ibid.* P. 10

Thus the incidents of malaria increased. The increasing incidents of malaria were reported from Mathura and Muzaffarnagar.[50] In the year 1821, it was reported that the ferocity of cholera was such that there was scarcity of wood for cremation.[51] The modification in natural conditions attracted nature's fury and it had its toll in the form of spread of a little known epidemic.

Such climatic condition and intensive farming affected adversely the soil's fertility. Due to deforestation and rising temperature, the evaporation of water also accelerated and it led salt to move to the surface. It led to salinisation of the soil and decreased the soil fertility and also the soil's capacity to hold water decreased. In the decade of 1820s salinity of the soil increased to such an extent that villages had to be abandoned, since the fields were no longer productive. Mainpuri and Etah districts witnessed such incidents. The Chambal-Yamuna Doab region turned arid and by 1880 the whole area was barren.[52]

This was the beginning of the formation of famous Chambal ravine, which in the post independent India sheltered dreaded bandits. If fallow period was given for respiration of the soil ingredients or crop rotation was done, such problem would have been mitigated to large extent. In the year 1838, water flow from the river Ganges and Yamuna was reduced by one third. In 1837 its level fell to 47 inches from 58 inches in the south west of Agra district.[53]

CONCLUSIONS

The British continued building railways and roads. One consequence was an increased ability to reach forests and cut them economically. By 1860, conditions had deteriorated so much that officers in much of central India were treating teak as an oddity.[54] E.P. Stebbing's authoritative work, *The Forests of India*

[49] *Ibid.* P. 40.
[50] I. Klein, "Population Growth and Mortality", *IESHR,* vol. 27, no. 1, 1990. P. 49.
[51] *District Gazetteer of United Province,* vol. 6, Aligarh. P. 29.
[52] *Imperial Gazetteer,* vol. 3, Etawah District. P. 226.
[53] *Selections North West Provinces, ibid.* P. 342.

ascribes the silting of the great eastern deltas of the Krishna and Godavari rivers to forest clearance hundreds of miles to the west. In northern India, the accessible sal, *Shorea robusta,* forests were being very heavily cut for home consumption. For the Dehra Dun district, figures of the annual forest revenue are available from 1815 onwards and it shows the uncontrolled felling.

Surveys had to be completed to identify and often compensate claimants for land taken as reserved forest. The newly reserved areas were then to be put under so-called scientific forestry and cut by private contractors holding leases from the government. The reserved forests of India, however, began to suffer from timber trespassing almost immediately. Forest guards would send word that villagers were driving their animals into the reserves of a certain district because village fodder resources were exhausted. A skeptical British officer would be sent to investigate; in his report he would confirm that livestock were in the reserve areas.

The British record is full of comments like one recorded by the director of the Geological Survey of India, R. Bruce Foote who came through Bellary District in 1903 and wrote that the ironwood patches he remembered seeing 20 years before were gone, replaced by a "few pollards not fit to be called trees."

In the late 1920s, the Royal Commission on Agriculture described the village lands of the country as "hopelessly overstocked."[55] A report of the same period from Bombay argued that India's grazing lands could be rehabilitated if given a year's rest and then grazed lightly. The authors went on to concede, however, that secure fencing was essential to any such program and that such fencing was "a counsel of perfection."[56]

Thus whatever modifications positive or negative the British did in the Indian forest it had its inherent motives i.e., maximization of profits, exploitation of forest resources and keeping the raj intact. Their efforts had hardly any philanthropic aim and in the due course they made very negative modification in the Indian

For detail please See, *Report of the Royal Commission on Agriculture,* 1928. [56] Even then, foresters had become embittered by the hopelessness of the situation: one wrote that forest fires at least were not a problem, since "all the combustible material is consumed by the half-starved cattle."

ecology, which legacy India is carrying even today. The motives of green imperialism were completed by short-term gain while for the long run the various flora and fauna were destroyed completely.

EYEWITNESS TESTIMONY- ACCURACY AND CREDIBILITY

*DR. MANISHA MIRDHA

ABSTRACT

Memory is never perfect. Our minds are not like video cameras that we can record an event, store it over time and play it back later and that to with perfect accuracy. The memory traces can actually undergo distortion. As the old saying goes memories do not just fade, they also grow. What fades is the initial perception, the actual experience of the events. Every time we recall an event, we must reconstruct the memory, and with each recollection the memory may be changed or coloured by succeeding events. With the passage of time, with proper motivation and with the introduction of special kinds of interfering facts, the memory traces seem sometimes to change or become transformed. These distortions can be quite frightening, for they can cause us to have memories of things that never happened. Even in the most intelligent among us is memory thus malleable. Eyewitness testimony, which relies on the accuracy of human memory, has an enormous impact on the outcome of a trial. Unfortunately in its present state, eyewitness evidence though technically reliable in its own right tends to convict innocent individuals in a devastatingly high proportion. There might be many factors responsible for this inaceuracy, some which are under the control of the legal system and some, which are not.

INTRODUCTION

The Criminal Justice System relies heavily on the eyewitness identification for investigating and prosecuting crime. When someone who has witnessed a crime recounts that they have seen 'with their own eyes' they tend to be believed." Vivid anecdotes and personal testimonies can be powerfully persuasive, often more so than compelling but abstract

* Lecturer in Psychology, Faculty of Policy Science, National Law University, Jodhpur.

information. Tests conducted in 1979[1] have shown an enormous swing from a no-guilty verdict, to that of guilty within the same case simply through the introduction of an eyewitness. This alone displays the potency of eyewitness testimony, and asserts the theory that jurors tend to over believe, or at least weigh heavily on such evidence[2].

A critical review of eyewitness memory research suggests that such testimony has greater prejudicial than probative value and therefore should not be allowed in court. The evidence in many areas is inconsistent, the procedures and measures used to study various relationships are not well tied to legal procedure, and there is no evidence that the experts who testify would be any better at detecting witness inaccuracy than uninformed jurors. Finally, the nature of what is known about human memory is so complex that an honest presentation of this knowledge to a jury would only serve to confuse rather than improve their decision-making. In everyday life we often remember things differently from what was experienced. We organize material to make it meaningful, we add details to make sense of events, and we change it in the light of subsequent information. Memory does not provide an accurate record of an event but an interpretation of it.

EYEWITNESS IDENTIFICATION

Courts and juries often view the identification of a defendant by an eyewitness as particularly convincing but analyses of proven wrongful convictions have consistently shown that mistaken eyewitness identification is responsible for more miscarriages of justice than all other potential causes combined.[3] In a survey of 205 cases of wrongful convictions mistaken identification was found to be involved in 52%. The most disturbing evidence for wrongful identifications as a major cause of injustice comes from the use of DNA analysis. The re-evaluation of cases where people had been convicted and where DNA material had been preserved revealed forty cases of wrongful convictions. Of these 40 cases, 36 involved eyewitness identification

[1] E.F. Loftus, *Eyewitness Testimony* (Harvard University Press, Cambridge, 1979)
[2] T. D. Kennedy and R. C. Haygood, "The discrediting effect of eyewitness testimony", *Journal of Applied Social Psychology,* 1992.
[3] A. Rattner, "Convicted but innocent: Wrongful conviction and the criminal justice system", *Law and Human Behaviour,* vol.12, 1988. Pp. 283-293.
[4] *Ibid.*

evidence in which one or more witnesses falsely identified the defendant.[5]

The question that arises is that why false identification occurs? The plausible causes can be broadly differentiated into two categories. On the one hand witnesses may have had a poor view of the criminal; a long delay between the encounter and the recognition test may have weakened the memory representation of the culprit or the post-event information may have contaminated the witnesses' memory. These factors, which affect the accuracy of witness testimony over which the justice system has no control, are called *Estimator variables*[6]. On the other hand are the *System variables* , which also affect the accuracy of witness testimony and over which the justice system has some control, such as how the police may conduct the recognition test; the way in which questions are framed; or the way in which a line-up is constructed and conducted.

ESTIMATOR VARIABLES

Estimator variables are those features of the crime or the conditions in which crime occurred which are not under the control of the crime investigators. They are of interest because knowing how estimator variables influence identification accuracy gives us some basis for gauging the reliability of eyewitness identification. The better we are able to assess identification accuracy, the better we are able to assess defendant's culpability and then finally find the best way to resolve a criminal charge.

(a) Confidence level

Whether or not eyewitnesses exude a high level of confidence about their identifications of criminal suspects is of immense importance in the courtroom. Judges and juries both rely heavily on witnesses' confidence when making their own decision about the witnesses' accuracy. The accuracy with which an eyewitness identifies a culprit and their confidence in the judgment are not positively correlated with one another. The reality of this finding is rather troublesome given that the confidence that an eyewitness expresses in the identification is admissible evidence in court proceedings. Given that the two are not

[5] G.L. Wells, "Applied eyewitness research: System variables and estimator variables". *Journal of Personality and Social Psychology,* vol. 36, 1978. Pp. 1546-1557.
[6] *Ibid.*
[7] *Ibid.*

positively correlated with one another and on occasion, have been found to be negatively correlated with one another can lead to a misplaced verdict of guilt or innocence resulting in erroneous evidence being taken into consideration.[8] Research also demonstrates that if a person who makes a false identification from photo spreads is told that a co-witness has identified the same individual their confidence increases dramatically. Conversely if they believe that the co -witness has identified someone else or not has been able to select anyone then their confidence drops profoundly.[9] Wells and Bradfield[10] also showed experimentally that not only is people's confidence increased significantly by being told that they are correct but it distorts their memory in other ways also. They reported having had a better view of the perpetrator, having paid more attention to the event and having more easily made their identification decision than did those who believed themselves to be incorrect.

(b) Weapon Focus

Weapon focus refers to the concentration of a crime witness's attention on a weapon be it the barrel of a gun or blade of a knife and the resultant reduction in ability to remember other details of the crime. It could be seen that in court proceedings attention on a weapon is so concentrated that it causes the exclusion of everything else. Less extreme is the characterization of the weapon as an object that "appears to capture a good deal of.. .attention resulting in among other things a reduced ability to recall other details from the environment."" Loftus'[2] suggests that the weapon focus effect occurs because the presence of a weapon focuses attention away from less dramatic visual -images, sucl; as the face of the perpetrator. They examined this phenomenon by presenting subject-witnesses with a series of slides depicting an event in a restaurant. Half of the subjects saw a customer point a gun at the cashier; the other half saw him hand the cashier a check. Eye movements were recorded while subjects viewed the slides. Results showed that subjects made more eye

[8] S. M. Kassin, "Eyewitness identification: Retrospective self-awareness and the accuracy-confidence correlation", *Journal of Personality and Social Psychology,* vol. 49, 1985. Pp.878-893.

[9] C. Luus & G.L. Wells, "The malleability of eyewitness confidence: Cowitness and perseverance effects", *Journal of Applied Psychology,* vol. 79, 1994. Pp.714-724.

[10] G.L Wells & A.L. Bradfield, "Good you identified the suspect: Feedback to eyewitness distorts their reports of the witnessing experience", *Journal of Applied Psychology,* vol. 83(3), 1998. Pp.360-376.

[1] E.F. Loftus, *Eyewitness testimony.* (Harvard University Press, Cambridge, 1979).

[12] E. Loftus, G. Loftus & J. Messo, "Some facts about weapon focus", *Law and Human Behaviour,* vol.11, 1987. Pp.55-62.

fixations on the weapon than on the check, and fixations on the weapon were of a longer duration than fixations on the check. It was also seen that later during recall the memory of subjects in the weapon condition was poorer than the memory of subjects in the check condition. These results provided the first direct empirical support for weapon focus.

However Pickel[13] argues that it is the unusualness rather than the degree of threat that is the key variable producing the weapon focus effect. He did two experiments to prove it[14]. In the first it was found that undergraduates who watched videotape showing an armed man provided less accurate descriptions of him if the setting were one in which a gun would not be expected (such as at a baseball game) than if it were quite usual (such as a shooting range). The second study showed that witnesses gave poorer descriptions of an individual if they were carrying an object that did not fit with their occupation (such as a priest carrying a gun) and better if the object carried was not unexpected (such as a police officer carrying a gun). These results indicate that weapon focus occurs not because of the presence of weapon *per se* but because weapons are surprising and unexpected in many situations.

(c) Stress and Arousal

Being witness to a serious offence would definitely put anyone under a lot of stress. But the effect of this stress and arousal are still very debatable. Some research shows that increased levels of violence in filmed events reduce accuracy[15] whereas other research has failed to find this effect[16]. A frequent claim by defense experts is that stress and arousal causes more mistakes. They claim that the consensus of scientific judgment is that emotional arousal is destructive to the perception process and hence to memory[17]. But the correlation between stress and

[13]K. L. Pickel, "Unusualness and threat as possible causes of Weapon Focus", *Memory,* vol.6,1998. Pp. 277-295.
[14]K.L Pickel, "The influence of context on the "Weapon Focus" Effect", *Law and Human Behaviour,* vol. 23 (3), 1999. Pp.299-311.
[15]B. R. Clifford, and J. Scott, "Individual and situational factors in eyewitness- testimony", *Journal of Applied Psychology,* vol. 63,1978. Pp. 352-359. [16]B. L. Cutler, S. D. Penrod, and T.K. Martens, "The reliability of eyewitness identification: The role of system and estimator variables", *Law and Human Behavior,* vol.11,1987. Pp. 233-258.
[17]S.M. Kassin, P.C., Ellsworth, and V.L. Smith, "The 'general acceptance' of psychological research on eyewitness testimony: A survey of experts", *American Psychologist,* vol. 44, 1978. Pp.1089-1098.

memory is not that simple. Deffenbacher reviewed some 21 studies that he claimed, examined the relationship between arousal and the accuracy of eyewitness memory. He noted that ten of them produced results that suggest that higher arousal levels increase eyewitness accuracy and the remaining 11 studies produced just the opposite result - lower accuracy of memory was yielded by experimentally manipulated increases in arousal or higher individually assessed arousal levels. The fact that half of the studies found one effect and half found another leaves us nowhere. But Deffenbacher provided a thorough analysis of this inconsistency. The relation between stress and memory is not a simple decreasing function, but an inverted U-shaped function. (Refer to figure 1)

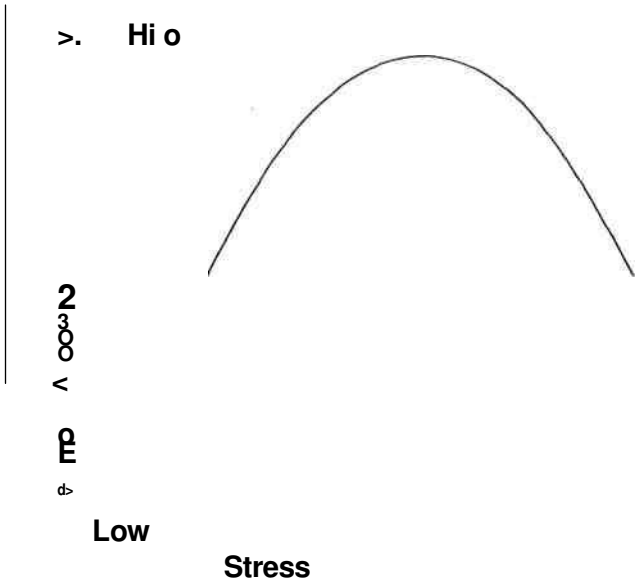


Figure 1

Both low levels and high levels of stress are assumed to produce poorer performance than medium stress levels[19]. To draw this conclusion, Deffenbacher argued that those studies that found a positive relationship between stress and memory generally used lower stress levels in all conditions and studies finding the opposite relationships used higher levels of stress.

In conclusion we can say that the relationship between stress and accuracy of testimony is a very complex one. Stress interacts with many other factors but still the fact cannot be ignored that when people witness a very serious crime they are highly stressed. This can lead to memory impairment, which the witnesses may try to camouflage with 'filing in

[18]K.A Deffenbacher, "The influence of arousal on reliability of testimony", In S.M.A. Lloyd-Bostock, and R.B. Clifford (Eds.), *Evaluating witness evidence: Recent psychological research and new perspectives* (John Wiley & Sons, Chichester, 1983) [19] Yerkes-Dodson law: We perform poorly when we are at both high and low levels of arousal and that we perform best at medium levels of arousal.

gaps'. This reconstruction of memory can further distort the fact leading to false testimony.

