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ARBITRATION: NOT LITIGATION*

FALI S.NARIMAN"

Fellow-students of law, ladies and gentlemen... I say fellow-students because we lawyers and judges are always students of law: my senior in Bombay Sir Jamshedji Kanga told us that whatever a lawyer's age, whatever his position at the Bar or on the Bench, he or she is always learning. A lawyer (he said) never stops learning.

I am delighted to be here and I thank the Vice Chancellor Mr. Justice Mathur for inviting me. I have delivered speeches and lectures on many occasions but frankly this is the first time I have been invited to deliver an oration. I looked up the definition in the Shorter Oxford Dictionary -*k* defines an oration "as a speech given in connection with a particular occasion" - and the occasion is to honour the memory of Justice Bodh **Raj** Sawhny: a most fitting occasion, at which his distinguished son and ■embers of his family are present.

I feel privileged to follow in the foot steps of Chief Justice Anand, the Qiairman of the Bodh Raj Sawhny Memorial Trust who delivered the first oration. About Chief Justice Anand I must let you into a secret.

fci the minority education institution cases in which I had appeared as **kad** Counsel, there were a spate of decisions of the Supreme Court of ■**adia** - of Benches of five, seven and nine Judges - and I recall an occasion, when arguing on behalf of minority educational institutions **when** Justice Anand was on a Bench of eleven Judges presided over by Qucf Justice Punnchi.

•**"ken** all the decisions were cited before the Bench, Justice Anand made Ac following pertinent point:

^*Smth* Annual Justice Bodh Raj Sawhny Memorial Oration 2009 *
Tkr speaker/author is a former Attorney General of India.

"Was it ever contemplated by theframers of our Constitution (he asked) that post-graduate education and specialty education should also fall within the provisions of Article 30? "

I remember that when Justice Anand posed this question I was very angry, and I said that Article 30 covered all educational institutions and that since the St. Xavier's College Case - a case in which nine Judges had sat - secular education in colleges had been held to be governed by the discipline of Article 30.

But to be very angry in Court is not necessarily to be right - about which there is the story of Lord Eldon. Lord Eldon spent twenty five years as Lord Chancellor of England. When he was a lawyer, as plain Mr. Scott, he argued a case in the Chancery Courts and lost, and thirty three years later the same case was cited to him, when now as Lord Eldon, he presided in the same Court of Chancery. He said that he remembered the case very well:

"... and very angry I was with the decision; but I have lived long enough to find out that one may be very angry and very wrong!" I too recall that when I argued before Justice Anand, I was very angry and I now realise now that I was very wrong.

All the complexity of our present problems about minority education that we are infested with could well have been avoided if we had argued and the Court in its final decision had simply said, as Justice Anand had then tentatively suggested, that the provisions of Article 30 were meant to give minority education institutions preference not only in religious but in secular education as well, and that all minorities upto college level were entitled to establish and maintain educational institutions of their choice; but that it had to stop there. To say that Article 30 also governed post-graduate and specialised studies, as was later held by Justice Kirpal who presided over another Bench of 11 Judges in November 2002, was, I now realise, a unmitigated disaster - for minorities. By insisting on Article 30 reaching out and encompassing post-graduate and speciality studies in medicine, engineering and the like, I believe it is the minorities that have lost out: and the true content and intent of Article 30 has got devalued only because we tried to reach out to what was not within our grasp.

A word about this great city -1 have come to Jodhpur now after 40 years and I am delighted to be back here in the presence of law students and the faculty of the National Law University.

Before 1 went from Bombay to Delhi in 1972, I used to come here quite often. In those days there were no hotels - the only place to stop at was the Circuit House where, because of some rationing restrictions in Rajasthan, no food was ever served on Mondays. We had to buy it from Kwality's! When years later, accommodation was made available at the Umed Bhawan Palace, I used to stay there. Of course there was no National Law University then - as far as I recall though there was a law college.

For me, Jodhpur is a delightful city where you can see camels on the streets during the day and hear the shrill call of peacocks at night. It was a peaceful city -1 hope it still is.

I also recall one particular occasion when I was here to appear in the High Court way back in May 1964; news about Pandit Nehru's passing away was announced and there was a condolence meeting in the Court of Chief Justice D.S. Dave where Mr. C.L. Aggarwal, then a leading lawyer and President of the Bar Council addressed the Court. He is the only person I know who always spoke - whether in an obituary reference or when arguing in Court with his eyes completely closed. His distinguished son, Suresh Agarwal, was then a practising lawyer in the Supreme Court. Suresh later became a Judge of the High Court of Rajasthan and later came to be appointed a Judge of the Supreme Court. And he made a very good Judge indeed.

So Rajasthan does have some memories for me.

The subject of today's title was suggested by the Vice-Chancellor and when I asked him whether the students would be interested in this specialised subject he said that arbitration law was part of their curriculum. So I will speak to you - not about the law - which you already know - and are being taught - but about the practice and problems faced in this branch of law.

Being familiar with the practice of arbitration for many years, I can confidently say that we now have a very good Arbitration Act of 1996 which is based on the UNCITRAL Model Law of 1995. But it is we lawyers and Judges who have not so far exhibited an earnestness of properly implementing it. We have an excellent Constitution - the Constitution of India, 1950 - and yet we do not seem to know how to uorfc *it - this is also the fate of this new \996 Act* - excellent in conception but very poor in implementation and enforcement.

Let me speak first generally about International Arbitration.

I must tell you that it is an irksome topic - especially after my good friend Jan Paulson - currently President of the London Court of International Arbitration (LCIA) - addressed the students of Mc Gill University, in Montreal, a few months ago at which he confidently asserted that - *"International Arbitration is not Arbitration"*. He said that this was because in arbitration, that is, domestic arbitration, there was an alternative to Courts, but there was simply no alternative to international arbitration - because there was no - there is no - supranational Court.

So, as Jan Paulson put it, in a transnational environment *"International Arbitration is the only game "*.

Let me then tell you how this *"game ",* as Jan Paulson calls it, was played in India in the past, and how it has been played during these last twelve years.

The game was *"played"* with much suspicion and much ill-feeling in the bad old days.

In 1983 when I participated in the 60* anniversary celebration of the Court of Arbitration of the ICC, in Paris, my friend US Judge Howard Holtzmann stressed the idea of Judge and Arbitrator as being *"partners in a system of International Justice "*. But quick to respond - Judge Keba Mbaye from Senegal (Africa) contradicted him. Keba was then Judge of the International Court of Justice and its former President.

He said, politely but firmly, that the notion that there was a system of international justice was not shared by countries in Africa, Asia and Latin America, who still saw arbitration as a foreign judicial institution imposed upon them: developing countries were rarely the venue of international arbitration and even more rarely, produced arbitrators.

And he spoke of the hostility of African Courts to arbitrations by foreign tribunals, and I quote what he said, *"fAJs everybody knows, arbitration is seldom freely agreed to by developing countries. It is often included in contracts of adhesion the signature of which is essential to the survival of these countries "*.

Well, till the early nineteen eighties, conditions in the Indian sub-continent (in India, Pakistan and Bangladesh) were somewhat similar to

those described by Judge Keba Mbaye. International Arbitration was unpopular in India for the same reason, and also because in trans-national disputes in the nineteen sixties, nineteen seventies, and even in the nineteen eighties; Indian parties were not able to effectively defend claims brought against them in the ICC Court and in other foreign tribunals - due to India's then low reserves of foreign exchange. Remember - India went global, with its foreign exchange touching one billion dollars, only in the nineteen nineties.

We also had another problem - an indigenous one. In India, the traditional attitude of Courts towards arbitration had been paternalistic - almost school-masterly. This was fostered by our archaic law of arbitration - enacted at the beginning of the 2nd World War (the 1940 Act). As for International Arbitration, there was a lurking suspicion as well, in many Indian minds, of a revival of foreign dominance.

But, over the years, things have changed.

I recall that at the Centennial Conference of the London Court of International Arbitration (LCIA) Jean-Louis Delvolve (a Court Member) presented a stirring piece titled *"The Fundamental Right to Arbitration "*\ his theme was that the time had come to proclaim arbitral freedom as a fundamental principle, to be constitutionally guaranteed by every State. And he gave a homely example to illustrate his point -

"In the same way as no one is obliged to travel by train in a country where the State provides a public railway service if one has the benefit of a means of transport which is better adapted to one's needs (and even if the trains run on time!); so no one should be obliged to submit himself to even the most diligent of State Courts, should he and his adversary both consider that a private judge would be more appropriate to decide their disputes ".