(d) Racial Bias

There is a tendency for people of one race to be better at identifying people from their own race at all durations of exposure. There are many studies that refer to the common finding that eyewitnesses are more accurate at identifying perpetrators of their own race than perpetrators of other races. A recent meta-analysis[20] by Meissner and Brigham[2'] reviewed the results of 31 separate studies involving 91 separate experimental tests of own versus other race identifications. In total, over 5000 eyewitnesses participated in these studies. Across all studies witnesses were 1.4 times more likely to correctly identify a previously viewed own-race face when compared with performance for other-race faces. Witnesses were 1.56 times more likely to falsely identify a novel other-race face when compared with own race faces. White participants demonstrated a significantly larger own-race bias when compared with Black participants but only with respect to false identifications. With respect to correct identifications, Whites and Blacks showed the same own-race bias. People apply more lenient criteria in identifying someone of a different race or ethnicity, while using more stringent requirements for making an identification of someone of the same racial or ethnic group.[22]

SYSTEM VARIABLES

System variables are integrally part of those factors that can be controlled by the legal system to enhance the accuracy of testimony by eyewitnesses. They include all of the ways that law enforcement agencies retrieve and record witness memory, such as lineups, photo arrays and other identification procedures. System variables that substantially impact the accuracy of identifications include selection of "fillers" (or members of a lineup or photo array who are not the actual suspect), instructions to witnesses before identification procedures,

[20] Meta-Analysis is a research technique for statistically averaging or combining the results of multiple studies to arrive at a summary conclusion reflecting the trend of the research results.

[2I]C. A. Meissner, & Brigham. "Eyewitness identification: Thirty years of investigating the own race bias in memory for faces". *Psychology, Public Policy and Law,* vol. 7, 2001. Pp. 3-35.

[22] Gary L. Wells, "The other race effect in Eyewitness Identification", *Psychology Public Policy & Law.* vol. 7, 2001. P. 230.

administration of lineups or photo arrays, and communication after witnesses make identification.

(a) Line ups

Lineups serve different purposes in different cases. In the majority of cases the lineup is apparently used merely as a method to establish that a witness's memory is good enough to allow the witness to testify that a defendant who is already known, or very likely to be the perpetrator (because of various types of corroborating evidence) is the person that the witness saw. It is only in a small proportion of actual cases that the lineup serves as the primary and sole method of discovering who the perpetrator was[23].

The relative judgment conceptualisation states that an eyewitness tends to select a person from a lineup who most resembles the eyewitness memory of the culprit relative to the other line-up members. Although the relative judgment decision process permits eyewitnesses to do a reasonable job of identifying the culprit from a culprit- present line-up, when eyewitnesses view a culprit absent line-up there will be one lineup member who looks more like the culprit than the others and the chances of his being pointed out are increased. Another variable shown to have considerable impact on eyewitness identification from lineup is the pre-lineup instructions given to the witness. Malpass[24] was the first to demonstrate the ratio of accurate to inaccurate identification is strongly affected by whether or not eyewitness have been instructed prior to viewing the lineup that the culprit might or might not be in the lineup. A meta-analysis of the eyewitness identification literature on pre-lineup instructions reveals that the loss of accurate identifications from such instructions is minimal whereas the reduction of mistaken identification is considerable.[25]

Research also shows that viewing photographs prior to making identification can taint the identification and lead to false identification. This is known as "photo-biased identification." Photo exposure makes a face look familiar and witnesses will often, at a later identification,

[23]P.J. Moore, E. B. Ebbesen, and V.J. Konecni, "What does real eyewitness testimony look like? An archival analysis of witnesses to adult felony crimes". (Technical Report, University of California, 1994).

[24] R.S. Malpass, "Effective size and defendant bias in eyewitness identification lineups." *Law and Human Behaviour,* vol. 5, 1981. Pp. 299-309.

[25] N.M. Steblay, "Social influence in eyewitness recall: A meta-analytic review of lineup instruction effects", *Law and Human behaviour,* vol. 21, 1997. Pp.283-298.

experience that familiarity and mistakenly relate it back to some original event rather than back to the intervening photo exposure. It is not possible to separate which event the witness is identifying-that which first occurred or the later viewing of the photo. Persons appearing in identification tests whp also appeared in prior photos, such as mug shots, may be at greater risk for false identification.

(b) Post event information

Post-event information is information that is learned after an event takes place that is then integrated into the memory of the event. After integration occurs it generally is not possible to disentangle information, which came from the event itself from information, which was learned and became integrated later on. To the degree that the post-event information is false, this results in the ultimate memory becoming more inaccurate.

Loftus [6] has pointed out that a major obstacle to accuracy is the passage of time between the time an event is witnessed and the time testimony is given. During that interval, the witness is almost always exposed to misleading post event information from police questioning," new stories, leading questions and the statements that other people make. All such information becomes incorporated into what the witness remembers. The information blends into a 'story' that consists of details the person seems to remember.

One of the things that happen when you place a victim of a serious offence together with a police investigator is the unification of goals. Both have a desire to solve the crime, but if the victim has a very strong desire to solve that crime, they become especially sensitive to any feedback they may receive. And so, if the investigator has a suspect in mind, there remains the possibility that they may communicate that idea to the victim unwillingly [7].

This interaction is known as suggestibility, and is defined as the tendency of individuals to accept uncritical information during questioning, or

[26] E.F. Loftus, "When a lie becomes memory's truth: Memory Distortion after exposure to misinformation", *Current Directions in Psychological Science,* vol. 1, 1992. Pp. 121-123.
[27] E. Loftus, "What Jennifer saw", *Frontline - Internet Address,* 1998, available at http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/loftus.html

merely complying with what they believe the interviewer wants to hear . On the other hand, some interviewers have a tendency toward adopting self-fulfilling prophecy techniques, whereby questions are specifically designed to generate flawed results[29], and any information that does not fulfil these expectations is simply ignored. Loftus argued that information from misleading questions *permanently* alters memory for an event. The previously formed memory trace is overwritten and destroyed.

Study of eyewitness testimony has suggested that memory for observed events can be very fragile. The findings of such studies have important implications for the way in which eyewitness testimony should be used in real life and suggests that we should be very careful in the way in which eyewitnesses are questioned.

The distinction between system variables and estimator variables is in several respects consequential. Whereas estimator variables can at best increase the probability that the criminal justice system can sort accurate from inaccurate eyewitness identification, system variables can help prevent inaccurate identifications from occurring in the first place.

CONCLUSION

Despite the possibility of various errors that might creep in the whole process of eyewitness testimony, one should not conclude that eyewitnesses are always wrong. Eyewitness identification is highly fallible but it still carries great weight with jurors. Eyewitness identifications can be very accurate also[3] . In addition there have been various attempts made to increase the accuracy. Responding to many cases in which DNA analysis indicated wrongful convictions and to decades of relevant psychological research, U.S. Attorney general Janet Reno ordered the National Institute of Justice to develop nationwide guidelines designed to improve the accuracy of evidence provided by eyewitnesses.[31]

A major target for improvement has been the police line up in which witnesses examine several individuals (the suspect and the non-suspects)

S. Sadava and D. McCreary, *Applied Social Psychology* (Prentice Hall, Upper Saddle River, NJ, 1997)

[29] *Ibid.*

[30] J.C. Youille and J.L. Cutshall, "A case study of eyewitness memory of a crime". *Journal of Applied Psychology,* vol.71, 1986. Pp.291-301.

[31] Technical working Group for Eyewitness Evidence, 1999

and try to identify the one who is guilty. Accuracy is improved when police use a *blank-lineup*[32] control procedure.

The guidelines for suspect lineups are also applicable to photo-spreads. At no time should the tester initiate any form of interaction with the witness who is attempting to distinguish the true offender. This will remove any pressures from the witness, and ultimately lead to a better selection. Witness questioning also plays an important factor within the development of a functional testimony system. The first step would be to have the evidence (eyewitness testimony) recorded as soon as possible after the event has taken place. Any lapse of time would cause some deterioration of the memory or embellishment from discussion with others. When questioning a witness it is important to approach them with questions that are not perplexing, but instead clear and conscious. Unclear questions lead to uncertainty, which in turn leads the witness to become more reliant on the context of questions. The jurors are also being educated on the misdemeanours of the whole information processing system of the memory.

Eyewitness testimony can play a beneficial part in the criminal justice system if factors such as police procedures are controlled under the strict guidelines. If witness identification is correctly implemented, investigators and prosecutors will be able to make their judgments more effectively, and thus focus their resources more efficiently.

[32] A witness is first shown a lineup containing only innocent individuals and not the suspect. If the witness fails to identify any one of them, there is increased confidence in his or her accuracy. If an innocent person is identified, the witness is informed of his mistake and cautioned about the danger of making a false identification. Such an experience improves the accuracy of witnesses when actual lineups are then presented.

BIOMEDICAL WASTE DISPOSAL: INDIAN PERSPECTIVE

*DR. PRASHANT MEHTA

ABSTRACT

The issue of biomedical waste management has assumed great significance particularly in view of the rapid upsurge of HIV and Hepatitis B infections. Safe handling of biomedical waste continues to be a matter of serious concern for health authorities in India and consequently poses a serious legal problem. Thousands of tonnes of biomedical waste originating from hospitals, nursing homes and clinics in the form of cotton swabs and bandages infected with blood, IV fluid bags, needles, catheters, human tissues, body parts etc. is dumped in open garbage bins on the roads in most parts of the country. With apparently no direct machinery for granting permission post facility assessment to nursing homes in any of the states. Government of India has made proper handling and disposal of this category of waste a statutory requirement under the Bio-Medical Waste (Management and Handling) Rules 1998. However the magnitude of the problem is still far from being appreciated.

INTRODUCTION

Hospitals are one of the most diverse and complex institutions frequented by people from every walk of life in the society without any distinction between age, sex, race and religion. This is over and above the normal inhabitants of hospital i.e. doctors, patients and paramedical staff. Bio- medical waste is generated by variety of sources during the diagnosis, treatment, and immunization of human beings or animals, in research activities in these fields, and during the production or testing of biologicals.

* Lecturer in Chemistry, Faculty of Science, National Law University, Jodhpur

Bio-medical wastes may constitute wastes like sharps, soiled waste, disposables, anatomical waste, cultures, discarded medicines, chemical wastes, syringes, gloves, catheters, swabs, bandages, body fluids, human excreta, human tissues, and sticky bandages etc. This waste is highly infectious and can be a serious threat to human health if it is not managed in a scientific manner. It has been roughly estimated that 25% of waste generated in a hospital is infected.

All these institutions produce waste, which is increasing in its amount and type, due to advances in scientific knowledge and is creating its impact[1]. The hospital waste, in addition to the risk for patients and personnel who handle these wastes, poses a threat to public health and environment[2]. Surveys carried out by various agencies show that the health care establishments in India are not giving due attention to their bio-medical waste management.

Keeping in view inappropriate biomedical waste management, the Ministry of Environment and Forests notified the "Bio-Medical Waste (Management and Handling) Rules, 1998" in July 1998. In accordance with these Rules (Rule 4), it shall be the duty of every occupier of an institution generating bio-medical waste which includes a hospital, nursing home, clinic, dispensary, veterinary institution, animal house, pathological laboratory, blood bank by whatever name called to take all steps to ensure that such waste is handled without any adverse effect to human health and the environment.

The hospitals, nursing homes, clinic, dispensary, animal house, pathological laboratories etc., are therefore required to set in place the biological waste treatment facilities. It is however not incumbent that every institution has to have its own waste treatment facility. The rules also envisage that common facility or any other facilities can be used for waste treatment. However it is incumbent on the occupier to ensure that the waste is treated within a period of 48 hours.

[1] S.K..M. Rao, R.K.. Garg, "A study of Hospital Wasted Disposal System in Service Hospital", *Journal of Academy of Hospital Administration,* vol. 6(2), July 1994. Pp.27-31.
[2] I.B. Singh, R.K. Sharma, "Hospital Waste Disposal System and Technology". *Journal of Academy of Hospital Administration,* vol. 8(2), July 1996. Pp.44-48.

SOURCES OF BIO-MEDICAL WASTE

While urban solid waste has attracted the attention of town planners, environmental activists and civic administrators, there is yet lack of concern for bio-medical waste generated primarily from health care establishments, including hospitals, nursing, homes, veterinary hospitals, clinics and general practitioners, dispensaries, blood banks, animal houses, pathological laboratories and research institutes. The other sources of biomedical waste are the following:

Households: The domestic sector generates biomedical waste to a small extent, which is less than about 0.5% of the total waste generated in a household. The types of bio-medical waste generated in a household are syringes, cotton swabs, discarded medicines, bandages, plaster, sanitary napkins, diapers etc. Households are not covered under the law for generating biomedical waste.

Industries, Education Institutes, Research Centres, Blood Banks, Health care establishments (for humans and animals) and Clinical Laboratories: All the above-mentioned organizations generate Bio-Medical Waste in substantial quantities. This sector is covered under the purview of Bio-Medical Waste (Management and Handling) Rules 1998. The type of waste generated from an animal house is typically animal tissues, organs, body parts, carcasses, body fluids, blood etc., of experimental animals. Besides this highly hazardous microbiological and biotechnological wastes are also produced.

BIOMEDICAL WASTE MANAGEMENT PROCESS

Handling, Segregation, Mutilation, Disinfections, Storage, Transportation and Final disposal are vital steps for safe and scientific management of biomedical waste in any establishment'. The key to minimization and effective management of biomedical waste is segregation (separation) and identification of the waste. The most appropriate way of identifying the categories of

[3] D.B. Acharya, Meeta Singh, *The Book of Hospital Waste Management* (Minerva Press, New Delhi, 2000) Pp. 15,47.

biomedical waste is by sorting the waste into colour coded plastic bags or containers.

WHY BIO-MEDICAL WASTE NEEDS MANAGEMENT

Bio-medical waste needs proper management due to various hazards it poses to health, environmental besides legal, aesthetic reasons in addition to ethical reasons. The ethical aspect is more important as it is related to the social responsibilities, which the health professionals have, as a result of their status, knowledge and skills and an obligation to alert those who are at risk. This is reflected by the compulsory notification of infectious and notifiable diseases as a measure of public Hospital Management[4].

As regards Bio-Medical waste management, health professionals bear a responsibility to act in such a way to prevent exposure to various health hazards and exposures to dioxins, which are produced during incineration, which are generally cause of incurable cancers. The Medical ethics dictate that prevention must be carried out.

The issue of indiscriminate Bio-Medical Waste management in India has attracted the attention of the highest judicial body at the level of Supreme Court of India, which has from time to time issued instructions regarding management of Bio-Medical Waste[5] and its proper management.

MAGNITUDE OF BIOMEDICAL WASTE PROBLEMS: FOCUS ON **INDIA**

There are no national level studies on quantity of hospital waste generated per bed per day; but studies have been carried out at local or regional levels in various hospitals. Whatever data are available from these studies, it can safely be presumed that in most hospitals roughly about 1-2 Kg/bed/day of waste is generated .

[4] R.K. Sharma and S.K. Mathur, "Management of Hospital Waste", *Journal of Academy of Hospital Administration,* vol. 1(2), July 1989. Pp. 55-57.
[5] *Ibid.*
[6] One-study claims that the estimated quantity of the waste generated in the hospitals varies from 2-5 kgs^ed/day with a total Bio-Medical Waste generated 11-14 tons/day in the city of Delhi alone (with 13 hospitals, 13 nursing homes, 31 dispensaries and 88 health centres and polyclinics).

According to a WHO report, around 85% of the hospital wastes are actually non hazardous, 10% are infective (hence hazardous), and the remaining 5% are non-infectious but hazardous (chemical, pharmaceutical and radioactive waste).

HEALTH HAZARDS FROM BIO-MEDICAL WASTE

The improper management of bio-medical waste causes serious environmental problems in terms of air, water and land pollution. The nature of pollutants can be classified into biological, chemical and radioactive. Environment problems can arise due to the mere generation of bio-medical waste and from the process of handling, treatment and disposal. Although pollution cannot be mitigated completely, it can be reduced to a large extent.