But modern States, both in the West and in the East, have shown a marked reluctance to universalise the concept of absolute arbitral freedom. Even a State that is a party to the New York Convention (hereinafter, NYC) - as India is - is permitted to exclude arbitral freedom in relation to legal relationships which its laws consider to be 'non-commercial' (Article 1.3). And a New York Convention State may also refuse to recognise or enforce arbitral awards if, according to its

[1] THE LCIA CENTENARY CONFERENCE VOLUME, 141-151 at 145 (Martin Hunter, Arthur Marriott & V.V. Veeder eds., Martinus Nijhoff, 1995)

own law, the subject-matter of the dispute is not capable of settlement by arbitration, or where such recognition or enforcement is contrary to the individual State's own notions of public policy (Article V(2)).

But, within the constraints imposed by the NYC, the UNCITRAL Model Law, 1985 has shown the way towards greater arbitral freedom, outside the established National Court Systems.

Having ratified quite early the New York Convention of 1958, India's Parliament enacted the Foreign Awards Recognition and Enforcement Act, 1961. But it was only fifty years after independence and nearly sixty years after our old 1940 law of arbitration was in place, that India adopted the UNCITRAL Model Law of 1985. It did so along with twelve other States in Asia, of which five, including India, have expressly incorporated in their local laws provisions identical with Article 5 of the Model Law.

This is Section 5 of our new Act of 1996. It limits Court intervention in domestic and international arbitration only in matters expressly provided for by the Model Law and not otherwise. It wasn't like that in India in the old days under our 1940 Act where Courts could interfere - and did frequently interfere with arbitration proceedings and with awards - international and domestic - on the notion fostered by Judges - that it was the duty of Courts to keep arbitrators in place!

I told you a moment ago that our new 1996 Act had followed the Model Law - well, not entirely - and I must tell you that whenever we have departed from the UNCITRAL Model Law we have lived to regret it. For instance on the number of arbitrators, Article 10 of the Model Law is clear and precise: Article 10(1) says that parties are free to determine the number of Arbitrators, and Article 10(2) provides that failing such determination the Arbitral Tribunal shall consist of a sole Arbitrator.

But some official in the Law Ministry of the Government of India thought he would be clever and he added a proviso to Section 10(1) (Section 10(1) of our Act corresponds to Article 10(1) of the Model Law). This innovation which got passed in Parliament proved almost to be a Weapon of Mass Destruction!

The added proviso to Section 10(1) read: "*... provided that such number shall not be an even number";* this was of course done only in order clarify that we are departing from the old arbitral regime that prevailed under the 1940 Act, which was that of two arbitrators and an Umpire

appointed by them; the Umpire would render an award only when the two arbitrators disagreed.

But when adding this proviso to Section 10(1) the "framers" of the 1996 Act reckoned without the large number of arbitration agreements that had been already entered into before the commencement of the 1996 Act (that is, before 25th January, 1996.01.1996), where disputes under them would arise post January, 1996 and have to be adjudicated upon after that date.

As you know - lawyers are trained to be quick to pick on loopholes in the law. So taking advantage of the proviso, one of our public sector enterprises - MMTC (Mines and Minerals Trading Corporation) contended before the Supreme Court of India[2] that since the proviso prohibited reference to an *"even number"* of arbitrators, an arbitration agreement for appointment of only two arbitrators, as provided for under the old 1940 Act, was no longer valid post January, 1996; and such arbitration agreements could not be enforced under the new Act. The new Act, it was submitted, was therefore a dead letter for pre-1996 arbitration agreements.

Fortunately, for the growth of arbitration law in India the Supreme Court rejected this strictly textual interpretation of the proviso to Section 10(1). The Court said that an arbitration agreement entered into before 25th January, 1996, and providing for two arbitrators and an Umpire, should be read as making provision for reference to a panel of three arbitrators, that is two arbitrators and a Chairman,: which was not an *"even number";* Section 10 therefore, continued to apply to pre-1996 arbitration agreements as well. This strained but purposive interpretation of Section 10 by India's Supreme Court in the above mentioned case saved literally thousands of arbitration agreements entered into before 25th January, 1996 - which were still in the pipeline - from being "shipwrecked".

By deft judicial reasoning they were enabled to sail safely into the harbour of alternative dispute resolution provided for in our new law. This case highlights a'useful lesson to States who adopt the UNCITRAL Model Law, namely they must not tinker with the language of the Articles already adopted in the Model Law.

For the last twelve years then, we in India have had a good arbitration

[2] MMTC v. Sterlite Industries, 1996 (6) SCC 716

law in place - the Arbitration and Conciliation Act, 1996 and it governs both domestic and international commercial arbitrations.

As to why a good law sometimes does not work in India is simply this - because whilst Indian law favours dispute resolution by arbitration - Indian sentiment (aided and abetted by the legal fraternity) simply abhors the finality attaching to arbitral awards! - whether domestic or foreign. A substantial volume of case-law in India bears testimony to the long and arduous struggle to be freed from binding arbitral decisions. The aim of almost every Indian party to an arbitration agreement, domestic or foreign, is:

"Try to win if you can; if you cannot, do your best to see that the other side cannot enforce the award for as long as possible. "

I am often asked whether a foreigner can rely upon the arbitral process when dealing with India, and my answer has always been in the form of a counter-question: *"Tell me ",* I ask the foreigner, *"how long do you expect to live? "* because there is in the Indian legal system, for all who use it, ample - sometimes excessive - due process: and you have to be patient and persevering.

If a non-resident or a foreigner, lasts out long enough for the system to make judicial forays into the arbitral process, in which they are involved and when it finally concludes, also to pick holes in the award rendered as a result; if the foreign party survives the ultimate outcome, as General Electric Co. did, then my answer has always been positive: the foreigner can justifiably rely upon the arbitral process when dealing with India. There were three rounds of litigation through three Courts in Renusagar Power Co. Ltd. (the Indian company) v. General Electric Co. (the American Corporation) - and the judgments in each round are sub-titled for the sake of identifying the points decided in each round as: Renusagar-I (1985),[3] Renusagar-II (1991)[4] and Renusagar-III (1994)[5] (hereinafter, "Renusagar Power") - like World War I, World War II (and God forbid) World War III!

The arbitral process in the General Electric case was first attempted to be thwarted by Renusagar from the middle of 1982 till 1987, unsuccessfully as it turned out, and then, when the arbitration ultimately proceeded to a

[3] Renusagar Power Co. Ltd. v. General Electric Company, (1984) 4 SCC 679
[4] General Electric Co. v. Renusagar Power Co., (1987) 4 SCC 137
[5] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644

hearing in London, an attempt was made or rather, a series of attempts were made, to annul the London award in two separate proceedings in India and this five year period stretched from October 1988 to October 1993: again unsuccessful for Renusagar as it turned out. General Electric had the staying quality of the Champion Litigator: it lasted out. And because of this quality General Electric was successful in the end.

The judgment in that case was delivered in October 1993 by a Bench of three Judges of the Supreme Court, a Bench which included Justice Anand. It set a new and healthy trend. It established that Indian Law, enacted to implement India's accession to the New York Convention, 1958, must be so interpreted as to uphold, and not invalidate, a "foreign award" governed by its provisions. Fortunately this trend has continued under our new Arbitration and Conciliation Act 1996 - though not without some hiccups.

And the major hiccups have been two judgments of our Supreme Court - one, in the case of Bhatia International v. Bulk Trading S.A.,[6] (hereinafter, "Bhatia International") decided by a Bench of three judges: which is perhaps understandable, though it is wrong, and a much later decision in the case known as- Venture Global Engineering v. Satyam Computer Services Ltd.,[7] (hereinafter, "Venture Global") not at all understandable and also wholly wrong.

In Venture Global, a Bench of two Judges feeling bound by the ratio, or principle, of the earlier decision of the Bench of three Judges, sought to apply it to a totally different situation, with results which I can only characterize as "disastrous".

But we have to be respectful about decisions of our Highest Court.

There is a charming story as to how lawyers, reared in the Anglo-Saxon system of jurisprudence, may legitimately criticise decisions of their Highest Court. It was Prof. Arthur Goodhart who showed the way. He was Editor of the prestigious Law Quarterly Review (LQR) for 50 years **and** he made some extremely critical comments about some of the judgments of the House of Lords. And the comments were not badly received only because whilst criticising, Goodhart also massaged the egos of Judges. Believe me, Judges - as a class - do have big egos!