Air Pollution can be caused in both indoors and outdoors. Bio-Medical Waste that generates air pollution is of three types -Biological, Chemical and Radioactive. Indoor air pollutants like pathogens present in the waste can enter and remain in the air in an institution for a long period in the form of spores or as pathogens itself. This can result in Hospital Acquired Infections (Nosocomial infections like AIDS, Hepatitis B & C etc.) or Occupational Health Hazards.

The patients and their attendants also have a chance of contracting infections caused due to pathogens or spores, which are air borne. Dust may harbour Tubercle Bacilli and other germs, which cause diseases if inhaled.

Covering wastes properly or routing the wastes in such a way that the shortest distance is used and sensitive areas are avoided can reduce indoor air pollution caused due to biologicals. Segregation of waste and pre-treatment at source can also reduce this problem to a great extent.

Indoor air pollution can also be caused due to:

- Poor ventilation: The building design plays an important role in maintaining proper ventilation. Faulty air conditioning also will result in poor circulation of air within the rooms.

- The paints, carpets, furniture, equipment, etc., used in the rooms, can give out volatile organic compounds (VOC).

- Use of chemicals: Disinfectants, fumigants etc., give out acidic or hazardous gases.

- On the other hand outdoor air pollution can be caused by pathogens. When waste without pre-treatment is being transported outside the institution, or if it is dumped openly, pathogens can enter the atmosphere. The most important are Biological agents, which pollute water and food and cause infections like cholera, typhoid, dysentery, infective hepatitis, polio, and hook worm diseases etc.

Chemical Pollutants that cause outdoor air pollution have two major sources- open burning and incinerators. Open burning of bio-medical waste is the most harmful practice and should be strictly avoided. The presence of plastics and hazardous materials in the waste will generate harmful gases such as oxides of sulphur, oxides of nitrogen, carbon dioxide and suspended particulate matter. These when inhaled can cause respiratory diseases. Certain organic gases such as dioxins and furans are carcinogenic in nature.

Radioactive Emission and Radioactive Wastes through research and radioimmunoassay activities may generate small quantities of radioactive gas. The clinical application of ^{85}Kr and ^{133}Xe is the principal source of gaseous radioactive waste material requiring disposal. Gaseous radioactive material should be evacuated directly to the outside by a special exhaust system or an activated carbon trapping device may be used.

Radioactive waste in liquid form can come from chemical or biological research, from body organ imaging, from decontamination of radioactive spills, from patient urine and from scintillation liquids used in radioimmunoassay. Undoubtedly, this last source of liquid waste produces the largest volume of liquid radioactive waste.

Water Pollution is another major threat from Bio-medical waste. If the waste is dumped in low-lying areas, or into lakes and water bodies, it can cause severe water pollution. Water pollution can either be caused due to biologicals, chemicals or radioactive substances.

The "pathogens present in the waste can leach out and contaminate the ground water or surface water. Harmful chemicals present in bio-medical waste such as heavy metals can also cause water pollution. Poor land filling technology may cause water pollution in the form of leachates. Water pollution can alter parameters like pH, BOD, DO, COD, etc. There are instances where dioxins are reported from water bodies near incinerator plants. Dioxins enter the water body from the air.

Land Pollution is caused by the final disposal of all bio-medical waste. Even liquid effluent after treatment is spread on .land. Henee, pollution caused to land is inevitable. Open dumping of bio-medical waste is the greatest cause for land pollution. Land filling is also harmful to a limited extent. Soil pollution from biomedical waste is caused due to infectious waste, discarded medicines, chemicals used in treatment and ash and other waste generated during treatment processes. Heavy metals such as cadmium, lead, mercury etc., which are present in the waste will get absorbed by plants and can then enter the food chain. Nitrates and phosphates present in leachates from landfills are also pollutants. Leachate containing concentrated heavy metals and or microbes, which are released from landfills, can lead to ground water and surface water pollution.

Radioactive waste generated from institutions can cause soil pollution. Cadavers, protective clothing, absorbent paper generated in the nuclear medicine imaging laboratory will also cause soil pollution. Minimizing the waste and proper treatment before disposal on land are the only ways of reducing this kind of pollution.

Last but not the least Bio-Medical Wastes breed vermin and pests. Examples are: Mosquitoes that transmit insect borne diseases like malaria and filarial, common houseflies, which transmit infections mechanically. Soil may be rich in Tetanus spores or the blood born pathogens have gained significant attention after the attack of HIV and HBV, HCV which can lead to AIDS and Hepatitis B, C and other viral and bacterial infections.

HANDLING OF BIO-MEDICAL WASTE

The main reasons for indiscriminate management and handling of Bio-medical waste can be outlined as follows:

1. Lack of Priority in Policy on Bio-Medical Waste Management and funds on the issue.

2. Lack of Managerial Skill and Training of Staff for dealing with Bio-Medical Waste and its proper management and disposal.

3. Lack of Appropriate Technologies for treatment and disposal of Bio-Medical Waste.

4. Lack of Strict Implementation of infection control measures like sterilization and disinfecting techniques.

5. Lack of Awareness among medical personnel, patients, attendants and people at large.

6. Lack of coordination between Hospital Management, Municipality, Central and State Pollution Control Board and Hospital Authorities.

7. Lack of Accountability of persons involved in the management of Bio-Medical Waste.

8. Lack of will to do it.

LEGAL IMPLICATIONS AND VIOLATIONS OF RULES

In this background and in persuasion of the directive of the Supreme Court, Ministry of Environment & Forest, Government of India issued a notification for Bio-Medical Waste (Management & Handling) Rules 1998 in exercise of powers conferred by Sections 6, 8 & 25 of the Environment Protection Act, 1986 which was published in The Gazette of India Extraordinary, Part-II, Section 3-Sub-Section (ii) New Delhi, July

27, 1998. Accordingly all the hospitals in the public and private sector are now bound to follow these rules to evade legal action[7].

Installation of incinerators is mandatory for hospitals with more than 50 beds. It may be kept in mind that any person can report any alleged negligence in management and handling of Bio-Medical waste to the appropriate authority[8].

The State Pollution Control Board / Committees have been asked to take action against the defaulting hospitals or nursing homes under section 15(1) of the Environment (Protection) Act, 1996 which reads as "whoever fails to comply with or contravenes any provisions of this Act, or the rules made or orders or directions issued thereunder in respect of each such failure or contravention, be punishable with the imprisonment for a term which may extend to 5 years or with fine which may extend to one lakh rupees, or with both, and in case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention[9]."

If the failure* or contravention referred to in sub-section (1) continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term, which may extend to seven years.

CONCLUSION

Hospital Management must understand the gravity of the issue and they must be able to differentiate between hospital waste and general waste. They must ensure proper identification, segregation at the source of generation, collection in prescribed coloured containers, safe transportation, appropriate treatment and environmentally sound disposal of Bio-Medical Waste. They

[7] R.N. Basu, "Issues involved in Hospital Waste Management; an experience from a large teaching institution", *Journal of Academy of Hospital Administration,* vol.7 (2), July 1995. Pp.79-80.
[8] *B.L. Wadhera* v. *Union of India and others,* (1996) 2 SCC 594
[9] The Bio-Medical Waste (Management and Handling) Rules, 1998

should also provide health education and training to everyone involved in the management and handling of Bio-Medical Waste.

Motivation and sensitisation of waste generators and health care providers to make environment safe for living and to protect them from legal actions for violation of Bio-Medical Waste (Management & Handling) Rules 1998. Make use of common facility treatment for economic reasons and keep Bio-Medical Waste management in priority list of policy making, starting from the very beginning.

Last but not the least is effective implementation of rules by surprise visits and inspection by appropriate authorities and fixing the accountability of each and every person involved in management of Bio-Medical Waste.

RECOMMENDATIONS

1. Hospitals having defunct / defective incinerators should be made to utilise central incineration facility in order to prevent rise in air pollution.

2. Small health care establishments in city, which have still not registered with central facility, should be encouraged to register there by bringing down the operating cost of contractor and decrease the cost of incineration per kg.

3. Government hospitals which at present are totally left on their own, should be brought into net of rigorous checking as far as Bio-medical wastes management is concerned and a corpus grant can be allotted to them to improve their infrastructural requirements for which provision exists in Government of India Rules.

4. On 'Polluter Pays' principle hospitals need to contribute in building infrastructure for Bio-medical waste management. This contribution can be in the form of assistance in sharing the cost of consumables and capital cost of Bio-medical waste management by Municipality, State Government, Public

Dr. Neera Kewalramani *et al, Training Module on Hospital Waste Management,* Brihan Mumbai Palika Public Health Department, Mumbai.

bodies or voluntary organization like Rotary Club and NGO's etc.

5. Public awareness for recourse to legal action against defaulters.

DIGGING AND UNEARTHING TRUTH: A TRUE TEST FOR THE TRUTH SERUM

*T. SUNDERRAMANTHAN

ABSTRACT

"Free at last, Free at last, Thank God Almighty I am free at last." These immortal words are of Rev. Martin Luther King (Jr.) delivered at the Lincoln Memorial on the 28 August 1963 portrays the exasperation of the rights jurisprudence the world over. The paper is introspection on how the acronychal activity of unearthing and raking "truth" from beneath the surface of the conscious is paradoxical to the tenets of constitutional governance. Furthermore, in the name of society many things are said and done, but the one single question, which is raked up, is can the individual be distinct from the society or vice versa? This chronic disregard for rights and liberty is a sin leading us directly to the door of retrogression.

INTRODUCTION

The Supreme Court in the famous (or would infamous be more appropriate? For it is said that great cases like hard cases make bad law) case *of ADM Jabalpur* v. *Shiv Kant Shukla'* held that a person's inviolable rights under Articles 20 and 21 may be suspended under emergency. It was argued before the court that even if a person's life were taken away illegally the court would be helpless. Such an apathetical situation though about 20 years behind our backs, contemporaneous with our Constitutional Jurisprudence advancing in leaps and bounds in this period, may make us believe that we may not see such a day once again. However history has been privy to the world turning one big circle on a number of occasions. This is eloquently evidenced

* T. Sunderramanthan, B.A.LL.B (Hons), National Law University, Jodhpur
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when George Santayana said, "Progress, far from consisting in change, depends upon retentiveness...those who cannot remember the past are condemned to repeat it." With the recent trend of "unearthing truth" from the accused in blatant violation of the sacrosanct *apriori* norms under the Constitutional framework no paradigm deviation is seen in these twenty years after all.

The Bombay High Court recently had the opportunity to test the much spoken of truth serum tests on the apostles of Constitutional framework of our nation in the case of *Ram Chandra Ram Reddy* v. *State of Maharashtra}* Though the petition was dismissed as being premature, certain seminal questions of human rights jurisprudence cropped up in this case. This would be the edifice on which the present paper would introspect, before arguing on the truth serum. The truth serum is a cocktail containing three grams of sodium pentathol and 3,000 ml of distilled water and dextrose intravenously administered to a patient to elevate him to a state of hypnotic trance.[3] Thus, in the process depriving a person of his ataraxical needs and mentally coercing to incriminate him.

SELF INCRIMINATION AND THE TRUTH SERUM TEST

Article 20 (3) of the Indian Constitution is the syncretistic result of the Anglo- Saxon jurisprudence and India's realities, culture and ethos, proving once again the cosmological nexus of human rights jurisprudence the world over. This monumental right traces its history to the maxim *"nemo tenetur seipsum tenetur"*[4]. Its birth was seen in the Rabbnic courts then was interposed in the British Star Chamber and finally after the American Courts trimmed this silver lamp of hope it found place in the Code of Criminal Procedure, 1973 due to providential grace for the British realised that a strong administration is imminent for their control over the nation. Finally, it engraved itself in the Indian Constitution receiving the patronage of the revered Constitutional Framers to attain its present consecrated form.

Article 20 (3) entails three ingredients; (a) To be a person accused of an offence (b) Compulsion to be a witness (c) It

[2] Criminal W.P. No. 1924 of 2003 decided on 5 March 2004.
[3] Anupama Katam, "Truth Serum Trial", vol. 21, Issue 05, *Frontline* 2004.
[4] Meaning a man cannot represent himself guilty.

should be against himself.[5] A Person accused of an offence does not mean a formal accusation by the issue of process by the court but the immunity would commence right from the moment a person is named in a FIR[6] in this manner the immunity can be availed from the moment the person is interrogated. The fortification one derives through Article 20 (3) sprouts even before the prosecution may begin its case i.e. when the police or the investigating authority has obtained incriminatory evidence with scant regard to the ataraxical needs of the accused. Krishna Iyer J spoke at length on this very point and arrived at the same conclusion.[7] Assuming and without conceding to the above line of argument, even if the petitioner is only a suspect he would be entitled to the privilege against self incrimination.[8]

The next element for the satisfaction of a violation of Article 20 (3) is compulsion. This morbid element acts as the spark to fill and infuse life and verdure into the resplendent character of the constitutional shield carved in Article 20 (3) of our holy Parchment. The element of compulsion posited generally is to safeguard the rights of the individual subverted by torture and third degree measures. This proposition is eloquently evinced in Chief Justice Warren's judgment in the landmark case *of Miranda* v. *Arizona*[9]. Referring to precedents the Chief Justice laid down in clear and unambiguous words that this principle grew up in response to arbitrary and unjust interrogating methods.

However, it becomes seminal to understand that the contours and contiguity of the elements of compulsion are restricted not only to the subjective tests of physical emasculation but it has to be read in a holistic manner to include even mental depravity or the usurpation of the ataraxyical' needs of an aggrieved party. The Supreme Court while enunciating the principle has inscribed the legal proposition that even inducement, threat or promise[10] would come within the confines of compulsion under Article 20 (3). The Supreme Court has also held that compulsion can be mental in

[5] *State of Bombay* v. *Kathi Kalu Oghad* **AIR 1961** SC **1808, para** 7.
[6] ***M P** Sharma* v. *Satish Chandra* AIR 1954 SC 300; Affirmed in *State of Bombay* v. *Kathi Kalu Oghad MR* **1961** SC 1808
[7] *Nandini Satpathy* v. *P L Dani* (1978) 2 SCC 424
[8] *Ibid.,* paras 37 and 41.
[9] 384 U.S. 436
[10] *State of Assam* v. *Rajkhowa Upendra Nath* 1975 Cr. LJ 354, para 45.

nature too." The Supreme Court succinctly opined in the case of *State of Bombay* v. *Kathi Kalu Oghad*[n] that compulsion "in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted."[13]

The erudition of Krishna Iyer J., compels and coerces me to quote once again from the landmark case of *Nandini Satpathy* v. *P.L. Dani.* - "We are disposed to read 'compelled testimony' as evidence procured *not merely by physical threats or violence* but by *psychic torture,* atmospheric pressure, environmental coercion, tiring interrogative prolixity, *overbearing* and intimidatory methods and the like - not legal penalty for violation."[15] He then goes on to further add - "On the other hand, if there is *any mode of pressure, subtle or crude, mental or physical, direct or indirect,* but *sufficiently substantial,* applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony' and violative of Article 20(3)."