* BhatiS International v. Bulk Trading S. A., (2002) 4 SCC 105
' Venture Global Engineering v. Satyam Computer Services Ltd., (2008) 4 SCC 190

Goodhart always prefaced his comments with placatory words. And he disclosed the secret only in his farewell speech when he retired as Editor of the LQR! This is what he said:

"If you are doubtful whether the judicial reasoning is wholly unassailable you preface your comment with the words: 'but with respect';

If the judgment is obviously wrong you substitute: 'but with great respect';

And if it is one of those judgments which have to be seen to be believed the introductory formula is: 'but with the greatest respect'. "
Applying the 'Goodhart formula' - the decision in Bhatia International deserves the prefatory remark: *"But with respect... "* However, Venture Global - can only be read *"but with the greatest respect".*

The message to the Judges in the 1996 Act is crystal clear: they must construe our Act as enacted - Part I separately from Part II. The provisions of Part I are to be invoked in cases where the place of arbitration is in India and the provisions of Part II must be made applicable to foreign arbitration where the place of arbitration is outside India and to enforcement in India of foreign awards. In other words, Judges must stick to the letter of the law, and not bother too much about its so-called "spirit".

It is good to recall what has been said about the spirit of laws:[8]

"If practice be the whole the law student is taught, practice must also be the whole he will ever know. He (i.e. the student) must never aspire to form and seldom expect to comprehend any arguments drawn a priori from the spirit of the laws, and the natural foundations of justice. "

Regrettably for lawyers and the litigating public alike it was relying on the so-called spirit of the 1996 Act, that in Bhatia International, relief was granted under Part I of the 1996 Act to holders of a Foreign Award - though Part I was not applicable to foreign awards - it was done with the best of intentions, namely, to enable Indian Courts to order preservation of assets of the losing Indian party - but in doing so the decision in Bhatia International - made Part I of the Act stand on its head!

[8] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Volume I, 32 (The Clarendon Press, Oxford, 1765-1769)

Later, instead of the Bench decision of three Judges in Bhatia International being confined strictly to the facts of that case, namely that holders of Foreign Awards were (perhaps) entitled to seek interim relief in Indian Courts under Part I (Section 9) so as to preserve and protect assets of the losing Indian party, a Bench of two Judges in Venture Global* considering itself to be bound by the ratio in Bhatia International, went to great lengths in assimilating the provisions of Part I with Part II - an exercise well beyond the limits of judicial law-making.

In Venture Global, a US Company with a Foreign Award against it made in London - an award in favour of an Indian party - failed in its attempts to resist execution in the USA. When it came to India and filed a suit in an Indian Court, all bur Courts, except the highest, rightly held it was not entitled to do so. But two Judges of the Supreme Court feeling bound by what they thought was the ratio in Bhatia International (a three Judge bench decision) permitted the suit that had been filed in India by the American party challenging the London Award (on New York Convention grounds) - to go on - even though Part I applies, under our 1996 Act, only to arbitral awards made in India, not abroad.

The decision in Venture Global is plainly erroneous. Hopefully it may be corrected by a larger Bench - because just a few days after the decision in Venture Global - in BALCO Industries vs. Kaiser-I-Hind (16-01-2008) - (which is unreported) when the Bench decision in Venture Global was cited before a Bench of another two Judges of the Supreme Court, one of the Judges said quite forcefully that the decision in Bhatia International was, in his personal opinion not correct, but the other Judge demurred. In view of the disagreement this case will now be posted before a different Bench - hopefully a larger. Bench, but with what result it is difficult at the moment to predict! Because matters dealing with arbitration are not listed before any specialised Bench - it could come before any Bench - and its fate would depend on the luck (good or bad) of the draw!

The lesson of Venture Global - whilst that decision lasts - is two-fold: first, you students must always familiarise yourselves with judgments of the Supreme Court that interpret the laws enacted by Parliament, including the 1996 Arbitration Act, and next, with the help of your Professors, assess and know what is the correct position in law. The lesson of Venture Global to draftsmen of arbitration agreements is always to include a specific provision in the arbitration agreement to the effect that Part I of the Act is specifically excluded in the event of a

dispute arising under the agreement. If one follows this simple tip, one will not be bothered with the decision in Venture Global, wrong as it is. Let me hasten to add - that to the host of uncomplimentary things I have so far said, there is a silver lining which one must know, namely, - there is no foreigner-bias in our legal system, nor amongst our Judges.

The foreign party loses or wins as often as the local. In fact, statistics show that in the last fifty five years, amongst the important arbitration cases that ultimately reached the Supreme Court, foreign parties have succeeded over Indian parties in twenty out of the thirty two cases decided by India's highest Court.

There are more problems. The 1996 Act makes provision for domestic arbitration in Part I, and for foreign arbitrations (and foreign awards) in Part II (Part II reproduces the provisions of the repealed Foreign Awards Recognition and Enforcement Act, 1961). On the basis of the UNCITRAL Model Law there are uniform criteria (or grounds) mentioned for the setting aside of domestic arbitral awards and for the non-enforcement of foreign arbitral awards. And this again has created difficulties for us.

In the earliest discussion on the proposal to draft a Model Law on arbitral procedure, the UNCITRAL Commission had decided that the scope of the Model Law should be limited to international commercial arbitration. Several delegations voiced their concern that this limitation on the scope of the law meant that States would have one arbitration law for international arbitration and a different arbitration law for domestic arbitrations and that this dual structure "might create complexity".

But I am afraid that the hunch of the UNCITRAL Commissioner was right - the working of the Indian Act of 1996 for the past twelve years has shown that "complexity" has been created not by having different arbitration laws for international and domestic arbitration, but by having a uniform arbitration law for both! This is particularly so because the "public-policy" ground - both in the case of domestic awards and foreign awards is worded in identical terms. That is, an award which is a domestic award may be set aside by a Court in India if it finds that the award "is in conflict with the public policy of India", and the enforcement of a foreign award may be refused if the Court finds that enforcement of the foreign award would be "contrary to the public policy of India".

In India, now there are two parallel lines of decisions each on separate

tracks:

1. In the first track are cases holding that in proceedings in India for recognition and enforcement of a foreign award, the parties are not entitled to impeach the award on merits; that the expression "public policy of India" in Section 48(2)(b) of our Act (which reproduces Article V of the New York Convention) must necessarily be construed as that term is interpreted in private international law, which means that a "foreign award" will not be recognised and enforced only if it is contrary to the fundamental policy of Indian law; or fundamental principles of justice or morality. This has been so held in Smita Conductors v. Euro Alloys Ltd.,[9] - a Bench decision of two Judges of the Supreme Court following the decision of the three Judge Bench in the now celebrated case of Renusagar Power. In Renusagar Power , the Supreme Court said that in order to attract the bar of "public policy" the enforcement of the foreign award must involve something more than a mere violation of Indian law.
2. But the public policy ground has been differently interpreted in the case of domestic awards. In a 2003 decision of the Supreme Court (by a Bench of 2 Judges) in Oil and Natural Gas Commission Ltd. v. Saw Pipes Ltd.,[10](hereinafter, "Saw Pipes") - a case concerning a domestic award - the Court without adverting to the prior decisions interpreting the term "public policy" equated a mere "error of law apparent on the face of the award" with "public policy"[11]. It was held in Saw Pipes that an award contrary to substantive provisions of Indian law or which was against the terms of the contract as interpreted by the Court - in other words an award that was "patently illegal" - enabled the Court to set it aside under the "public policy" ground in Section 34 of the 1996 Act which dealt with domestic awards.

Can the same words "public policy of India" used in different sections of the same Act bear different meanings?

[9] Smita Conductors v. Euro Alloys Ltd., 2001 (7) SCC 728 ;° Oil and Natural Gas Commission Ltd. v. Saw Pipes Ltd., 2003 (5) SCC 705 ′ Since Courts in India are precedent-oriented and since under the Constitution the law declared by the Supreme Court of India is binding on all Courts in India; the decision in Saw Pipes has been followed in several decisions of High Courts arising out of domestic awards: (i) State of Jharkand v. Bharat Distillery, 2004 (1) Arb.L.R. 127 (Jharkand); (ii) Jagmohan Singh v. Satish Ashok, 2004 (1) Arb.L.R. 212 (Bombay); (iii) State of A.P. v. K. Krishnan Raju, 2004 (1) Arb.L.R. 566 (Andhra Pradesh); (iv) Ram Kishan v. Freeway Marketing, 2004 (2) Arb.L.R. 508 (Delhi); (v) Sterlite Industries v. Department of Telecom, 2006 (3) Arb.L.R. 24 (Delhi); (vi) ONGC v. Schlumberger Asia Services, 2006 (3) Arb.L.R. 610 (Delhi).