The Supreme Court is also of the view that word compulsion has to be read as meaning "duress".[16] Duress traditionally means when a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or *duress per minas).* The meaning of duress has however deviated from what it historically meant. At present it means a case wherein a person's will is overborne or that he was incapable of making a free choice or of even acting voluntarily. It has been read under three planes. The first view was given by Lord Wilberforce in the case of *Barton* v. *Armstrong* .He held that the defence of duress lies in the fact of absence of true

" *Yusufalli Esmail N agree* v. *State of Maharashtra* AIR 1968 SC 147 P. 150.
[12] *Supra* note 5 para 17.
[13] *RK Dalmiaw. Delhi Administration* AIR 1962 SC 1821, para 290.
[14] *Supra* note 7.
[15] *Ibid.,* para 57.
[16] *Supra* note 5 para 16.
[17] [1976] A.C. 104

consent.[1] In short the test is whether *the free will is overborne}*[9] Courts have evolved another mechanism for duress called the *"practical choice " test.* The House of Lords in the case of *Pao On* v. *Lau Yiu Long*[20] has defined duress as coercion of the will, which vitiates consent. Furthermore in the case of *Universe Tankships of Monrovia* \. *I T W F*[21] the practical choice principle was categorically stamped down as laying down the law. According to this principle *the victim submits, as there is no practical choice open to him.*[22] Another view of the courts is that the person acting under duress intends to do so but does so unwillingly.[23] It does not deprive a person with all the rights but leaves him with a choice of evils.[24]

An analysis of the following propositions read in the light of factual edifice, which has groped our attention; a case for compulsion is indubitably made out. Firstly, the Constitutional scheme provides for protection against mental torture, which is being occasioned by the test. Further more, the mind of the person undergoing the test is overborne by the test *{extraneous process) as to render the making of the statement involuntary and, therefore, extorted.* In addition, reading it in light of the principles of duress too, the test beyond an iota of doubt portrays that the will of the mind has been overborne. The use of these truth serums is internationally considered as against the primary creed of human rights. Truth serum is considered tantamount to torture and people have decried its' application on human beings as it acts as the vanishing point for exercising free will and application of mind.[25] Many definitions of torture include the use of truth serum, and many people speak of torture and truth serum in the same breath.[26]

[18] *Ibid.* P.121; See also P S Atiyah, "Economic Duress and Will Overborne", *L.Q.R.,* vol.98, P. 197.
[19] *U.S.* v. *Washingtong* 431 U.S. 181
[20] [1980] A.C. 614
[21] [1983] 1 A.C. 366
[22] *Ibid.* P. 400.
[23] *Lynch* v. *D.P.P of Northern Ireland* [1975] A.C. 653 at 670
[24] *Ibid.* P. 690.
[25] Prof. Chandra Sekharan, "Truth About the Truth Technique", *Scholasticus Journal of National Law University,* vol. 2 No. 1, December 2004. P.32. Professor P. Chandra Sekharan a leading forensic expert and Padma Bhushan awardee has termed Truth Drugs such as sodium pentothol, sodium amytal, scopolamine and barbiturates belonging to the same family as "Psychological Third Degree".
[26] Marcy Strauss, "Torture", *N. Y.L. Sch. L. Rev.* vol'48, P.213.

Use of the truth serum has been emphatically held as amounting to coercion by the US Supreme Court in the landmark case of *Charles Townsend* v. *Frank G Sain, Sheriff of Cook County*[27]. Chief Justice Warren while delivering the opinion of the court held "Numerous decisions of this Court have established the standards governing the admissibility of confessions into evidence. If an individual's *'will was overborne" or if his confession was not 'the product of a rational intellect and a free will' his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological pressure and, of course, are equally applicable to a drug induced statement.* It is *difficult* to imagine a situation in which a confession would *be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum'* It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a 'truth serum,' if these properties exist.

Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible."[28] To be a witness has been held by the Supreme Court to mean testimony given by an accused, which incriminates him. Testimony contains within its reach and periphery written and oral testimony. However the meaning of testimony has been articulately defined by the Supreme Court to include only personal knowledge of the accused.

[27] 83 S.Ct 745: 372 U.S. 293

[28] *Ibid.* P.754; in addition Warren CJ adds, "It is at least generally recognized that the administration of sufficient doses of scopolamine will break down the will. Thus, it is stated in The Dispensatory of the United States (25th ed. 1955) 1223: Many persons are excessively susceptible to scopolamine and toxic symptoms may occur; such symptoms are often very alarming. There are marked disturbances of intellection, ranging from complete disorientation to an active delirium.... 'Unfortunately, persons under the influence of drugs are very suggestible and may confess to crimes which they have not committed... The crucial question, and the measure of evidentiary propriety under the Constitution, is whether the drug-whatever label was or was not affixed to it—so overbore the petitioner's will that he was unable to resist confessing. Whether or not he was conscious of what he was doing, the petitioner could, because of the drug, have been wholly unable to stop himself from admitting guilt, *ibid.* P.755.

INFRACTION OF ARTICLES 19 AND 21

The Supreme Court in its role as an 'Activist' has taken the human rights to a new paradigm. The Supreme Court has expanded and expounded new rights flowing from Article 21. Its scope has been expanded over the last fifty years and life and liberty now include in their sweep the rights to health, housing, handcuffing, medical confidentiality, free water and air, telephone tapping and even roads in hilly areas. In this regard the Supreme Court in today's dynamic and changing world has upheld a person's right to privacy[29] on a concomitant reading of Articles 21 and 19.[30] This however is not absolute for it is subject to reasonable restrictions under Part III. With the import of the due process clause into the Indian Constitution in the post *Maneka Gandhi*^ and *R C Cooper*'s[32] era the SC has held that every act of the state has to be tested on the cornerstones of *just, fair and reasonability.* The Supreme Court has through its interpretation incorporated the interrelationship doctrine under Part III wherein it has held that Part III provides an integrated[33] and intertwined scheme[34] for safeguarding the Fundamental Rights.

The right to privacy has received a shot in the arm especially with the Supreme Court's dictums on right against self-incrimination wherein the courts have strictly ushered in the principle that *personal information cannot be obtained without volition.* The right to privacy enjoyed by a person in light of a concomitant reading of Articles 19, 20 (3) and 21 can be circumscribed only by a reasonable restriction according to the mandate of Article 19. For a reasonable restriction under Article 19, law is a condition precedent. Law here refers to the positive law enacted by the Legislatures.

In the absence of such a law the right to privacy cannot be deprived. As a matter of prudence the Supreme Court has held that the executive cannot put restriction on the fundamental rights

[29] *Govind* v. *State ofM.P.* AIR 1975 SC 1378; *R Rajagopal* v. *State of Tamil Nadu* (1994) 6 SCC 632; *PUCL* v. *Union of India* (1997) 1 SCC 301 [30]'*Infra* notes 31 and 32.
[31] *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597
[32] *R. C. Cooper* v. *Union of India* AIR 1970 SC 564
[33] *Supra* note 31 paras 54-57.
[34] *Supra* note 32 paras 61 - 64.

and liberties of a person in the absence of a specific law. Sections 160-167 of Cr.P.C cannot be understood as law for this purpose for it does not say that the police can compel the accused to speak even on those aspects which would incriminate him, while, on the contrary, the sections mandate the investigating authorities to protect the rights of an accused's privilege against self incrimination.[36]

RIGHT TO SILENCE

Article 19 (1) (a) enjoins every citizen with a right to freedom of speech and expression. The right to freedom of speech and expression is said to a rock amidst moving sand, which protects and preserves democracy. It is the very pillar upon which the democracy of India stands. The Supreme Court has opined that the positive rights under Article 19 also include the negative rights.[37] Or in simpler words and more succinctly put, the right to freedom of speech and expression includes right not to speak, the right to form associations embraces the right not to form associations etc. The Supreme Court while adjudicating upon the issue of whether the right to die[38] is included within the ambit of right to life held that though the right to die cannot be gotten within the purview of right to life, the rights under article 19 stand on a different footing and the negative rights would flow through them. The US Supreme Court affirming this principle has held that the right not to speak flows through the **first**

[35] *Ram Jawaya Kapoor* v. *State of Punjab* AIR 1955 SC 549; *Kharak Singh* v. *State of* £/./>. AIR 1963 SC 1295

[36] Sections 161 (2), 313 (3) and 315 of the Criminal Procedure Code, 1973.

[37] *Excel Wear* v. *Union of India* AIR 1979 SC 25; *Kala* v. *University ofRajasthan* AIR 1984 SC 59; *Damyanti* v. *Union of India* AIR 1971 SC 840; See also H.M. Seervai, *Constitutional Law of India: - A Critical Commentary, vol. I* Pp. 807-808 (Universal Book Traders, 4th ed., Delhi, 1999).

[38] *Gian Kaur* v. *State of Punjab* AIR 1996 SC 946; *P Rathinam* v. *Union of India* (1994) 3 SCC 394 though P Ratinam was overruled by Gian Kaur, both the decisions laid down this above noted principle.- Quoting from para 21 of the Gian Kaur judgment- " In those cases i.e. the freedoms under Article 19, the fundamental right is of a positive kind for example the freedom of association , freedom of speech, freedom of movement, freedom of business etc., which were held to include the negative aspect of there being no compulsion to exercise that right by doing the guaranteed positive act...with respect and humility we find no similarity in the nature of the other rights such as the right to freedom of speech etc to provide a basis to hold that the right to life also includes the right to die."

amendment. It is also a principle of statutory interpretation that the affirmative would also include the negative. Every statute though limiting everything to one form, although spoken of in the affirmative would also include the negative.[40] If this right to silence has to be restricted then it would have to follow from the reasonable restriction under Article 19 (2). The reasonable restriction however flows only through a law[41] and since there is no law in the present case which regulates the right not to remain silent (which also includes expressions) and forcibly eject the truth out from the petitioner by conducting the three tests is a patent violation of Article 19.

VIOLATION OF DUE PROCESS

As a result of the Maneka Gandhi case[42] and R C Cooper case[43] the Due Process doctrine is imbibed into the Indian Constitutional paradigm. This conclusion is arrived at by reading Articles 19 (2)-(6) and 21 together. These restrictions imposed on a person's rights are not reasonable for the mechanism employed are not reliable and has adverse side effects.[44] This virus vitiates the

Abood v. *Detriot Board of Education* 431 U.S. 209; *Riley* v. *National Federation of the Blind of North Carolina* 487 U.S. 781; *Wooley* v. *Maynard* 430 U.S. 705; *West Virginia State Bard of Education* v. *Barnette* 319 U.S. 624; *Russo* v. *Central School District* No.l 411 U.S. 932; *International Diary Foods Association* v. *Amestoy* 92 F.3d 67; *Mckinney* v. *Alabama* 424 U.S. 669

[40] G.P. Singh, "Principles of Statutory Interpretation", (Wadhwa & Co., 9th edn., Nagpur 2004) P.352.

[41] *Union of India* v. *Naveen Jindal* (2004) 2 SCC 510 In the absence of a specific 'law', any intrusion into fundamental rights must be struck down as constitutionally invidious. *Bennett Coleman* v. *Union of India* AIR 1973 SC 106; Bishamber *Dayal* v. *State ofU.P.* (1982) 1 SCC 39; *KharakSingh* v. *State of UP.* AIR 1963 SC 1295; *Punit Rai* v. *Dinesh Chaudhary* (2003) 8 SCC 204; *Bijoe Emanuel* v. *State of Kerala* (1986) 3 SCC 619; *State ofM.P.* v. *Thakur Bharat Singh* AIR 1967 SC 1170.

[42] *Supra* note 31.

[43] *Supra* note 32.

****Supra*** note 25, Prof. Chandra Sekharan, a leading expert in forensic science in this article of his has said that the truth drugs is nothing but psychotherapy while the patient is in a sleep like state induced by barbiturates or other drugs of releasing repressed feelings, thoughts or memories... It has life threatening side effects like circulatory depression, respiratory depression with apnoea and anaphylaxis. Its adverse effects on CNS may produce headache, retrograde amnesia, emergence delirium, prolonged somnolence and recovery. Myocardial depression and arrhythmias may also occur. The other side effects are nausea, vomiting regurgitation and gastric contents, rectal irritation, cramping, rectal bleeding, diarrhoea, hiccups, sneezing, coughing, bronchospasm, laryngospasm, hypersensitivity reactions, hypothermia, thrombosis and sloughing salivation, shivering, shivering skeletal muscle hyperactivity....these under the best conditions will elicit an output contaminated by deception, fantasy, gabled speech etc. ; See also Fred E Inabu ,

entire gamut of reasonability since the mechanism is based on the whims and fancies of the executive, whom we have seen time and again, day in and day out, believe in enforcing their duties in an acronychal fashion. The truth serum cannot be relied upon for it is said it renders the intellect null and void. Unfortunately, persons under the influence of drugs are very suggestible and may confess to crimes, which they have not committed. False or misleading answers may be given, especially when questions are improperly phrased. For example, if the police officer asserted in a confident tone 'you did steal the money, didn't you? A suggestible suspect might easily give a false affirmative answer.[45] Research has also proved that the information provided by the subject need not be the truth, for they inadvertently make false statements under the influence of truth serum.[46]

Moreover it is essential to understand that one of the seminal rules of criminal jurisprudence is that the accused is not the object of criminal law but is a participant. He must, at all stages of the proceedings, *remain capable of actually "conducting" the defence.* This implies a continuous "freedom of will with regard to decision and action." Such freedom precludes deliberate suspension of his consciousness for the purpose of exploring his unconsciousness.[47]

The accused cannot waive this standing and this freedom, for they are not privileges granted to him, but fundamental principles of criminal procedure, based upon law. This fundamental rule of criminal jurisprudence is to ensure that the accused is allowed to conduct his defence on the basis of equality with the

"Self Incrimination - What Can An Accused Person Be Compelled To Do", *J.Crim. L. & Criminology,* vol.89, P. 1329. The author emphasis the same thing that truth serum is not reliable he says - "the use of these so-called "truth-serums" experimentally and even in actual criminal investigations the percentage of accuracy at the present time is not very high." ; See also Robert Sadoff, "Child Abuse and Repressed Memory Testimony", 1 *Quinnipiac Health L.J.,* vol. 1, P.79 the Author further strengthens the point stating that what every comes out from the test need not be the truth for the subject is influenced by the examiner.

[45] MacDonald, "Truth Serum", *J.Crim.L.,* vol.46, P. 259.

[46] Jason R. Odeshoo, "Truth Or Dare?: Terrorism And "Truth Serum" In The Post-9/11 World", *Stan. L. Rev.,* vol.57, P.209

[47] See in this regard Judgment of Bundesgerichtshof (I. Strafsenat) 5 B.G.H. St 332 wherein the court held that the fundamental principle is that an accused is a party to a case and not the object and it's the courts duty to preserve his dignity.

prosecution. If not allowed it would amount to negation of the principles of fair trail and derogation of the principle of equality enshrined under Article 14.

Finally the system that we have adopted is a system of adversarial determination and not inquisitorial determination. The application of these tests would challenge the roots of the very system that we follow and would go on to make the accused the object of the criminal system. Hence leading to the problems already mentioned above.

CONFLICTING INTEREST OF INDIVIDUAL AND SOCIETY

The present situation may remind us of the debate criminal law has always reminded us of, when the right against self incrimination has been raised, that the society is at loss by allowing a person to exercise his right against self incrimination. It would be a grave miscarriage, if at this juncture the monumental judgement of Krishna Iyer J., in *Nandini Satpathy*^ were not to be remembered - "To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft."[50] *State* v. *Individual* debate has been the apple of the eye for the jurists. The following analysis would drive home the point that the individuals' rights should be protected in such cases too.

[48] Helen Silving, "Testing of the Unconscious in Criminal Cases", *Harv. I. Rev.,* vol.69 P.683.
[49] *Supra* note 7.
[50] *Ibid.,* para 15 He further adds in para 34 - "There is one touch of nature which makes the judicial world kin - the love of justice-in-action and concern for human values. So, regardless of historical origins and political borrowings, the framers of our Constitution have cognised certain pessimistic poignancies and mellow life meanings and obligated Judges to maintain a 'fair state-individual balance' and to broaden the fundamental right to fulfil its purpose, lest frequent martyrdoms reduce the article to a mock formula. Even silent approaches, furtive moves, slight deviations and subtle ingenuities may erode the article's validity unless the law outlaws illegitimate and unconstitutional procedures before they find their first firm footing....The police are part of us and must rise in people's esteem through firm and friendly, not foul and sneaky strategy. The police reflect the State, the State society. The Indian legal situation has led to judicial concern over the State v. Individual balance."

Firstly, there is no law, which endows the state machinery with a guideline to act upon; thereby complete discretion is given to the state machinery to trample upon the fundamental rights of the individual.

Secondly, these new investigating techniques derail the divine concept of Just, Fair and Reasonableness laid down in the case of *Maneka Gandhi* v. *Union of India.*,[5']

Thirdly, When there are two conflicting principles of paramount importance, experience has told us that we follow the principle of harmonious construction whereby neither of the two conflicting interest be struck down. This has to be read in light of the factual premise that the two conflicting situations reside in. In the present incompatible playground, the individual would be the ultimate loser. He is being coerced to give personal knowledge away in a technique which has been considered unreliable world wide and decried by International Conventions, which if allowed would leave the body with no brain to act on, a house but no walls to live in and a world with no liberty to rely upon. Roscoe Pound[52] says that the society and state exists as the end but it is to be remembered that individual interest are a means thereto and in securing individual interests the law is securing a societal interest.

Therefore the problem ultimately is not to balance individual and social interests, but to balance this social interest with other social interests and to weigh how far securing this or those individual interests is a suitable means of achieving that result.[53] The tests as already noted are known to have life threatening side effects and are unreliable. In such a situation it would not be wise to foster the societal interest in this manner and a wiser decision would be to give way to the fundamental rights of the individual.

Fourthly, the present criminal justice system is well designed. In weighing the interest of the accused who demands the application of the test against the social and individual interest in preserving the integrity of the defense, account must also be taken of the fact that, if existing rules are conscientiously observed, the accused

[1] *Supra* note 31.
[2] *Harv. I. Rev.,* vol.28, P.343.
[3] *Ibid.* P.349.

need not prove his innocence, for the prosecution has the burden of establishing guilt beyond a reasonable doubt.

Fifthly, the framework of the Constitution on a reading would indicate that it gives precedence to the rights of the individual. Examples of this are replete within the Constitution, two monumental examples being Articles 359 and 31 C. Article 359 lays down that Articles 20 and 21 cannot be whittled down even during cases of emergency. So is the case with Article 31C which allows only the rights under Article 14 and 19 to be snatched away from an individual and not the rights under Article 21.

Thereby if the investigating authority is systematic and regular with their homework nothing can prevent them from securing a prosecution. While temporising ultimate justice or public interest and the individual interests which may be termed as the ends and the means respectively in an ordered civil society regard must be had to what the father of our nation Gandhiji had to say about it. He said that to achieve the ends even the means adopted has to be just. This was a noble vision, which guided our country to fight for independence in a peaceful manner.

Now the same principle is sought to be distorted or rather sliced according to the needs and in the process an attempt is made to do away with Article 51A (b) and thence play a huge fraud on the Constitution for it is important to know at this juncture that while interpreting myriad provisions of the Constitution considerable thought also be given to the Fundamental Duties under Part IV A - Article 51A - for the purpose of interpretation of the Constitutional scheme and for the purpose of maintaining a balance between the fundamental /legal rights of a citizen vis-avis, the regulatory measures both Part IV and Part IV A of the Constitution should be taken recourse to."[54]

CONCLUSION

The test despite failing to clear the tests on the Constitutional compass is also lowering the status of an individual. The primary concern however is how societal interest can be achieved in a situation wherein the individual interests are erased? It is

[54] *Union of India* v. *Naveen Jindal* (2004) 2 SCC 510; See also *Indian Handicraft Emporium and Ors.* v. *Union of India and Ors.* JT 2003 (7) SC 446

difficult to divest the individual interest from the societal interest. Only if the interest of the individual were fostered it would bolster the interest of society. No society would be benefited when the individuals are stripped of their rights and liberties. Truth serum test seeks to cause more harm to society than it benefits. A person's existence cannot be ridiculed and riddled by such capricious tests negating the principles of not only the Constitution but also the spirit of man. For it is to be understood that expediency in the name of progress at the cost of freedom is not progress at a11 but is in fact retrogression.[55]

[55] Citation, which the late Jurist Mr. Nani A. Palkhivala received from the Princeton University, contained these words describing him. It read: "Defender of constitutional liberties, champion of human rights, he has courageously advanced his conviction that expediency in the name of progress, at the cost of freedom, is no progress at all, but retrogression. Lawyer, teacher, author, and economic developer, he brings to us as Ambassador of India intelligence, good humour, experience, and vision for international understanding..." , .

GHOST OF DEMOCRACY IN THE MEDIA MACHINE**

"J.SAI DEEPAK

ABSTRACT

"As I would not be a slave, so I would not be a master. This expresses my idea of democracy", were the immortal words of Abraham Lincoln. This, in essence, sums up the single most irreducible construct, which one derives out of democracy i.e. balance between right to freedom and obligations. Democracy, essentially, survives on the voice of dissent that alone can lead to justice and in the modern day, arguably Media is the "Voice of the People". The need for media, its role, its responsibilities towards the people and its relation w4th reference to the organs of the state require elucidation.

AND THE TEXT FOLLOWS

A lone dissenting voice proclaiming eternal verities on the streets in the face of a totalitarian and autocratic regime has been an attractive figure in popular folklore since the time of Socrates and even before. These voices belonged to the morally upright, socially conscious and spiritually realized citizenry, however miniscule in number, which took upon itself the responsibility of reminding the powers that be, of proper exercise of their rights to perform their duties and obligations towards the subjects of the state. These people have been portrayed as heroic characters and since, it is said, their ideas were representative of the aspirations of the people, they were objective enough never to "contaminate"

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* LL.B (I.P.R), first year, Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur, West Bengal.

these aspirations with their own politic?! and idev/.c_{fc}ical prejudices or predilections when acting in representative capacity. In the absence of any evidence to the contrary, we shall accept these if one may call so, 'caricatures', and compare them with their modern representatives namely, the media. People like Socrates were fearless, intellectual and objective lest we forget, obedient to the law unto death. But then, are we not inducing a paradox by seeking objectivity? Since, it is the individual's very personality or thought process or subjectivity that brings in a creative element.

Every such person adds to our understanding of the larger picture and if inconsistency between seemingly diverse precepts is done away with, the end result is the complete truth. So subjectivity in thought and objectivity in judgment is the need of the hour. One may ask, if objectivity, impartiality and neutrality are synonymous with each other? Upon analysis, we find that they do differ significantly since objectivity, like detachment, is a lofty ideal, which finds application in spiritual pursuits and its application in a work-a-day world, though ideal, is impossible as most ideal things are. Objectivity may be sought in the science of inanimate matter but it is a chimera in the study of animate and rational beings like human beings. No man, however learned, can claim to be detached from his own ideological compulsions. Impartiality refers to being disinterested and neutrality refers to being uninterested.

In the modern world, the media has donned the mantle of Socrates. It is not an officious priest, which stands between the State and its subjects but in fact removes all that stands between the State and its subjects. It has been hailed as the Fourth Estate that is entrusted with the sacred duty of preserving democracy. It may be noted that only in democracies do we find media as the medium of communication and interface between the state and its subjects. In other forms of governance, it is merely the mouthpiece of the ruling junta. So a state that does not tire in proclaiming from the rooftops its democratic traditions should leave no stone unturned in ensuring the freedom of the press. In fact, by way of International Covenants such as Universal Declaration of Human Rights and national constitutions, Right of Expression has been declared a fundamental right i.e. a right that has been recognized to inhere in men and is hence inalienable. Does this mean that this right is an absolute one? Of course not,

there are restrictions, which may be imposed on it in the interests of the nation, but to what extent can they be extrapolated to shackle and gag the press is the point of contention here. The media is given the right to comment on everything in the public domain that includes people leading a public life whether as part of state organs or as public individuals. The restrictions placed on the media by the state may be grouped under a separate branch of law, which like any other law is an organic body that grows along with the percolation and influence of media on our lives. However, this branch of law has to take a pragmatic approach striking a fine yet perceptible balance between various seemingly conflicting interests such as freedom and accountability, privacy and transparency, security and liberty *et al.*

The most vituperative invective hurled by the media and the proponents of its freedom are directed at the bureaucrats lamenting their utter callousness to the values of a free press as enshrined in the Constitution and their blissful ignorance of the thin line which the media has to toe in exercising its rights at the same time fulfilling its responsibilities towards the citizens. The media and the state are often seen in adversarial roles perpetually at loggerheads with each other and involved in a disgusting slugfest for eternity. The media says that the legislature and the judiciary believe in preserving "respect and awe" for its members by eliciting strict obedience. This, according to it, is a view that belongs to the Roman era and is anachronistic with the order of the day. It says that such a chauvinistic and feudal mindset is the reason that the State uses the resources at its disposal to terrorize and hound it.

The example of Tehelka scandal (Operation West End) is often cited where the Tehelka group was destroyed brick by brick when the same cold-blooded efficiency could have been put to better use for the welfare of the nation. But when one of the members of the Judiciary went on to accuse and berate the Apex Court of the land as suffering from "acute intellectual inadequacy", no action was taken against him since he was one of their own kind or should one call it "ilk"? Does this not smack of hypocrisy and casteism, *albeit* of a different kind? A recent government order which was to be issued by the Government of Andhra Pradesh giving special powers to members of the Judiciary and the Police to book newspapers for defamation was recently withdrawn when it drew unprecedented ire from the press and the public alike.

This shows that support and goodwill of the public is the only potent weapon, which can come to the rescue of the press. One should remember that the prestige of a government in the eyes of the people is contingent on the quality of its governance, its ability to dispense justice without inordinate delay and in strict yet humane enforcement of the statute book and not by malevolently waving the statute book in the face of the media to give it endless dog days. No sane law-abiding citizen would contend the fact that Courts and Legislatures need the power of sanction to ensure obedience and to prevent disruptions to its smooth functioning. But there is a world of difference between obedience by rational understanding and "toeing the line" of a political superior merely out of fear without completely comprehending the rationale behind the law. When even Law of Crimes and punishment is taking a relook into its retributional attitude in favour of a correctional system, is it not logical that the Legislature and the Judiciary too should follow suit?

One would agree without demur that the State machinery requires a redressal mechanism for those of its members who have been aggrieved on account of false allegations defaming the individual or the institutions. But does it not defy logic to get into a reactionary and medieval mentality where criticism of every kind against a member of the State organ is perceived as an attack on the sanctity of the institution itself? One might even call it *"Judicial Fascism"* where everyone and everything is a holy cow and *"ijtihad"* (right of interpretation) is out of bounds since only the *mullahs* named judges are vested with the sole right to interpret, judge and issue *fatwas* to punish. Some in fact have begun to question the right of Courts and Legislatures to arbitrarily rebuke its critics merely on the grounds that the institution has been "scandalized" or "brought into disrepute". An alternative has been suggested by way of normal judicial process as in an action for defamation than arbitrary power of privileges.

The "Contempt of Court" action is in fact an unsavoury relic of our colonial past and like most of our colonial hangovers, it imbibes the worst rather than the best of English traditions. This power of the Court literally, figuratively and perpetually hangs over the heads of the media like the proverbial sword of Damocles. It would be worthwhile to note that most European Courts and legislatures have severed the remnants of their ties with their feudal past and yet have wonderfully retained their

sanctity unlike ours where microphones, *paadukas* (footwear of the saintly) and everything under the sun become deadly missiles as part of our Integrated Missile Development Programme (IMDP) in the hands of our *"literate, learned and saintly elected representatives'"*.

Thus far, one has viewed the issue through the eyes of the press. Now let us take a look at the vitriol heaped on the media by the judiciary and the legislatures. It might do us well to recollect the (in)famous outburst outside the very precincts of the Supreme Court by one of the most dazzling legal minds who adorns the Indian Legal system accusing the media of "Media Trial" in the Jessica Lai murder case. This incident, however strong our sympathy for the hapless victim may be, certainly throws up very pertinent questions such as an objective test for defining and identifying the domain of "Public Interest".

The brash and tactless manner in which the electronic media has often resorted to so-called investigative journalism including sting operations, reporting of judicial proceedings within and outside the court and manufacturing public opinion through Short Message Service (SMS) polls and other popular techniques on issues that are sub-judice, raises serious doubts on the limits of public interest journalism. Also, the media finds it easy to hold individuals in the state machinery or institutions accountable but the judiciary and legislature are often left fighting an all-pervasive and united, yet faceless adversary who is equally adept in a war of attrition as in an all out war. The issue is further complicated when private entities delicately camouflage vested commercial interests as public interest ably aided by technology.

One may ask to what extent is the independence of the press being undermined by corporate-style profit driven business and a penchant for wielding influence in the minds of the public? It may well nigh be possible that honest legislators and judges are painted with the same brush as the unscrupulous ones. Does this not harm the future by dissuading those who would like to serve the nation as legislators or as members of the judicial fraternity? Apart from the injury inflicted on these two organs by their own behaviour, it cannot be denied that the image portrayed by the media too has done incalculable damage to the esteem and faith reposed by the public on these two very essential bodies. We have seen the tremendous power of the media to whip up passions and

generate frenzy in the minds of the public to the extent of a rebellion during the arrest of the present Chief Minister of Tamil Nadu by the erstwhile AIADMK regime. Can such abuse of power go unchecked? Is it a mere platitude to preach, "With great power comes greater responsibility"? This incident also brings in another question of an unholy nexus between politics and journalism where media has become a potent and near-flawless weapon in the hands of power brokers. To use a now-famous sobriquet, it is an *"Axis of Evil"*. So we see here that it would be too simplistic to say that the Judiciary and Legislature are in the same camp and are pitted together against the media. The labyrinth, which the power structure has become, does not allow for such na'i've portrayals of complex realities.

The recent outburst of a Tamil Nadu State Cabinet Minister against the Judiciary is a classic instance to drive the point home. If the media accuses the Judiciary of "Judicial Fascism", the Judiciary too is quick to accuse the media of *"Journalistic Knavery or Skullduggery"*. There goes a saying that as more things change, the more they remain the same. Today an activist, not active, Judiciary has the power to impose Censorship, bans and not to forget the increasingly ubiquitous and troubling phenomenon of issue of fatwas by extra-neo-para judicial fora and yet the power of the media to disseminate information too has increased by leaps and bounds. So the Judiciary is not entirely wrong when it says that it has its hands and scales (not platter) full thanks to the hyperactivity of the media.

Ultimately, it has to be understood that for a nation which aspires to be a superpower in the true sense of the word and for a growing economy, a legal system which is synonymous with predictability, scientific temper and German efficiency is a condition precedent to build confidence in the investors from abroad and at home. Similarly, an active media with panache for accurate, ethical, creative and responsible journalism too is an important prerequisite since it is an indicator of the liberal mindset of a society and its ability to take the bull by its horns rather than shy away from it. Dissent is the sign of a vibrant democracy and so conflict of interest and difference of opinion between the media and the Judiciary is both desirable and necessary for churning of ideas. One might go a step further and say that a noisy existence is better preferred over an inert and gloomy co-existence in the name of harmony.

To quote one of the finest intellectual minds of this era, Dr.Amartya Sen[1] from his authoritative book *"The Argumentative Indian",* "the tradition of public reasoning is closely related to the roots of democracy across the globe"[1]. But then moderation is a virtue better practiced than preached, so this intellectual brainstorming between the media and the Judiciary should not lead to bad blood since they are not adversaries but partners in the development of the society. Neither is a prey nor a predator since both form the pillars of a functional democracy. Each should respect the other's private space (if at all there is something called private) and yet leave sufficient space for constructive criticism.

A code of ethics, which is imputed legal validity, is the need of the hour. Nevertheless, control over the self should not need constant whipping in the form of a rulebook all the while. It is the fond hope of every supporter of democracy that a day will come when the Judiciary and the Media shall work together cementing their ties and in turn, the foundations of democracy bearing in mind the golden words of former Supreme Court Judge, the inimitable V.R.Krishna Iyer[2] "The twilight of liberty and the darkness of despair will never give place to a dawn of hope until the press becomes the eyes and voice of the nation, and an intrepid mediator and stern critic who would use its influence fearlessly to correct the government and the governed alike. Paper power may emasculate economic justice into paper freedom at its own peril!"[2]

[1] Amartya Sen, *The Argumentative Indian* (Penguin Books, London, 1st ed., 2005)
[2] V.R.Krishna Iyer, *Free Press in a Hungry Republic, in Law, Freedom and Change* (Affiliated East-West Press Pvt. Ltd., New Delhi, 1975). P.71.

LAW OF ADOPTION AND PROTECTION OF CHILD RIGHTS IN INDIA

*RICHA MEHTA

ABSTRACT

Adoption is the legal act of permanently placing a child with parents other than the birth parents. Adoption results in the severing of the parental responsibilities and rights of the biological parents and the placing of those responsibilities and rights onto the adoptive parents. It is a worldwide institution. Almost all religions and mythologies contain some reference or other to adoption. In contemporary world, the emphasis of adoption has changed from providing child to childless to providing home to homeless child. As far as inter-country adoption is concerned the same has been acknowledged by the Supreme Court of India as a means to rehabilitate abandoned children. In absence of a legislative provision the Courts have provided guidelines in this regard.