I would submit they can, and in most legal systems, they do.

Most legal systems consider that the scope of public policy must be more restricted in the sphere of foreign awards. The number of matters considered as falling under "public policy" in international cases is smaller than that in domestic ones and the distinction is justified by the differing purposes of domestic and international relations. Refusal to enforce a foreign award is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental principles[12].

I would submit that whilst it may be possible to take the view that in the case of a setting aside of a domestic award the public policy ground - could perhaps be assimilated to a "patent illegality" (where the national Judge has concluded that it is contrary to "justice" or "fairness") - the same would not be true in the case of conditions for non-enforcement in India of a foreign award. And this is simply because enforcement of foreign arbitral awards is the principal justification of all international commercial arbitration and international conventions are directed to this end.

The heart of the New York Convention, 1958 is the specification of limited grounds on which recognition and enforcement of an award may be refused. That the arbitrator has misinterpreted facts or law is not a defence to enforcement. The Court's scrutiny is strictly limited to ascertaining whether the award gives rise to a possible refusal of enforcement only on one of the narrow grounds mentioned in Article V, and the process of scrutiny cannot extend to an evaluation of the arbitrator's findings.

But the overpowering influence of India's old domestic Arbitration Act of 1940 where errors of law on the face of the award enabled Courts to set them aside - has survived the repeal of the 1940 Act because India's Courts, like Courts in some developing countries, just cannot get used to the idea of forums other than established Courts finally deciding

[12] FOUCHARD CAILLARD GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION 996 (E. Gaillard & J. Savage cds., Kluwer, 1999) In fact in Renusagar Power, the Supreme Court said as much when speaking of New York Convention grounds for non-enforcement of foreign awards - *"It is obvious that since (NYC and) the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction. "*

commercial disputes!
Many Judges in the NYC contracting States are mentally just not adjusted to the limited role of the Court before which a foreign award is brought for recognition and enforcement. Some Judges simply will not accept that an award which the Court believes to have produced an unjust result should be enforced. And accordingly, when perusing foreign awards and the limited grounds available under the New York Convention for their enforcement, Judges have been known to import their own individual beliefs about the "justice of the case", and then to try and fit their predilections into the public policy ground, contrary to the avowed intent and purpose of Article (V)(2)(b) of the Convention. I remember that at a Conference of the International Council for Commercial Arbitration held in Seoul (South Korea) in the year 1996, Prof. Whitmore Gray an American lawyer mentioned a case he had witnessed on a visit to Thailand. A young Thai lawyer was seeking enforcement of a foreign award in a Court in Thailand, which was a State party to the NY Convention.

The Thai Judge said to the lawyer that it was his legal duty to satisfy himself about the substantive fairness of the award. The lawyer was a smart fellow - he decided on his feet that any attempt to "educate" the Judge at this time about the Court's limited role under the New York Convention would prejudice his client's chances of enforcement. So he deliberately (albeit reluctantly), went through the process of proving the award's substantive fairness. And fortunately for his client, he succeeded.

I had a similar experience in the early 1990s in the Oil and Natural Gas Commission of India v. The Western Company of North America, ' when it was being argued in 1990 before a Division Bench of the Bombay High Court. I had to persuade the Judges that the award (in that case an award made in London) was not "perverse" (which the Judges at first said it was). Such persuasion is wholly unnecessary; and is contrary to the plain language and spirit of the Convention.

But International Arbitration, like reputation, rests on public confidence, and the principal member of the public whose confidence is essential to sustain a foreign award is the local Judge of the Court of enforcement. Sty friend Dr. Ceroid Hermann, former Secretary General of L'SCITRAL, once described this as the 'hi-fi factor' in International Commercial Arbitration. And another friend Neil Kaplan, the man who

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as judge in Hong Kong put arbitration law on the right track, has said that it was perhaps quite unfair to expect Judges overnight to attach much significance to (what he described as) "a piece of paper signed by an arbitrator however eminent in some far away part of the world".

But the talk given by Neil Kaplan was many many years ago. It is now time that Judges all around the world, including India, realise that after ratification of the New York Convention much more weight and effect must be given to what Neil Kaplan had once described as that "piece of paper signed by an arbitrator in some far away part of the world". *One day our Supreme Court will. The signs are propitious.*

Because in a judgment handed down in McDermott International Inc v. Burn Standard Co. Ltd.,[14] *(hereinafter, "McDermott International") - a Bench of two Justices has said that the 1996 Act had made provision for the supervisory role of Courts for the review of arbitral awards only to test the validity of awards on the touchstone of the limited grounds mentioned in the enactment, and the Court was no longer enabled to correct errors of arbitrators whether of law or fact. The decision in McDermott International also said that the Bench decision in Saw Pipes regarding the scope of public policy may have to be reconsidered by a larger Bench, an event that has regrettably so far not taken place. McDermott International was not a case concerning a purely domestic arbitration ~ it was an international commercial arbitration but under Part I - where one of the parties was foreign - with the place of arbitration in India; hence governed by the provisions of Section 34 (in Part I) and not Section 48 (in Part II). Incidentally, in the McDermott International case the award of the arbitrator was of a retired Chief Justice of India (CJ Pathak) and it was upheld by the Court.*

So at the moment, the position about international arbitration in India is a bit like the position of old Justice Oliver Wendell Holmes, a judge much respected in India.

When Justice Holmes was ninety and still working, there were stories about him going-the-rounds in Washington. One of them was about his travels by train - when on one occasion the conductor asked him for his ticket, and the Judge, fumbling through his pockets, could not find it. Suddenly recognising the distinguished jurist, the conductor said:

"That's alright Justice Holmes. We are very pleased to have you riding on our train. If you find your ticket send it in to the Rail Road

[14] McDermott International Inc v. Burn Standard Co. Ltd., 2006 (11) SCC 181

Office. "

Irritated by the patronising courtesy, the Judge responded saying *"Young man, the question is not, where is my ticket? The question is: where is it I am going".*

The question as to where is it that we are going on enforcement of New York Convention awards, I hope to be able to report - not now but in the not too distant future - that we are going in the right direction. But I cannot truthfully say so today.

As to the exhortation in the title of this oration - *"Arbitration: Not Litigation"* - it is legitimate because litigation in India is too time consuming.

Think about it - in most activities, the possibility of occasional error is admitted and even guarded against. But litigation is the only activity in which the chances of error are admitted to be so high that an elaborate machinery has been provided for the correction of error; not a single error but a succession of errors. *"In other trades, wrong is regarded as a miatter of regret, but in the law it is regarded as a matter of course* ".[5]

Provision for one appeal may be considered a reasonable precaution, but two appeals suggests panic, three despair and four suggests complete lack of confidence in the judiciary. In litigation, in our anxiety to do justice we deny justice by delaying it.

Sir Alan Herbert (A.P. Herbert) who has written a charming series of imaginary cases under the title *"Uncommon Law"* compares in his autobiography, *"Independent Member"* the legal profession with the medical:

> *"Our surprise would be great if after removal of our appendix b\ a local surgeon we were taken before a District Town Surgeon who tyrJered our appendix to be replaced, and our surprise would give place *> stupefaction if we were then referred to a distinguished surgeon in the Slate capital who would ask that our appendix should be extracted again, jrtd finally if a Board of distinguished surgeons in London ordered the jppendix to be replaced, we would be happy that we were still alive! Yet utch a succession of operations is what our law provides in our jdministration of justice ".*
>
> \P Herbert - Independent Member.

So too in India.

Ultimately then, is arbitration preferable to litigation? Well, sometimes, but not always. It all depends. A judge can ruin a good case by a bad judgment and so can an arbitrator. But then in our existing Court system - especially our three-tier Court system, the error of the trial Judge can be commented on and reversed by the Appellate Courts - right upto the highest Court. But in arbitration the arbitrator's award is final.

Arbitrators (like Judges) do make mistakes - under intense public scrutiny it now appears that they make even more mistakes than before - in the perception of users and of commentators.

An arbitral award is only as good as the tribunal that makes it. Greater expertise is now expected - nay, demanded - of Arbitrators. As with cricket umpires, life is getting more and more difficult for arbitrators, their decisions are not only in the public domain, they are published, talked about and criticised. The mistakes of cricket umpires are now exposed to the cruel gaze of millions of television viewers - with the help of an advanced digital computer system known as Hawkeye (a system based on technology used in brain surgery), a system which claims definitively to answer the question: *"Would the ball have hit the wickets if it had missed the batsman's pads? "*

In the next decade or so - I predict we will have the same sort of technological benchmark with reference to which the decisions of arbitrators will be tested for their rationality and justness! And it is only with the very highest standards of efficiency and probity that arbitrators will be able to meet the aspirations of users of arbitration. It is only then that we will be able to confidently say - *"Arbitrate - Don't Litigate."* There are now an increasing number of arbitrators from different countries around the world helping to build Third World confidence in International Arbitration. As for the quality of such arbitrators there is a view - not very popular - propounded by my esteemed friend Jan Paulsson. It is not popular only because it is elitist. He once spoke on *"Ethics and Elitism in Arbitration "* and it was not at all well received.

He said to his audience (and he was booed for saying it) that it was a mistake to think that it was a good thing for the international arbitral process if the greatest number of persons possible had the opportunity to act as Arbitrators; and he ventured to suggest that given the high stakes and great sensitivities involved in international arbitration, there was a good case for supporting the emergence and recognition of an elite corps

of international arbitrators in the arbitral world, and also an elite corps of national arbitrators. Individual reputation, in this field, he went on to add, grows by slow accreti6n of evidence of independence and fair mindedness - the building of a reputation is a lengthy process which offers no assurance of success, but it creates a depth of confidence which can never be achieved by self-serving declarations of independence and impartiality.

As to the future of arbitration, I believe it is reasonably bright, perhaps only because the future of litigation is not. An English Judge, who wished to remain anonymous, famously said: *"Litigation is an activity that has not markedly contributed to the happiness of mankind. "* If Arbitration is not to suffer the same fate, I would suggest that Judges in national Courts raise their sights, and adopt a transnational outlook, remembering always the true consensual nature of all arbitrations - domestic and international. I would also suggest that Arbitrators - especially international arbitrators - adjust their sights as well, with robust reasoning and a clearer articulation of the decision made. A good arbitrator is one who writes acceptable reasons for stated conclusions - reasons that satisfy the loser, as well as the winner. And the test of a good arbitration is where the party which loses genuinely thinks that the proceedings have been fair.

Remember, this is the land where the Buddha was born. It was the Buddha who prescribed with prescient wisdom, five principles that must be observed by a wise ruler when resolving disputes amongst his subjects, and this how they have been recorded in a book on the - Teaching of Buddhish"[16]:

"fFJirst, examine the truthfulness of the facts presented; second, ascertain that they fall within jurisdiction; third, enter into the mind of the parties to the dispute so that the judgment to be rendered be a just one;

fourth, pronounce the verdict with kindness, not harshness; and fifth, judge with sympathy. "

Arbitrators whether they hail from the East or from the West - whether their cultural background is from the First World or the Third World - they cannot possibly go wrong if they follow these five simple principles laid down more than two thousand years ago.

* Published by Buddhist Promotions Foundations (Bukhyo Dendo Kyaokai) 3-14, Shiba,
* Chome Minato-ku, Tokyo, Japan.

There is much prosperity in present day international (and domestic) arbitration - not only in India but also in other parts of the world. But you must also know that a large part of this prosperity is shared only amongst lawyers and amongst those who run arbitration centres and conduct arbitration cases! It is somewhat doubtful whether users of international arbitration are really getting their money's worth!

So what is the way forward?

There is a growing body of opinion which believes, that international arbitration, even well-conducted arbitration with competent arbitrators is not necessarily the most successful way of deciding certain international commercial disputes. Other ways have to be explored. And that is why we see words like "conciliation" and "mediation" creeping into trans-national business contracts. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are beyond the power of lawyers and Courts to achieve.

Last October, I was invited to a conference of the Global Indian Diaspora at Singapore and the topic was *"Arbitration and Business Dispute Resolution - the Way Forward"*. In the materials provided by the organisers of this conference, mention was made about suits, just then filed, in courts in Singapore between Singapore Airlines and British Airways. British Airways alleged a patent infringement of their first class sleeper beds which was reported under the fetching title *"Let Sleeping Beds Lie "* and frankly, it was the sexy title that attracted my attention! But there was more to it than the title. The interesting bit of information offered to us was that the suits were mediated for just over two days and an amicable compromise was reached. Each Airline issued identical press statements to the effect that they would look forward to continuing competition through their products and services, rather than through law courts and arbitration.

That is the way sensible corporations must resolve business disputes. Unfortunately that is not the way they generally resolve them in India. There is an entirely new Chapter in our 1996 Act - on "Conciliation" - which is rarely used. It can and should be more frequently used.

I did want to speak to you a bit longer on some other aspects of the 1996 Act. But my time is up.
Before I am passed slips of paper by the Chairman with ominous remarks, let me console myself with the words of India's great national

poet Rabindranath Tagore. In one of his epic poems he writes:

"The butterfly has not months but moments to live, and yet it has time enough ".

Like the butterfly in the poem, I have had time enough. Thank you all.

INDIAN POLICE: CRISIS OF CREDIBILITY

ALOK KUMAR GUPTA & GEETANJALI SHARMA*

The greatest irony of the century is that the institution created to protect the life, liberty and property of the common men has degraded lo the extent of posing a threat to the same. The organization which should have commanded greatest faith and trust of the people has become an organization having least amount of reverence as - Protectors are becoming exploiters and Saviors are becoming killers. The common men are at the perils of the state, which now exists as an organized mafia, rather than a 'politically organized society'. The 'obligations of civility" on the parts of state and its institutions is grossly missing.

Criminalization of Police is one of the most significant and disturbing ramifications of Criminalization of Politics in India. Police is the immediate institution of the state which has gathered and strengthened the courage to degenerate itself on account of criminalization of politics. Obvious reason is that the political leaders have been resorting to use police officials and their subordinates to serve their own vested interests. Consequently, such police personnel become privy to their wrong deeds and corrupt practices. Once the police personnel is assured that the master himself is involved into corrupt practices on account of various interests (in most cases to make money and enhance and maintain their power), they too get motivated to mint money and serve their own interests. The entire process triggers a kind of chain reaction which in turn leads to a strong and illegitimate nexus among the different institutions of the state, be it legislators, judicial officers, judges, police personnel, bureaucrats etc. Today, the problem has come to such a naught and is rotting the system so fast that a deep and serious thinking is required to tackle the problem.

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This paper is an attempt to identify some of the leading cases which have contributed towards corrupting the police organization and further criminalizing the same. The common people have come to believe that police is a state-sponsored terrorist or in common street parlance they are termed as licensed-lumpen, or licensed-killers and licensed-rapists. No doubt it is an extremely challenging endeavor as information about such incidents when reported in media are on most occasions based on speculation and because of the power and position of the involved officials it is difficult to extract the information as evidences are hushed up and mitigated. Moreover, very few of such cases reach to their logical endings. Nevertheless, a modicum of genuine attempt is being made on whatever little information available from the print and electronic media. The list of some of the important crimes which are being accounted below is not an exhaustive list; some may consider it certain cases in isolation. However, we must understand that specific cases lead to generalization and even if these cases are considered as cases in isolation they do suggest the kind of rot that is creeping in this organization. At least there is hardly any doubt about the fact that: Credibility of the police is in great crisis.

A. CORRUPT ACTIVITIES OF POLICE OFFICIALS: SOME CASE STUDIES

I. RUCHIKA'S CASE: AN OFFICIAL'S TYRANNY DOES NOT EVEN DISCOUNT AN INNOCENT'S LIFE!

The recent turn of events which got enormous media attention and shook all segments of the society to shame and distress was the revisitation of Ruchika's case, years after her death. The events brought an ugly picture of the misuse of one's clout and position. Haryana Inspector General of Police (IGP) S.P.S. Rathore, also the Haryana Lawn Tennis Association President, was charged with molestation of the 14-year-old budding tennis player named Ruchika Girhotra in his office situated in the garage of an under construction building at Panchkula's Sector 6. While Ruchika and her friend Aradhana were practicing their game, Rathore by a premeditated plan while finding Ruchika alone outraged her modesty by molesting her. The molestor even forgot that his victim was of the same age as his own daughter as they were classmates in the same school. The entire incident has been traced from the memorandum signed by Ruchika which was later given to the Finance Commissioner, Home Secretary and even Haryana government.[1]

Supriya Bhardwaj, "Ruchika Girhotra Case: Molestation of Minor, Abuse of Power", *Times of India* (New Delhi), December 23, 2009.