INTRODUCTION

Adoption is currently defined as a legal and social process by which the child of one pair of parents becomes the child of other parents. Adoption confers upon the child and the adoptive parents the same mutual rights and the obligation that exists between the child and his natural or biological parents. The adoptive child is permanently removed from his biological parents and becomes the legitimate child of his adoptive parents. In theory, the adoptive child secures all the rights and performs all the duties of a biological child. Adoption has also been defined as the establishment of the relation of parent and child between persons not so related by nature. A popular meaning, apart from the law, is the taking of a child, not one's own, into the family and rearing it. Adoption in legal contemplation is the act by which the parties thereto establish the relationship of parent and child between

* Academic Associate, Business Policy, IIM (A)

persons not so related by nature, and which, in many respects, severs the natural relations existing between the child and its parents, although in a narrower sense it is restricted to the act of the person taking the child. Adoption also has a popular meaning, apart from its use in the law. While generally the term has reference to some form of legal procedure, in common use, it is frequently applied to taking a child, not one's own, into the family and rearing it.

ADOPTION IN ANCIENT LEGAL SYSTEM

Almost all religious myths and mythologies contain some reference or other to Adoption - some famous and explicit, whereas others are more covert and implied. For example, in Greek mythology, Hercules, the hero, was adopted by Hera, the goddess, wife of Zeus. In Hindu mythology, Shakuntala was adopted by the sage Kanwa, and both Krishna and Kama were brought up by adoptive mothers.

The Babylonian Code of Hammurabi, as well as the laws of the ancient Hebrew and Egyptian civilizations also understood the legal concept of Adoption and discussed the same, as did the laws of the ancient Zoroastrians. The Holy Quran as well as Christian canon law refers to Adoption as permissible.

The tenets of Hindu Law clearly state that twelve kinds of sons were recognized and one of them was the Dattaka son, i.e. a son "whom his father or mother gives as a son affectionately in a time of distress to one who is of the same caste. Thus, going by the traditional Hindu norms, there can be no adoption of a Hindu hild by a person of another religion. Further more, even under the Modern Hindu Law, there can be no adoption unless between people of the same religion. The reason for this being that it is assumed that a child having lived by the Hindu way of life would be unable to adjust to a new cultural upbringing.

LEGAL REGIME IN INDIA

The enactments concerning Adoption & Guardianship in India are:

(a) The Hindu Adoption and Maintenance Act, 1956: It is the only statute in India comprehensively governing the substantive and procedural aspects of Adoption. It's scope, however, is

confined to Hindus. (There is thus a legal vacuum as regards Adoption by any other religious community in Indian Personal Laws - a vacuum that urgently requires to be filled by legislation. Such a clarion call for legislation, however, is also outside the scope of this paper, which deals exclusively with Inter-Country Adoption.)

(b) The Juvenile Justice (Care & Protection) of Children Act, 2000: The Act speaks of rehabilitation and social integration of children by way of Adoption.

(c) The Guardians and Wards Act, 1890: This Act is a secular legislation, which may be directly invoked by the other religious communities for being conferred Guardianship although Adoption is conspicuously not dealt with. This secular legislation was used by the Supreme Court to create a system and procedure for Inter-Country Adoption in India, where no enactment was in force.

(d) The Hindu Minority & Guardianship Act, 1956.

(e) The Hindu Succession Act, 1956.

(f) The Indian Succession Act, 1925.

CONSTITUTIONAL & STATUTORY STATUS OF CHILD

From the discussion in the Constituent Assembly at the time of framing of the Constitution of India (hereinafter the Constitution), it is clear that there was no significant deliberation as to the future citizens of India i.e. Children. However, there are some provisions relating to children incorporated in Part III and IV i.e. Fundamental Rights and Directive Principles of State Policy. Article 15 Sub-clause (3) of the Constitution permits a preferential treatment for making any special law for women and children. This provision demonstrates the intention of framers of the Constitution that the State shall strive for the protection of the children. This permissive clause applies both to future laws and to the existing laws. Thus, the State is free depending on its capacity to provide negatively or positively special treatment to children. Article 23 of the Constitution explicitly prohibits trafficking in human beings and forced labour and exploitation. Although this provision does not speak particularly about children, it applies to them and it is more relevant in their case. Article 24 of the Constitution explicitly prohibits employment of

children in factories etc. The provision prohibits employment of children below 14 years of age. Article 39 (e) and (f) of the Constitution directs the State to evolve a policy to eliminate abuse of tender aged children and to free the children from the circumstances that force by economic necessity entrance into avocations unsuited to their age and strength. The State is further directed to create social and economic conditions and infrastructure for the children for their healthy development and provide facility and climate for the exercise of freedom and maintenance of dignity. Article 45 of the Constitution casts a duty on the State to provide free and compulsory education to all the children. Article 41 deals with a right to work, to education and public assistance in certain cases. Article 47 of the Constitution directs the State to raise the level of nutrition and standard of living of its people and the improvement of public health. Thus, the Constitution casts a duty on the State to protect the children and look after the welfare and wellbeing of the children in all its dimensions and to provide all facilities for developing their personalities.

Today, there are more than 250 Central and State enactments relating to children, dealing with marriage, adoption, criminal law reformatory services, probation, children homes, prohibition of smoking, suppression of immoral traffic, while welfare, prevention of vagrancy and beggary, tortious and contractual liability of children, transfer of property, labour welfare, education of children health and other miscellaneous matters.

PRESENT STATUS OF ADOPTION IN INDIA INCLUDING INTER-COUNTRY ADOPTION

The concept and practice of adoption in India has changed significantly. The adoptions were parent centred, the need of the parents being the primary consideration. The law of adoption, which is confined to the majority community in India evolved due to importance of son, attached to Hindu rites. Since it may not be that every couple is blessed with a son, at one time, to borrow a son from another family was known as *"Dattaka Putrd"* (adopted son). Thus, the law of adoption is still wedded to the archaic notion of providing child to childless. Thus, there has been, a practice to adopt children from within the family or kinship group. Since 1960, changes have taken place at the social, legal and practice levels of adoption. The practice of placing unrelated children in adoption through agency intervention began in early

1970s. The focus of adoption has now clearly shifted from the needs of parent to the rights of children to have a family. Recently, Foster Care Schemes have come in existence. It is different from adoption where the child severs all ties with his own natural parents. In Foster Care, the child is placed in another family for a short or extended period of time depending upon the circumstances. Such a Scheme has been proved to be useful in cases of large scale natural calamities or cyclone. In Foster Care Scheme, financial support is provided to the foster family in order to care for the child as well as support to the natural parents towards rehabilitation so that they may take the child back, when possible.

Irrespective of the fact that there is no legislation providing for adoption of an Indian child by a foreigner, there is tremendous growth of instances of Indian children being adopted by foreigners. A foreigner wishing to take an Indian child in adoption has to follow the procedure provided under the Guardian & Wards Act, 1890. The Supreme Court in one of the "Public Interest Litigation"' acknowledged inter-country adoption as a means to rehabilitate abandoned children. The guidelines have put stop to private adoptions. All inter-country adoptions are adoptions directly by foreign parents through Government recognition in both sending and receiving Countries. There are certain regulating agencies recommended in the said judgment like Voluntary Coordinating Agency, the Central Adoption Resource Agency and the Child Welfare Agency. The Supreme Court has recognized the Indian Council for Child Welfare and Indian Council for Social Welfare as an agency for the purpose of scrutiny of adoption cases.

MALPRACTICE IN ADOPTION AND PROTECTION OF CHILD

The instances of malpractice in adoption even by the parents have been reported. Children are virtually made slaves by destitute parents in the houses of landed gentry as full time servants or part time servants looking after both domestic chores as well as agricultural operations. The situation is aggravated in all cases of bonded labour where the child is lost forever for himself. In urban areas also, exploitation of children in myriad occupations and forms is a common feature and goes unnoticed being common workers in the capacity of helpers for artisans and skilled workers and mechanics. The most atrocious and heinous traffic in children

[1] *Laxmikant Pandey* v. *Union of India,* (1985) Supp. SCC 701

is carried by the syndicates of criminal gangs who capture helpless children, maim them and keep them in the begging business and also in some cases, entice them at an early stage for preparing them for the flesh trade. In case of foreigners adopting an Indian child, a circuitous way under the Guardian and Wards Act, 1890 is required to be adopted. The procedure had led to a lot of malpractices by social organisations and voluntary agencies engaged in the work of facilitating the adoption of Indian children by foreign parents. The Supreme Court in Laxmikant Pandey's case[2] after hearing several organizations and voluntary agencies engaged in placement of children in adoption delivered a judgment formulating procedural safeguards in the matter of adoption. The Supreme Court has recognised the Indian Council for Child Welfare and the Indian Council for Social Welfare as agencies for the purpose of scrutiny of adoption cases. There are several Government schemes out of which majority of them in cooperation with the NGOs work for the cause of children.

The programmes and schemes focus on child labour, non-institutional services, health, nutrition, education, street children, children in institutions, child prostitutes and disabled children. It is said that there are about 120 schemes and programmes for the welfare and development of the children through more than 13 ministries and departments. The Ministry of Social Justice and Empowerment through the National Institute of Social Defence and Child Line India Foundation in this regard initiated a campaign. The National Institute for Child Protection is an institution aimed at building partnerships with the allied systems such as the police, the health care system, the judicial system, the juvenile justice system, the education system, the transport system, the labour department, the media, the department of telecommunications, the corporate sector, social workers and elected representatives. Thus, an attempt has been made for the development of child-focused culture.

The United Nations Conventions on the Rights of Child is a milestone in the international movement on behalf of the child rights. After nearly 59 years of independence and over a decade after India became a signatory to the United Nations Contention on Child Rights, the Indian children continue to be the most neglected segment in the society. A Commission is established under the Commissions for Protection of Child Right Act, 2005 (Act No. 4 of 2006) to examine and review the safeguards for

[2] *Ibid.*

protection of child rights and look into the matters relating to children in need of special care and protection. It will recommend appropriate remedial measures, all of which is spelt out for the first time in the Act.

In a large number of Conferences and Seminars, the recommendations have been made for enactment of common and special adoption laws applicable to all people of India irrespective of their religion. It is argued that it will be an enabling legislation and will ensure the best interests of the child. It is also being suggested that role and function of the agencies involved in adoption work must be clearly defined to avoid the abuse. However all shall be possible only when the proper legislative instrument and framework are put at place.

BOOK REVIEWS

Ronald Dworkin, Justice in Robes, (Universal Law Publishing Co. Pvt. Ltd., Delhi, First Indian Reprint 2007). Pp.308, Price: Rs.325.

Justice in Robes is one of the finest expositions of jurisprudence by Ronald Dworkin, an eminent Professor of Law and Philosophy. Ronald Dworkin has been a provocative legal thinker on the issue of constructing a logically consistent and philosophically useful description of what law is and what law should do. Essentially Ronald Dworkin is a Rights jurist and his expositions cover all the ingredients of philosophical thinking of law.

Justice in Robes is a sequel of Dworkin's jurisprudential expositions, it contains essays, which explicate his notion that law must have a moral component, and deconstruct and criticize the ideas of competing theorists. The book under review is one of the finest attempts of Dworkin and succeeds in explaining what he believes about the context and contours of right. For over three decades, Dworkin has been the most influential in advocating the view that judges should merely follow the law[1]. In the present collection of essays, Dworkin explores the relationship between law and morality, elaborating his previous arguments and replying to a number of prominent objections.

Ronald Dworkin's incisive and lucid style, which readers find in *Law's Empire,* is extensively followed in the book under review. Theory of deconstruction in legal analysis peeps through Dworkin's explanations in *Law's Empire* wherein he emphasised that every legal interpretation reflects an underlying theory about the general character of law and on this exists the base of Anglo-American legal system. Dworkin assessed three such theories. The first, which has been very influential, takes the law of a

[1] See Taking Rights Seriously (1977), and Law's Empire (1986) by Ronald Dworkin.

community to be only what the established conventions of that community say it is. The second which is currently in vogue, assumes that legal practice is best understood as an instrument of society to achieve its goals and the third which is the most fundamental point of law i.e., not to report consensus or provide efficient means to social goals, but to answer the requirement that a political community act in a coherent and principled manner towards all its members.

Ronald Dworkin says[2] that the essays in Justice in Robes are collections mainly about law in what he would call the *doctrinal* sense. These essays explore the concept of "the law" of some place or entity being to a particular effect.

Specificity of law through various perspectives appears to be the most *niche* area of the book under review. How should a judge's moral convictions bear on his judgments about what the law is? Everyone, lawyers, sociologists, philosophers, politicians, or judges all have answers to that question, which ranges from "nothing" to "everything." In his new book Ronald Dworkin argues that the question is much more complex than it has often been taken to be by various schools of legal thinking. Dworkin charts a variety of dimensions of the pedagogy of law; semantic, jurisprudential and doctrinal in which law and morals are undoubtedly interwoven.

Justice in Robes restates and summarizes Dworkinian views and analysis of the interwoven connections of law and morals, which emphasizes the sovereign importance of moral principle in legal and constitutional interpretation. However the book under review is a piece of scholastic critique as well because Dworkin has not fallen short of criticising rival theories against his own. We may take an example - he argues that pragmatism is empty as a theory of law and adding further he presents an artificial anatomy of legal theory and outcome which he names as legal pragmatism.

According to Dworkin, pragmatism is most easily and generally described as a theory of adjudication, which holds that judges should always decide the cases before them in a forward-looking consequential style. Under this style the judge is more concerned about future social goods than prototype reliance on past. Such

[2] See the introductory part of the book under review.

reflections indeed make us to think, what next, which do not confine us to rethink that there, exists some shackle of the past interpretation, legal thinking or judgment.

Dworkin has referred to a number of legal thinkers and philosophers in this book, which is a new account critical analysis. At one place in chapter 7 while discussing analytical positivism he has referred to Joseph Raz stating that Raz's special theory of authority is arbitrary and designed only to produce that result and that, on any normal conception of authority, standards can be authoritative even if interpretation that draws on moral conviction is necessary to determine what they require. In chapter 8 Dworkin has discussed recent essays by Coleman, Raz, Michael Stephen Green, and Scott Shapiro that demonstrate how profoundly the arguments of contemporary analytic positivists depend on ignoring the crucial distinctions among the doctrinal, sociological, and taxonomic concepts of law.

Dworkin has repelled the views of "inclusive positivism", which contemplate that morality is relevant in legal reasoning only when and where the rules of law do meet the pedigree tests of a rule of recognition incorporate morality by reference. Justice in Robes is a masterpiece writing of Dworkin, which covers legal philosophy in nine chapters with impeccable criticality.

Chapter 1 titled Pragmatism and Law studies the claims and arguments on Pragmatism and Law. This chapter elaborates views of two writers on the subject, firstly of philosopher Richard Rorty and secondly of literary scholar Stanley Fish. It must be submitted that both thinkers are not lawyers but both have written critically about Dworkin's legal views. In this chapter Dworkin has argued that the version of pragmatism defended by Richard Rorty and Stanley Fish is philosophically confusing and cannot be stated except in metaphors that cannot be unpacked without making their arguments self-refuting.

It must be added that legal pragmatism theorises judicial decision-making. It emphasizes the need to include a more diverse set of data and claims that law is best thought of as a practice, which is rooted in the specific context at hand, without secure foundations, instrumental and always attached to a perspective. The most influential version of pragmatism in academic law is different still. It is on the surface less

philosophical and more practical than the views discussed in Chapter 1, but its central thesis is nevertheless an important and controversial position in political philosophy. It holds that anyone with political power should use that power to try to make things better in whatever way is possible given his institutional position and the degree of his power.

The relation of pragmatism and law is complex but not confusing and Dworkin in Justice in Robes has categorically brought this aspect forward. If we look into the metaphor of pragmatism and law, it appears that for the legal pragmatist all legal controversies are essentially attached to a specific and unique context. As Posner describes it, emphasizing the unavoidable presence of a specific context disconnects the whirring machinery of philosophical abstraction from the practical business of governing our lives and our societies. It must be noted and ascertained first what a legal pragmatist should look for; a legal pragmatist largely agrees upon four main aspects of a pragmatist version of jurisprudence, firstly, attribute importance to context, secondly, the lack of foundations, thirdly, the instrumental nature of law, and fourthly the unavoidable presence of alternate perspectives. These four aspects make a legal pragmatist. An exhaustive and complex account of pragmatism and law could be seen in this chapter. It could be said that Dworkin has given an elaborate connotation to legal pragmatism in this chapter, which must be read by a legal practitioner, judge or academician.

Dworkin says that he has bracketed in chapter 2, Cass Sunstein with Posner as members of an "anti-theory" school of thought. The main reason is that their views on legal theory vary substantially. This chapter titled "In Praise of Theory" deliberates and brings out the interpretive question of what law holds on in some particular subject and is in principle an open-ended question.

This finding of Dworkin is critical to decision-making process and to the attributes of justice as perceived from the judgment. Judges can normally reach competent answers by consulting only the legal materials of their own jurisdiction that fall into the doctrinal neighbourhood of their immediate problem, guided by

[3] Richard Posner, *Overcoming Law* (Harvard University Press, Cambridge, 1995) P. 463.

the principle of local priority. But reading further the question looms large is whether Judges should involve themselves in cases to give dictates of morality and law, answer is an obvious no but the crucial fact of interpretation of laws remains with Judges wherein such individual moral factors could not be undermined. Dworkin does not deny this rather he believes that such input of morality from the side of the bench must be encouraged. It must be borne in mind that such trajectory of legal thinking would indeed open the question of formalism in decision-making process, which is one of the chief characteristics of the Rule of Law.

In chapter 4, titled Moral Pluralism, Dworkin identifies Isaiah Berlin as the most powerful champion of fundamental conflict in political values. He adds that Berlin's theory of deep conflict in moral values challenges the ideal of integrity at a very basic level. Dworkin has explicated and criticized his claims and arguments in Chapter 4. It must be reiterated here that to a great extent Dworkin has out proved Berlin's theory of value pluralism, which even Berlin could not defend. Undoubtedly Berlin's belief in pluralism was at the core of his philosophical writings as well as his studies of contemporary politics and the history of ideas but Dworkin's critique of the same happens to be at the center of chapter 4.

Chapter 5, Originalism and Fidelity is a reflection on judicial thinking of which Ronald Dworkin appears to be a very strong protagonist. While discussing Justice Antonin Scalia's jurisprudence, Dworkin observed that some of the Supreme Court justices who have embraced originalism do not follow its principles consistently in their own judicial behaviour. Their votes in controversial cases might be better explained by a very conservative political agenda that does not depend on the success of any overall interpretation of the American legal practice. It is a known fact that Dworkin has argued against this "originalist" theory of constitutional interpretation for many years, the main reason for the same could be that this theoretical approach does not suit the Dworkinian reasoning of heavy moral inputs in the adjudicating process.

In Chapter 5 he has discussed a philosophical confusion, which infects the arguments that conservative lawyers and judges have offered on its behalf. Dworkin distinguishes between two very

different ideas i.e., semantic originalism, which insists that the words in a constitutional text must be given the meaning that those who enacted the text intended them to have; and expectation originalism, which argues that these words must be given the force in law that they expected it to have. Semantic originalism seems to me unassailable: it simply applies general philosophical understandings of the idea of meaning to legal texts.

Chapter 6, Hart's Postscript and the Point of Political Philosophy is an elaborate explanation of Dworkinian understanding of the Hartian Concept of Law. Dworkin states that our concepts of different forms of social institution, like bureaucracy, meritocracy, marriage, and law, are not concepts of natural kinds whose essential nature is given by physical or biological structure or something comparable. We experts and non-experts alike do share a rough sociological concept of law: we would almost all make certain assumptions if astrozoologists reported that a group of intelligent non-human animals they had discovered on a distant planet had a kind of legal system.

Students of jurisprudence know Dworkin's comments on the Hartian "rules of recognition" and chapter 6 of the book under review is in furtherance thereof. Rules of recognition; the central thesis of the Concept of Law maintains that in each and every modern legal system there are 'social rules', as Hart called them, which are followed by the pertinent legal community (particularly judges), and which define the sources of law. Hart further assumed that in each and every legal system, eventually one rule of recognition can be identified, which subsumes, in a hierarchical ordering, all the rest.

It must be noted with sincerity to jurisprudential developments that the Hartian concept of legal validity is exhausted by the reference to the rules of recognition. This conceptual thesis, underscores that a norm is legally valid if and only if it derives its validity from one of the sources of law identified by the rules of recognition. This mandate of legal validity has brought numerous questions and one of such questions is on Dworkin's main critical efforts wherein he aimed to show that this conceptual thesis of Hart is groundless, because the law comprises numerous norms whose legal validity cannot be traced back to the sources of law identified by the rules of recognition.

In other words, it is not the existence of the rules of recognition but their importance for the explication of the concept of legal validity that was the focus of most of the controversy at the time. The book under review goes to the extent of defying existence of any rule of recognition as such.

It must be duly noted that in the Concept of Law Hart provided two main characteristic features that rules of recognition possess. Firstly, rules of recognition are secondary, power-conferring rules and secondly, they are 'social rules' whose validity consists in the fact of their 'acceptance' by the pertinent community. It could be noted through writings of Dworkin that his initial emphasis was importance and acceptance of rules of recognition but in the book under review it appears that even the existence of such rules of recognition is questioned.

In chapter 7, Ronald Dworkin explains a bitter conflict of legislative opinion and judicial opinion. In this chapter titled Thirty Years On, Dworkin explains philosophical thinking on positivism and lawyering. He has emphasised that Oliver Wendell Holmes and Learned Hand, defended legal positivism because they believed that judges should obey the decisions of popular legislatures and not themselves attempt to criticize or supplement those decisions out of their own perhaps different (and, those lawyers thought, typically more conservative) moral convictions. Dworkin has named them as political positivists who assumed that the best justification of legal practice includes what they took to be a democratic principle: that the people as a whole and not judges, whom the people cannot discharge, should decide what laws should govern them. Dworkin has identified Joseph Raz as a leading contemporary analytic doctrinal positivist whose philosophical methodology has raised interesting conceptual questions.

It might be noted for relevance here that some contemporary academic lawyers defend legal positivism in a similar, explicitly practical and political way; Liam Murphy, for example, believes that if judges appeal to morality in reaching their decisions about what the law is, the general population will be led to think that whatever is law is just. That seems counterintuitive and implausible, but Murphy's arguments are nevertheless a good illustration of the character of political positivism.

Dworkin states that Hart's version of doctrinal positivism, which has been influential in academic legal philosophy, though not in legal practice, is now generally understood to be an example not of political but of analytic positivism. Dworkin furthers by adding that there are at least hints of political positivism in his early work. He once also argued, for example, that it would facilitate moral criticism of law firmly to separate legal from moral argument. Would it be correct to identify positivist in a blend of law and moral principles? This chapter ponders over and answers this question.

As a legal thinker Dworkin framed his attack primarily on legal positivism, and he is now best understood as having challenged a conception of positivism in which a rule of recognition identifies a set of distinctively legal rules that in turn produce legal decisions. According to Ronald Dworkin, legal positivism refers to a proposition that law is largely a set of its own rules, that such rules can be identified by the rule of recognition on the basis of their source (pedigree) and not of their content, and that the rules so recognized determine the results in all cases except for the small number in which judges would exercise legally unconstrained discretion. In order to understand and depict the nature of adjudication in advanced common law systems, Dworkin focussed on the rule of recognition but he referred to it as the "pedigree" of a legal rule.

In his initial discourses Dworkin stated that there may be a set of legal rules recognized by a rule of recognition, but actual adjudication of hard cases is not restricted to the application of such rules. Rather, such adjudication involves the application of principles as well as rules, and no rule of recognition could identify the principles; legal, political, and moral as an interconnected whole that play such a large role in the decision of actual cases.

According to Dworkin, model of rules cannot explain what is actually happening in a large number of hard and important cases in the courts of law thus the positivist account of the nature of law turns out to be descriptively false. This happens to be the biggest attack on positivist thinking from Ronald Dworkin.

Chapter 8 of the book under review titled the Concepts of Law is essentially a review of Dworkin's philosophical tenets with the contemporary thinkers. In this chapter he has reviewed the argument between analytical positivists and himself in a different way. He has elaborately referred and discussed essays by Coleman, Raz, Michael Stephen Green, and Scott Shapiro, which according to Dworkin demonstrate profoundly that the arguments of contemporary analytic positivists depend on ignoring the crucial distinctions among the doctrinal, sociological, and taxonomic concepts of law.

This is an interesting point to be noted that Ronald Dworkin, happens to be H.L.A Hart's successor as Professor of Jurisprudence at Oxford, much of Hart's work has been called upon to support one or the other side of debates about adjudication and about the explanatory virtues of different versions of legal positivism. When it comes to Ronald Dworkin, he is the most vivid critique of Hart's legal philosophy. H.L.A Hart and his works are everywhere *ii*\ contemporary jurisprudential discourse, any course of jurisprudence today is incomplete without studying the Concept of Law."

However Hart's presence in today's jurisprudential landscape is typically framed by debates in which he and his work are at best passive participants. Some of these debates are about adjudication and legal sources, while others are about the nature of law and which version of legal positivism best explains it. In both cases, however, it was Ronald Dworkin's challenge to Hart that provided the initial stimulus to debates over rules of recognition and a rethinking on legal positivism.

Chapter 9 of the book titled 'Rawls and the Law' highlights the legal philosophy depicted by John Rawls through a Dworkinian perspective. Indeed much of the most important work in legal theory is done today not by lawyers but by political philosophers and economists working both within law schools and within their own academic departments. No theorist has made a greater contribution to legal philosophy in modern times than the political philosopher John Rawls.

Dworkin suggests that traditional understanding of law and morality is unchallengeable but there is scope for rethinking. Morality and law indeed are separate departments of legal thought, which encourages us to chart relations between two different intellectual domains but such charting of relation is unsatisfactory. Dworkin believes that in order to make this intellectual domain more understandable and palatable we might see it from a different intellectual topography and in that case it is advisable to treat law not separate from but as a department of morality.

Justice in Robes is an exceptional account of legal philosophical thinking, which underscores value and morals as a content of law. It could be seen that value pluralism misunderstands the nature of moral concepts. Dworkin has identified adjudication as a core attribute of legal justice mandating a formal rational legal system . Dworkin comments considering the American perspective that constitutional originalism reflects an impoverished view of the role of a constitution in a democratic society, and that contemporary legal positivism is based on a mistaken semantic theory and an erroneous account of the nature of authority.

To sum up it would be apt to say that the book under review witnesses a philosophical dialectic, which helps building critical legal thinking. In the course of his critical study Dworkin discusses the works of many of the most influential lawyers and philosophers of the era, including Isaiah Berlin, Richard Posner, Cass Sunstein, Antonin Scalia, and Joseph Raz and last but not the least H.L.A. Hart. Justice in Robes is a classical collection of essays by Ronald Dworkin, which reveals explanatory virtues of

[4]See the third meaning or definition of rule of law as stated by A.V. Dicey in Introduction to the Study of the Law of the Constitution, Oxford, 1885. Here reference on this issue could be made to Max Weber who categorised legal systems into four kinds: formally irrational, substantively irrational, formally rational, and substantively rational. Rationality refers to the generality and universality of law. Formality refers to the characteristic that the criteria of lawmaking and law finding are intrinsic to the legal system itself; that is, all rules, procedures and decisions can be deduced from the legal system itself. In contrast, a legal system that emphasizes substantive qualities of lawmaking and law finding uses factors outside law, such as ethical, emotional, religious or political factors, to evaluate cases. According to Max Weber, only a formally rational legal system can achieve "legal domination" (rule of law) through consistent application of general rules, because only a formally rational legal system can maintain a consistent system of abstract rules that is necessary for the rule of law.

different versions of legal positivism and the theories of adjudication.

'Sanjay Pandey

Sean Butler (Ed.), Studying the Law, (Universal Law Publishing Co. Pvt. Ltd, Delhi, 2007). Pp. XI+106, Price: Rs.125.

'One never ceases to be a student' and this statement is more apt when the subject is law, where the quest for knowledge is all the more unending. This is perhaps the appropriate introduction from the seemingly educative directions emerging from the book under review. Written by engrossed academicians, it introduces the reader to the techniques, which make studying law easier, and more lucid. The book under review could best be described as an introductory guide, illustrating the approach and tools towards studying law generally and its various areas in particular.

Considering this book as a guide towards approaching legal learning, the spread of the book is quite intriguing. It seeks to classify the dimensions of legal mix into nine branches or rather streams of law. The prelude to legal analysis comprises of the introduction, both to the nature of legal analysis as well the purpose of the book and its relevance in the present context of legal education. It begins with the examination of the 'nature of legal process', a short one though, and is quick to point that "legal approach teaches caution, and a proper awareness of precedent and previous behaviour, demanding a balanced approach to contradictory viewpoints in which strengths and weaknesses of all sides are exposed", a reflection of the condensed learning.

The nine parts of the book reflect a judicious selection of the various branches of law posing challenges to a trial lawyer. However the perspective is typically English legal system oriented. The first part, written by Dr. Andrew Henderson of St. Edmund's College, Cambridge, deals with 'Constitutional Law' and focuses on the issues facing the British Constitutional law setup, giving a cursory insight into the various institutions involved and their relationship *inter se*. Beginning with the

sources of constitutional rules, the chapter proceeds to examine the relationship between the institutions and citizens, etc. Certain illustrations are cited to reflect the constitutional law in practice in the European nation wherein the royal prerogative, official secrecy and other related areas are brought to the fore to explain the state-of-affairs affecting the constitutional system as prevailing therein.

Dr. Sean Butler, the editor of the book, has written the second part of the book under review, which provides a background to the English legal system in terms of its inheritance from the Roman legal system and its continuance into the existing system. The historical background traced goes up to 510 BC when the Roman Republic was established. The concepts developed in that system, as being continued, are highlighted as forming the base of the existing legal setup. For example, the binding nature of contracts made with slaves on the master if master had specifically empowered the slave to that effect, as constituting the 'principle of agency'; damages for injury etc. Throughout the chapter analogous concepts have been explored to pave the way for a clearer understanding of the Roman law principles, as relevant in the context of modern day legal system.

Nicholas J McBride of Pembroke College, Cambridge, has contributed the third part of the book under review, which deals with 'Tort Law'. This chapter provides lucid illustrations to explain *legal rights* and *duties, wrongs;* the emphasis of this chapter is to provide a layman's understanding to intricate legal issues to the new entrants in this branch of study. Cases like *Bradford Corporation v. Pickles* [1895] AC 587 are handpicked to be discussed in details such that the essentials of tort liability are brought to the fore. The idea may not be but the presentation is novel. Thereupon discussing issues such as liability for omissions, vicarious liability, chapter goes on to examine the 'future of tort law' as built on strong foundations to persist even after numerous codification exercises have taken place and common law courts are becoming reluctant to experiment more torts. The author insists upon the continuation of the tort law as vouching the protection of individual rights against the face of their violations.

Nicholas J McBride has contributed the fourth chapter of the book as well, which deals with 'Criminal Law'. The discussion

begins with an examination of the functions of criminal law; 'core function' and 'secondary function', as the author puts it as, 'protecting rights by punishing those who deliberately violate them' and 'to deter people from acting in ways that are contrary to public interest' respectively. Thereafter the chapter proceeds to inquire into the key concept of intention, as required in most criminal offences.

However the inquiry under this chapter concludes rather abruptly by leading to a discussion on 'morality and criminal, law', which finds itself out of place in the hierarchy of certain pivotal elements towards understanding criminal law such as, role and relevance of motive, actors in criminal law, nature of trials as contradistinguished with civil suits, role of state in prosecution etc. In fact more emphasis is given on the principles as having been evolved from judicial decisions rather than statutory rules, which itself is quite perplexing given the strict regime for application of criminal legal system.

The fifth chapter deals with 'Land Law' and is contributed by Dr. Neil Jones of Magdalene College, Cambridge. The beginning of the chapter has been made rather interesting with the introduction of political science concepts and economic parameters affecting the existing legal regime on land law, as in the United Kingdom. The 'classification of interests' of the various stakeholders in the case of land and the thrust towards examining the ways and means for the 'co-ordination of rights' so as to arrive at an amicable balance *inter se* makes the discussion contemporary for all times to come.