When the case was reported, there was no First Information Report (FIR) lodged but the information was recorded only in the form of a Daily Dairy Report (DDR) on August 18, 1990. On September 3, 1990, DGP R.R. Singh found Rathore prima facie guilty and submitted a report for FIR in the matter in which he categorically mentioned that it was a case of pre-planned molestation as Rathore deliberately sent Aradhana out of his office and as alleged, molested Ruchika.[2] Later, new DGP R.K. Hooda and the then Home Secretary J.K. Duggal recommended departmental action and charge-sheet against Rathore. However the then chief minister Hukam Singh (Lok Dal) ignored not only the hue and cry after the episode but also the inquiry report made by R.R. Singh. A year later, on May 28, 1.991, the charge-sheet was approved against Rathore during the Governor's rule in the state. On July 23, 1991, Bhajan Lal-led Congress government took over and while he remained the chief minister till May 9, 1996, most of the alleged atrocities on Ruchika's family took place. For instance Ruchika's brother Ashu was illegally picked by the Haryana police and kept in illegal detention for almost two months while eleven car theft cases registered against him.

Tragically, unable to cope with harassment imposed on self and her family, Ruchika committed suicide by consuming poison on December 28, 1993. The emotionally shattered father says, *"My daughter used to cry her heart out, as the molestation incident had, according to her, made her life useless. I used to console her, but in vain. She used to curse Rathore for spoiling her life. Even two days before she decided to end her life, Ruchika cried and cursed Rathore and his stronghold over the system.'"*[7]' A few months after Ruchika's death, in April 1994, the charges framed against Rathore were dropped during Bhajan Lai's tenure and on November 4, 1994, Rathore was promoted as Additional DGP by the Bhajan Lai government. Before this Rathore was also given the police medal in 1985 for his meritorious service. His name was recommended by the then Om Prakash Chautala government in Haryana. During Bansi Lai's tenure from 1996 to 1999, Rathore was promoted as DGP. On August 21, 1998 CBI probe was ordered in Ruchika molestation case by the Punjab and Haryana High Court. On September 30, 1999 Departmental enquiry exonerated Rathore in molestation case and he got promoted as DGP with effect from May 20, 1999. On October 10, 1999

[2] "CHI to Re-probc Rathore's Role in Ruchika case" *Zee News.com,(*International edition). December 24. 2009.
[3] Supriya Bhardwaj & Ajay Sura "Ruchika case: Family Still Lives in Dread", *Times of India,* December 24, 2009.

Rathore was made Haryana's DGP (state police chief) by the Chautala government.[4]

In the meanwhile, FIR was lodged on December 29, 1999 under section 354 of Indian Penal Code (IPC).[5] The case was further taken up on November 16, 2000, where the CBI filed charge-sheet against Rathore in Ruchika molestation case. As a result on December 5, 2000, Rathore was removed as Haryana DGP and sent on leave. He subsequently retired from service in March 2002. The CBI special court convicted Rathore in the Ruchika molestation case and sentenced to six months imprisonment and fine of Rs. 1,000 on December 21, 2009.

Therefore, one can easily infer from the facts of the case that all political parties continued to promote and probably shield Rathore between 1990 and 2002.[6] When the case was revisited, all the jigsaw puzzles started falling in place. It was found out that the case was manipulated at every stage. The inquest report made after Ruchika's suicide contained her false name as Ruby and her age as 19 years, even though she was a minor. The details of her father were also incorrect and the role of a lady named Veena can also be traced who has been mentioned as Ruchika's mother, even though her original mother had passed away years back. To further complicate the matters, the cause of death was given as consumption of slimming pills despite the real reason being a poisonous pesticide. All this culminated in the consolidation of the case from defense's side and as a result charges of abetment of suicide under s. 306 of IPC[7] were not made against Rathore and as a result he was convicted by a CBI court in the molestation case and awarded a six-month jail

[4] Siwach, Ajay Sura & Supriya Bhardwaj, "The Protection Racket", *Times of India,* December, 27, 2009.

[5] S. 354 of IPC reads as follows:

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

[6] Jaideep Sarin, "Rathore Enjoyed Patronage of Four Haryana Chief Ministers" *The Indian News,* December 23, 2009. For more details read at: http://www.thaindian.com/newsportal/politics/rathore-enjoved-patronage-of-four-haryana-chief-ministers 100293757.html#ixzz0cIGpgyS8

[7] S. 306 of IPC reads as follows:

Abetment of suicide

If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

sentence. The role played by CBI was equally obnoxious and the investigations done by them had several loopholes which were clear attempts to shield the guilty officer. The lawyer fighting the case for Ruchika, who was himself slapped with defamation charges alleged that the case was not conducted properly in the initial years of the trial.

Role of the Sacred Heart School Authorities also compels one to believe that the extent of one's clout can be misused beyond limit. Ruchika was expelled from the school in September 1993. It was the only instance when a student has been expelled from Sacred Heart for not paying fees on time. A magisterial probe, conducted by the Chandigarh Union Territory administration, has found that SPS Rathore's daughter, Priyanjali, hadn't deposited fees on time for two quarters in the same session (1990-91) when Ruchika Girhotra defaulted, but Sacred Heart School authorities didn't act against her. Thus the inquiry reveals that Ruchika's expulsion by the school was arbitrary, wrong and appeared to be a result of outside influence as Rathore pressurized the school Principal to expel Ruchika to save his daughter from embarrassment."[9]

At the fag end of 2009 and beginning of 2010, after 19 years of the entire journey and on the 16th death anniversary of the young girl, the entire nation pleaded through online campaigns and lighting prayers that the case needs to be revisited. The authorities assured to treat the matter as a model case, to prove that nobody can subvert the law and that the principle of rule of law applies equally to everyone.[10] Hence lodging of fresh FIRs by the brother and father of the victim as well as the proceedings to take away the police medal of the officer involved have started. Justice will not be completely met till the accused is punished in proportion to the heinous act committed by him. In the entire matrix the role of media, Non Governmental Organizations, voluntary and social organizations as well as the public authorities remained extremely vital. But sadly this is not the first case of this nature.

"Ruchika Case: Family to File Fresh Case", *Outlook India,* December 29, 2009. [9]
"School Singled out Ruchikajet off Rathore's daughter", *The Times of India,* January 8, 2010.
"""Government to Revisit Ruchika Case for Reinvestigation", *IBN Live* December 30, 2009 available at http://ibnlive.in.com/news/govt-to-reopen-ruchika-case-for-investigation/107946-3.html.

2. K.P.S GILL'S CASE: A SENIOR OFFICER'S CONDUCT: AN INFORMAL GESTURE OR SEXUAL HARASSMENT?

Another famous case of Rupan Deol Bajaj v. Kanwar Pal Singh Gill & Anr" was very much in news when a senior IAS officer, Rupan Deol Bajaj was slapped on the posterior by the then Chief of Punjab Police, Mr. K P S.Gill at a dinner party in July 1988. When the act was done, Gill was in a drunken state. He had just returned from his success of Operation Black Thunder and his image at that point of time was no less than a national hero. Rupan Bajaj filed a suit against him, despite the public opinion that she was blowing it out of proportion, along with the attempts by all the senior officials of the state to suppress the matter.

Gill was first convicted by Chandigarh's Chief Judicial Magistrate (CJM) only after a year in August 1996 and sentenced to three months' imprisonment. In January 1998, the.district and sessions court in Punjab upheld the conviction but changed the sentence to three years of probation. The Punjab and Haryana High Court too upheld the sentence but reduced the probation to one year. The Supreme Court too upheld his conviction in January, 1998 and fined Mr. Gill Rs.2.5 lacs in lieu of three months rigorous imprisonment under Sections 294 and 509 of the Indian Penal Code.[12] However, in this incident he never went to prison and the case took over 17 years to be decided. He was directed to pay the compensation to Bajaj, who refused to accept it. The amount was thus given to a women's organization by the court.[13]

When the demand for stripping Rathore off his police medal was made, the ex-IAS officer Rupan Deol Bajaj, who had fought this case made a similar plea that Padma Shri given to Mr. Gill should be withdrawn as he

1995 SCC (6) 194. - S. 294 & 509 of IPC reads as follows: **S 294: Obscene Acts and Songs**
***Tx>ever.** to the annoyance of others-
**M* Does any obscene act in any public place, or
*%• Sings, recites or utters any obscene song, balled or words, in or near any public place,
Shall be punished with imprisonment of either description for a term which may extend **u** Saw months, or with fine, or with both.
S. 509: **Word, gesture or act intended to insult the modesty of a woman**
»%ae*er. intending to insult the modesty of any woman, utters any word, makes any «w*d or gesture, or exhibits any object, intending that such word or sound shall be heard, *(±a& such gesture or object shall be seen, by such woman, or intrudes upon the privacy rf such woman, shall be punished with simple imprisonment for a term which may **eiaeod** to one year, or with fine, or with both.

* **"Gill** and Rathore, Protectors Turned Molesters", *Express Buzz* (Chandigarh), **Dtwmber** 23. 2009.

did not deserve it on account of his conviction for sexual harassment charges. Deol, who is now an information commissioner claimed that the award was given to him in 1989 even when he had been booked for trying to outrage her modesty. This was done despite more than 90 IAS officers petitioning the government not to honour a person involved in a molestation case.[14] This plea of the victim has been criticized by some who claim that the case of Mr. Gill cannot be compared to that of Rathore as Mr. Gill has an excellent professional record and the case was merely blown out of the proportion. But it is important to keep in mind that both the officers have been held guilty and convicted under the eyes of law and the doctrine of'rule of law' demands that such officers should not consider themselves above the pretext of law and hence equal punishment needs to be met out to them. Yet another case involving a top notch officer in Haryana cannot be forgotten.

3. R.K. SHARMA'S CASE: A DEADLY COCKTAIL OF POWER, POLITICS AND MEDIA

Popularly known as the Shivani Bhatnagar murder case, it involved the role of an IPS officer named R.K.Sharma. Shivani was the principal correspondent of the *Indian Express* who was found murdered in her East Delhi flat, on January 23, 1999. On July 30, 2002 Delhi Police arrested Sri Bhagwan as he allegedly spilled the beans on officer RK Sharma and subsequently on August 3, 2002 Delhi police team raided the officer's residence at Panchkula in Haryana. Pradeep Sharma, another alleged killer, was thereafter arrested by the police. On August 7, 2002 Delhi police released Pradeep Sharma's picture and declared a reward of Rs 50,000 for his arrest. A Delhi court also issued a non-bailable warrant against him. Delhi police later got forensic report on the handwriting and fingerprints of one of the accused, Pradeep Sharma.

The role of union communication minister Pramod Mahajan's was also alleged in the murder case, even though Mahajan denied the allegations and said that he shared a purely professional relationship with Shivani. R.K.Sharma was suspended from service on August 23, 2002 and later his bail plea was rejected by Delhi High Court. Delhi police began attaching officer's properties and finally Sharma surrendered on September 27, 2002 in a court in Ambala, which sent him to judicial custody till October 5. The charges against the officer included that of Section 302 (murder), 120 B (conspiracy), 201 (causing disappearance of

[14] "KPS Gill a Convict, Strip Him of Padma Shri: Rupan Deol", *The Times of India,* January 6, 2010.

evidence) of the Indian Penal Code.[15] Later, Police claimed to have found some "classified" documents from Shivani's flat, corroborating the prosecution's claim that he used to pass on secret papers to her. On March 18, 2008 the court convicted R K Sharma along with three other accused and later on life term along with fine was imposed on the accused.[16]

The cause of her murder is said to be certain documents and pictures in her possession and also certain classified information regarding the famous St. Kitt's case. The court rejected further probe against higher-**ups** and politicians though their names were linked up several times during the course of the trial. Finally justice was met after nine years of **the** incidence when R.K. Sharma, the 1976-Batch, Haryana cadre IPS officer was convicted for life. His sentence was reduced from death

■[!] The abovementioned sections reads as follows:
S. 302: **Punishment for murder**
Whoever commits murder shall be punished with death, or [imprisonment for life] and **shall** also be liable to fine.
S. 120B **Punishment of criminal conspiracy**
(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with **death,** [imprisonment for life] or rigorous imprisonment for a term of two years or **upwards** shall, where no express provision is made in this Code for the punishment of **such** a conspiracy, be punished in the same abetted such offence.
(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to **commit** an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.
S. 201: **Causing disappearance of evidence of offence, or giving false information to screen offender**
Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,
If a capital offence.- shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;
If punishable with imprisonment for life.- and if the offence is punishable with '[imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;
If punishable with less than ten years' imprisonment.- And if the offence is punishable **with** imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided fro the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

[16] Based on "Shivani Bhatnagar Murder Case Timeline", *Newswatch* Archive, March 24, 2008, available at http://archives.newswatch.in/newshl,og/546 Sources: *The Indian Express, Press Trust of India and The Times of India.*

penalty to life imprisonment on account of his 'excellent service record' and no criminal history.

4. BITTI MOHANTY'S CASE: AN OFFICER MISUSING HIS CLOUT **TO SHIELD HIS GUILTY SON.**

The rape case involving Bitihotra Mohanthy and a German national girl was another case of police high handedness. Bitti Mohanthy, a student of MBA at Delhi's Indian Institute of Labour Management and son of Orissa DGP (Fire Service) and Commandant General (Home Guards), Bidya Bhushan Mohanthy was the prime accused in the case. Bitty and the German national student visited Alwar and Sariska on March 18, 2006 and had checked into the same hotel into separate rooms. On 20th night, Bitti Mohanty had allegedly forcibly kept her in his room and then raped her. He was also alleged to have been inebriated throughout the incident. They left for Delhi on the same train in the morning, without any police complaint being filed. Apparently he also snatched her mobile phone, but returned it next morning. The lady messaged a friend in Delhi, who contacted the German embassy. Alwar SP Rajesh Ari said he received an SMS from her family, and took action by stopping the train to Delhi and arresting Mohanthy.

German lady's determination to fight and not succumb to Bitty family's pressure finally led to his sentence for seven years in jail on April 12, 2006. While serving his sentence, he was allowed a 15-day parole to meet his ailing mother from November 20, 2006 to December 4, 2006. The order for parole was given on the basis of dubious facts. The role played by doctor as well as disappearance of convict's mother from the hospital indicates the existence of a planned activity. The court order barred Bitti from leaving Jaipur.[17] Ever since, he is absconding and the police in Orissa are still searching for his whereabouts.

The Rajasthan Police had filed a case against B.B. Mohanty for allegedly helping and abetting his son to escape from judicial custody and harbouring him since then as Mohanty signed a surety bond worth Rs.50,000 fo take Bitti on parole. He has, however, refused his involvement and denied any knowledge of his son's whereabouts. If found guilty, Mohanty would face jail term of a year-and-a-half to life

[17] "Did Doctor Help Bitti Get Parole?" *Times Now,* January 5, 2010 also available at http://www.timesnow.tv/I3itti-Mohanty-will-face-law-Orissa-CM/articleshow/4335700.cms

imprisonment. [8] But nothing substantial has been done in this case so far and the authorities both central and state are only promising to set up bigger probing bodies to sort out the matter.

5. MADHUKAR TANDON'S CASE: ANOTHER COP GOES MISSING IN RAJASTHAN.

Alongside the search of Bitti Mohanty, another allegedly rapist cop, Madhukar Tandon is on the hit list of the police in Rajasthan. Malli Devi, a resident of Bandikui in Dausa district alleged that on January 21, 1997 she was abducted and taken to Noida where she was raped by former DIG of Rajasthan, Madhukar Tandon, then posted in the police headquarters and who is now reported to be absconding. Khayali Ram, the husband of the victim who was a constable attached to the DIG made a statement: *"It has been 13 years that he ruined me and my family."*

Tandon had summoned Malli Devi to Jaipur from the village on the pretext that an accident has happened in his family. When she arrived in Jaipur she was forcefully taken to Noida, to the DIG's residence, where she was victimized.[19] Though a case of rape and sexual exploitation was filed against Tandon in Dausa in 1997, not much was done in the case. The senior IPS officer is still absconding and evading arrest for the past 12 years. Moreover, in 2001, the victim's husband was allegedly forced to quit when he declined to withdraw the case in exchange of money, pressurized by senior police officers.