Further, the discussion of concepts like property, possession, ownership, licenses, leases, effect of registration, etc. substantiated by case law makes the chapter a must read, at least for building a theoretical foundation of the stream. However, the lack of discussion on the statutory provisions is stark and needs a re-looking so as to bring in context with the contemporary setup, which is equally relevant for a beginner.

The sixth chapter is on 'Equity' and is contributed by Elaine Palser of Exeter College, Oxford. Beginning with a judicious mix of its location in the history and its practical importance in modern-day law, the author has subjected the concept to a discussion of vital features comprising this branch of law. Owing

its origin to the limited number of legal remedies available during the middle ages, as administered by the Courts of Common Law; equity has been a prerogative of the King's Chancellor, who was made responsible to deal with such alleged cases of injustice arising from lack of legal remedies to enforce the claims. This has been very well brought up with the discussion of 'Chancery's creations' and 'equitable maxims' taking the lead to concretise the learning. Significant emphasis has also been given to trusts and their forms; express trusts, resulting trusts, and constructive trusts, as the author puts them. Thereafter he proceeds to inquire about the ways for creation of trusts, attributes of subject matter, intention to form the trust, objects of trust etc. A substantial place has also been given towards case laws as well to elaborate the principles put forth.

Nicholas J McBride has contributed the seventh chapter, on 'Contract Law'. The introduction is quite short and unimpressive and straight away the discussion focuses on terms such as covenants, bilateral contract, unilateral contract, estoppel, etc. In fact the entire discussion on contracts *per se* is missing with a noticeable lack of statutory provisions affecting the formation, performance, discharge of contracts, etc. forming the key ingredients for understanding this branch of law. Instead illustrations have been extended, in too simple terms, to identify contracts as 'double-edged sword', a discussion quite unnecessary and unclear in focus. There is some examination of the binding nature of contracts but that too is in the light of certain handpicked provisions from property laws, law relating to negotiable instruments, etc., which fails to bring forth the actual concept in discussion and tends to waive around those specific illustrations.

Chapter eight of the book under review is contributed by Jonathan of Exeter College, Oxford and covers 'Family Law'. It may be interesting to read but fails to bring forth the scope of this branch of law when the chapter begins with the note that 'family law is about chaos'. In fact the discussion, which builds up, as can be anticipated, is more concerned with woes and tensions surrounding a family and its members instead of a discussion of law and its provisions purporting to settlement of such conflicts. Therefore the 'rights of teenagers', 'disputes over frozen embryos', 'contracts between parents and children' are discussed with an absolute ignorance of the marriage, succession,

inheritance and other key concepts forming the basic tenets of family law. The chapter would have served enormous purpose had it been authored as a critique on family law being unable to deal with modern day issues and bringing an end to the internal conflicts facing a family. However as an introductory chapter on family law, as the prelude to the book aims it to be, it miserably fails to serve its purpose. In fact the critical evaluation of the role of lawyers in their handling of such cases is also unwarranted and brings the profession disrespect.

The ninth and final chapter is on 'EU Law' and is contributed by Dr. Andrej Savin of Emmanuel College, Cambridge. The discussion begins with the intent to expose the readers to the tenets forming the EU, what does it do, how did it develop, etc. The intent is novel but the discussion is confined to reproducing key provisions from different treaties, which fails to bring about the desired effect on the reader. Thereafter the regulation aspect of the EU law, as regulating the affairs of the member nations is brought to examination with a discussion on the basic principles of EU, the concept of subsidiarity as forming the basis of this Union, establishment of a single market, free movement of goods, free movement of persons etc. There is a subtle lack of the legal provisions bringing forth the importance of EU law in the internal national affairs of the Members but the spread of the chapter duly compensates this demerit.

In all, the book is an interested read in so much so that it brings forth the examination of certain branches of law from different perspectives. However this overdriven zeal to simplify the understanding of the legal principles has translated into lack of substantial coverage on the basic issues underlying these laws, which are required to be exposed as an introductory guide to law.

The book seems to be motivated by the complexities and intricacies facing the legal system and is aimed towards creating an aptitude for a student as a beginner in its unending quest to understanding the legal system.

The choice of the branches of law, as reflected in these nine chapters may be appropriate. However some of the chapters fail to bring to the fore and present systematically the issues that need to be examined in order to encompass a complete understanding.

This may be effectively reconsidered and improved upon in later editions.

'Tarun Jain

P. Narayanan, Patent Law, (Eastern Law House, 4* Edition, Kolkata, 2006). Pp. 1021. Price: Rs.890.

In view of India's obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights (hereinafter TRIPS Agreement) and the need to cope up with requirements of present day global and liberalized economy the Parliament has brought substantial changes to patent law in India in the form of recent amendments to the Patent Act, 1970.' The present edition of the book by the learned author on patent law proves its worth in the light of recent amendments and is the most appreciable effort by the author.

Author has divided the book under review into twenty-three chapters. First chapter introduces the subject in a lucid manner. The author starts with a discussion on historical development of patent law, which gives an opportunity to the beginners to well acquaint themselves with the basic understanding of the patent law. The chapters following thereafter provide a thorough discussion on substantive and procedural standards of Indian patent law. The case laws on the subject have been very appropriately referred but it seems that the author has used Indian cases miserly. The book under review is substantially based on English case law on the subject with a few U.S. cases discussed on some contemporary issues.

The book under review has done a valiant effort to incorporate a discussion of patent specification but to one's surprise, the book

[1] The fourth edition of the book has come seven years after the third edition. Indian Patent Act has been amended three times during this period viz. by The Patents (Amendment) Act, 1999 (w.e.f. 26 March 1999); The Patents (Amendment) Act, 2002 (w.e.f. 20 May 2003); and The Patents (Amendment) Act, 2005 (w.e.f. 1 January 2005) respectively.

does not incorporate either the specificity of various claim formats or analysis of the same. A book on patent law, if considered as a reference book, it must incorporate minute details on specification and claim writing. Detailed specifications analysis is important for a patent attorney and for a law student equally because patent claims and the way patent specifications are written have a bearing on the entire legal protection of the patent in question. However, to an Indian student who is to be introduced to the patent law, the information on specification given by the author appears to be sufficient.

This fourth edition of the book has introduced three new chapters on contemporary issues. Chapter twenty one, which has been newly introduced in this edition, discusses about patenting of certain special categories of subject matter viz. biotechnological products, genetically engineered organisms, DNA sequences and other products resulting from genetic research, presentation of information, computer related inventions, business methods etc. Though the learned author has referred to various English and American authorities on the subject the whole discussion in just three pages by no means does justice to the issue.

Chapter twenty-two, another new chapter reflects on protection of Trade Secrets. This topic has its own importance as sometimes protection of trade secrets appears to be a replacement for a patent and in some cases considered to be a better protection. The discussion is solely based on US law on the subject. It would have been better had the author provided a comprehensive view of protection of trade secrets in USA, UK and India.

Lastly, chapter twenty-three introduces right of publicity. Theory of this right is that a celebrity's identity can be valuable in the promotion of products and celebrity has an interest that may be protected from the unauthorized commercial exploitation. However in a short discussion of one and half pages the author seems to have been unsuccessful in establishing link between contents, as the last paragraph of the chapter appears to be irrelevant. The author has also not been able to establish a link between right of publicity and Patents.

A valuable part of the book under review is its appendix. The texts of almost all the important Indian and English statutes, current and repealed are included in it. Further, embodiment of several international documents in the appendix such as Paris Convention for the Protection of Industrial Property, 1883 and the Patent Co-operation Treaty, 1970 give an additional value to the book.

A welcome step in this fourth edition of the book is reference by the learned author to various books and treatises on the subject which have been recently published viz. Cornish & Llewelyn on *Intellectual Property* (5th Ed.), Paul Goldstein on *Intellectual Property* (5n Ed.), *Intellectual Property* by Roger E. Schechter & John R. Thomas, *Cases and Materials on Patent Law* by William H. Francis & Robert C. Collins (5th Ed.) to name a few. At the same time reference to various U.S. cases, which focus on patentability of computer software and business method patents, makes the book under review a reference book. However, this new edition does not reflect upon the TRIPS provisions and relationship of patents with that of the international trade, which is an obvious expectation of a reader in the light of the recent amendments to the Patents Act, 1970.

The book is an excellent starting point for those who want to familiarize themselves with the intricacies of the patent law. Most of the important concepts have been covered precisely and lucidly, and the book discusses nearly all the landmark English cases.

This new edition of the book has, by and large, been successful in presenting the contemporary patent law issues. It is submitted that incorporation of European Patent Office (EPO) and United States Patent and Trademark Office (USPTO) guidelines in respect to patentability of computer software, business method and biotechnological products can bring an added merit to the book and will make it more useful for practitioners.

There was a great need for a book that gave a comprehensive summary of all the aspects of patent law together with the recent changes and amendments under patent law in India. The New

edition of the book fulfils this need admirably. It deserves to be on the shelf of all the students of intellectual property law.

'Pawan Kumar Pandey

Nandan Kamath, *Law Relating to Computers, Internet and E-Commerce,* A Guide to Cyberlaws and the Information Technology Act, 2000 with Rules Regulations and Notifications, (Universal Law Publishing Co. Pvt. Ltd., 3rd Edition, New Delhi, 2007). Pp. XLIX+749. Price: Rs.495.

Two words driving the engine of growth in the contemporary world today are Information and Technology. Today's society is knowledge society wherein the technology regulates production and dissemination of this knowledge. Information Technology (IT) these days stands as the single factor contributing to rapid change of any Political economy. All of us in some or the other way are an indispensable part of this drive of change. The history of any economy can now be divided into two eras, the time before IT and after it.

The IT Act, 2000 is an attempt to address problems brought due to technological changes and advancement. The IT Act, 2000 has introduced a regulatory framework laying down ground rules for use of various aspects of Information Technology. This Act, like any other piece of legislation that regulates technical fields, is dependent on scholarly explanations and commentaries for its proper implementation. Moreover, it leaves many other areas relating to cyberspace un-addressed giving rise to a strong need for scholarly contribution.

The first edition of the book under review fulfilled, to a large extent, these requirements. It appeared for the first time in 2000 as a commendable and pioneering effort in the area of cyber law. The book brought together contributions of different scholars that addressed a wide range of topics relating to cyber space. However, having appeared soon after the coming into force of the IT Act, 2000, explanations to various parts of the Act were unsatisfactory and premature.

The present, much awaited, 2007 edition of the book under review takes care of such shortcomings.

Divided into two parts, the book in Part I covers various global issues involved and addresses issues of jurisdiction, defamation, freedom of expression, e-taxation, and Intellectual Property Rights. These global issues have been discussed in the backdrop of emerging case law and enactments in different countries. An important feature of the present edition is that chapter which analyses the celebrated Microsoft anti-trust trial. The chapter is useful not only for discussion on the case but also for a fairly comprehensive discussion on the concept and general principles of anti-trust laws. Moreover, the simple language of the chapter makes it useful for those who are uninitiated in cyber laws. Another significant aspect of this part are the changes that have been incorporated in chapter 18 titled, 'the World Trade Organisation, Cross-Border Electronic Commerce and Customs Implications' authored by the editor himself. This chapter discusses some important questions such as nature of taxation, the place of transaction for the purposes of taxation. It also throws light on important distinctions between *Goods* v. *Services, Tariff* v. *Quantitative Restrictions* that have been sources of debate for a long time.

In addition to being valuable for inclusion of some new issues, the book remains useful for its discussions on some very basic concepts related to cyber space. The book begins with introduction to World Wide Web and Internet. It discusses the challenges before judiciary and law enforcement agencies that have been posed by information and communication technologies giving examples of Internet Fraud and Phishing scams. A chapter of the book under review written by Ankit Majumdar is devoted to the jurisdictional issues in cyberspace. It discusses the problem of the absence of territorial borders in cyberspace as the rise of the global computer network is destroying the link between geographical location and jurisdictional control, which includes the power of local governments to assert control over online behaviour, the effects of online behaviour on individuals or things, the legitimacy of local sovereigns efforts to regulate phenomena and the ability of physical location to give notice regarding which set of rules apply. The authors have discussed

the "minimum contact"[1] theory that U.S. courts have applied for resolution of disputes in cyberspace due to lack of regulatory reach in borderless world and the problem of controlling activity based outside the jurisdiction. The author also discusses the feasibility of transnational cyber law independent of all legal systems and applies only to online commercial activities. With respect to Indian law the author has tried to discuss the provisions of the Code of Civil Procedure, 1908 for determining jurisdiction however the chapter has not taken up the issues in the background Private International Law. It also fails to discuss the role of WTO and its dispute resolution mechanism.

The book also reports briefly on the various types of technology used for collecting electronic evidence and its admissibility in courts of law. It also discusses in detail the amendment that has been made in Indian Evidence Act for the admissibility[2] of electronic records, digital signatures and digital evidences. Even though the focus is on Indian Evidence Act, positions in the U.S. and the U.K. are also discussed.[3] It throws light on video conferencing where evidence would be recorded by the magistrate or under his dictation in open court. The drawbacks of this method are also discussed in the book under review. As a matter of procedure, evidence by video conferencing in open court should be taken only if the witness is in a country, which has an extradition treaty with India and whose laws punish contempt of court and perjury[4]. But the author did not mention the process of confiscation of electronic evidence and computer forensics.[5]

Information can also be gained in a more conniving and unexpected fashion about digital signature[6] and certifying authorities. The author has explained these technicalities in detail but in the absence of proper diagrams and flowcharts it becomes difficult for the readers to develop a clear understanding. The process of creation and verification of digital signature,

[1] The theory rules that courts may address assertions of personal jurisdiction based on a defendant's online contacts with the forum state.
[2] The Indian Evidence Act, 1872 Section 65B.
[3] The author has primarily used the United Kingdom and United States as references because they are, like India, common law jurisdictions.
[4] *State of Maharashtra* v. *Dr. Praful B. Desai,* (2003) 4 SCC 601.
[5] Computer forensics refers to the tools & techniques to recover, preserve, and examine data stored or transmitted in binary form.
[6] Section 3 of the Information Technology Act, 2000.

functioning of "hash function" and the concept of digital envelope has been made clear by the book under review. The power and functions of controller of certifying authorities have been discussed in detail by the author.

The book under review contains a comprehensive chapter on the issues relating to Intellectual Property Rights in online medium. Technology is a double edged sword. On one hand it is creating a new means to fix the original expression in a tangible form and on the other it is being exploited through copyright infringements with impunity. Even some of the Internet activities like linking, framing, meta-tagging or caching are an anathema to a purist. The book contains a comparative study of Intellectual Property laws of various jurisdictions as well as relevant provisions of the WIPO Copyright Treaty and the TRIPS. It discusses the liability of ISPs with respect to copyright infringements in comprehensive manner. It also explains the registration process of Domain Names, Domain Name disputes and Domain Dispute Resolution Policies.

The book discusses in detail the cyber contraventions and cyber offences. The author has tried to make clear distinction between the unauthorized access and hacking with computer system. The role of Adjudicating officer in holding enquiries in cases of cyber contraventions of the provisions, Acts, rules and notifications and then if required fixing the quantum of compensation/ penalty.

The Author has discussed in detail the issue relating to pornography in electronic medium and discussion has been made from a global perspective. Authors have identified the places on Internet, which are being used for dissemination of pornographic material. An earnest effort has been made by the author to cover all the aspects relating to cyber pornography. Provisions of the U.S. Communication Decency Act, 1996, sections 292, 293 of the Indian Penal Code and section 67 of the Information Technology Act have been analysed in the light of decided cases. The issues of cyberstalking and cyber defamation have been addressed in great detail.

The book under review is especially useful for its Part I, however Part II of the book falls short of the expected standards, wherein authors have discussed the Information Technology Act, 2000. In this it seems that the emphasis of the author is more on providing

information rather than deciphering the key legal issues in view of the global context of Internet. The new edition does not endeavour to explain clearly and comprehensively even the core technical terms.

These shortcomings could be overlooked in the first edition since this book was written just after enactment of the IT Act, 2000 but a more detailed discussion was expected in the third edition.

***Atul Kumar** Pandey*

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