Tandon had political connections which went all the way to former Prime Minister Late Narasimha Rao. The case is almost dead now but persistent efforts are being made by the district people as the M.P Kirori Lai Meena recently staged a protest outside Chief Minister Ashok Gehlot's residence along with his supporters, the victim and her husband, demanding a CBI probe in the inordinate delay in arresting the offending senior cop.[20] The rape victim has been waiting for justice for almost 13

[18] "Bitty Mohanty Will Face Law: Orissa CM", *Times Now,* January 5, 2010 available at http://www.timesnow.tv/Bitti-Mohantv-will-face-law-Orissa-CM/articleshow/4335700.cms

[19] "Rajasthan Launches Search for Former DIG Charged with Rape", *Hindustan Times* (Jaipur), December 30, 2009.

[20] Abha Sharma, "Another Case Gains Voice in Rajasthan", *The Times of India* (Jaipur), December 31,2009.

years but the biggest irony is that the accused who is a police officer is still absconding. '

6. P.S NATRAJAN'S CASE: A STING OPERATION INTO THE CORRUPT ACTIVITIES OF YET ANOTHER OFFICER.

The sex video of Ranchi Inspector-General of Police P.S. Natarajan, shows yet another instance of the abuse of one's power and position for exploitation of a helpless women. 22 years old Sushma Baraik who is a tribal woman approached police on account of her adversities, but was sexually exploited by the junior officers as well as a top notched officer named Hayat. She managed to complain about Hayat to the CM, Arjun Munda and that's when Natarajan, a 1975 batch IPS officer, came into the picture. He was asked by the Jharkhand authorities to conduct a departmental probe into the tribal woman's charges against Hayat. But Natarajan promptly gave Hayat a clean chit, saying that there was no substantial evidence to prove the woman's charge. Thereafter Natarajan began forcing her to have sex with him for about seven months. The young woman claimed that Natarajan began landing up at her house, pursuing her relentlessly, used a combination of threats and persuasion to compel her to submit to his demands.

Exhausted by years of sexual abuses, the woman then took a rather bold and unusual step to expose her tormentors. So wretched was the woman's position that she didn't even mind degrading herself further on a national TV in order to punish the men who had made her life a living hell. And since Natarajan was a high-ranking police official, besides being a well-known figure in both Bihar and Jharkhand, the TV channels were interested. The trap was set and Natarajan just had to shed his clothes.

The case seems to have serious social and political overtones[22]. Finally Inspector-General of police P.S. Natarajan got suspended and remained a fugitive for more than a year on charges of alleged sexual exploitation. Finally he surrendered before a city court on November 6, 2007.[23]

[2]"Special Wing to Trace Former DIG", *Rajasthan Talkies,* December 31, 2009 also available at http://www.raiasthantalkies.com/2009/12/special-wing-to-trace-former-dig.html

[22] "Jungle Laws", *Outook,* August 15, 2005.

[23] "Sleaze Case 1G Gives Up Natarajan Surfaces After Year in Hiding", *The Telegraph* (Calcutta) November 7, 2006.

By highlighting these few cases of top officials and their involvement by virtue of the misuse of powers and responsibilities entrusted on them, either to satisfy their sexual lust or go on to the extent of killing others, it is clear that moral depravity and criminalization is rampant in this arena. Apart from these cases which have become very high profile and gathered immense media attention and public outcry, as a result that judiciary gets bound to act upon them, yet there are many cases still languishing which go unreported and the conviction rate remains negligible.

7. CUSTODIAL VIOLENCE- RANGING FROM RAPE TO MURDER

The situation of custodial violence remains the most threatening arena where perpetrators of such crimes go scot free. Custodial rape remains one of the worst forms of torture perpetrated on women by law enforcement personnel. Official reporting is nothing short of appalling. According to National Crime Records Bureau (NCRB), one custodial rape case was reported in India in 2007, two custodial rape cases were reported in 2006, and seven custodial rape cases in 2005.[24] These figures cannot be considered an accurate reflection of the incident of rape in custody. As with other years, in 2008 the Asian Centre for Human Rights documented several cases of torture of women by law enforcement agencies.

7.1 Case study of custodial rape victims

On February 1, 2008, two sisters, were illegally detained by Head Constable Parminder Singh and an Assistant Sub Inspector while they were waiting to board a bus to Barnala in Punjab. They were brought to Sadar police station and illegally detained for two days. Both sisters were sexually harassed by Head Constable Parminder Singh who allegedly demanded Rs 50,000 to release them. They were subsequently released after they paid Rs 30,000.[25]

On the night of February 21, 2008, a 40-year-old woman, mother of five children, was allegedly gang-raped by three men including two policemen identified as Vijender Singh, a constable in the Haryana Armed Police and Dinesh Kumar, inside the Haryana Governor A. R.

[24] National Crime Records Bureau, "Crime In India 2007", available at hup:-'. i)crh.nic.in/cii200J/cii-2007/ CI lAP13.pdf

[25] "Cop Faces Sexual ftarassment Charge -PSHRC Entrusts Probe to ADGP", *The Tribune,* Feburary 28, 2008.

Kidwai's security barracks in Chandigarh. The victim was returning home from a temporary catering job at Nek Chand's Rock Garden in an auto-rickshaw. The policemen forcibly dragged the victim from the auto-rickshaw, took her to the security barracks and raped her.[26]

There are plethoras of such incidents which have been brought to light. They only go on to show the amount of lawlessness that is infecting the society every single day. It reveals that those who are meant to maintain law and order in the society are the greatest threat to 'Law and Order' as well as peace in the society. Such incidents disillusion the common man regarding the state of affairs in the country and goes on to consolidate the cynic's views that the system is leading on the path of an inevitable rot.

7.2 Custodial Deaths: Some Statistics

Further from April 1, 2001 to March 31, 2009, the deaths of 1,184 persons in police custody were reported to the NHRC. An overwhelming number of these deaths had taken place as a result of torture. Most of these deaths took place within 48 hours of the victims being taken into custody by the police. During this period (1 April 2001 to 31 March 2009), the highest number of custodial deaths was reported in Maharashtra (192 cases) followed by Uttar Pradesh (128), Gujarat (113), Andhra Pradesh (85), West Bengal (83), Tamil Nadu (76), Assam (74), Karnataka (55), Punjab (41), Madhya Pradesh (38), Bihar and Rajasthan (32 each), Haryana (31), Kerala (30), Jharkhand (29), Delhi (25), Orissa (24), Chhattisgarh (23), Uttarakhand and Meghalaya (16 each), Arunachal Pradesh (11), Jammu and Kashmir and Tripura (9 each), Puducherry and Chandigarh (3 each), Himachal Pradesh (2) while Manipur, Goa, Sikkim, and Dadra & Nagar Haveli recorded one case each.[27]

Most of these deaths are given the names of suicides while custody. For instance, in a reply to the Rajya Sabha (Upper House of Indian Parliament) on March 12, 2008, then Home Minister of India, Shivraj Patil cited suicide as one of the primary causes of custodial death.[28] But the Home Minister failed to clarify as to why so many accused had committed suicide in police detention, what had led them to act in this manner and how they had accessed the means (knives, poisons and open electric cables) etc. Thus due to these loopholes in our current system,

"Alleged Rape by Guards at Raj Bhavan", *The Asian Age,* February 22, 2008.
"Torture in India, 2009", Report by Asian Centre for Human Rights, June 2009.
Unstarred Question No. 1281 answered on 12.03.2008.

such crimes are facilitated easily and these protectors of law do not even think twice before taking the law in their hands.

8. THE POLICE ENCOUNTER INDUSTRY

The encounter of dreaded criminals use to thrive on the principle that if the police is unable to nab the culprit, or force its surrender and the criminal may jeopardize the life of common citizens or are threat to the police itself, then the police was entitled.to encounter such criminals and liquidate them by engaging them in exchange of fire. However, with growing nexus between police, politicians and the underworld the police allegedly involved itself in the business of encounter of criminals for some cross purposes, in most cases to kill the criminal of the other gang to oblige and collect some money from the gang on whose payrolls they happen to work. Some time they allegedly did it for promotion and pelf. On the name of encounter they started killing innocent people and would declare them absconding criminal. Thus, manipulated and motivated encounter further scandalized the police and has further eroded the credibility of police and the rule of law. The latest is the arrest of top policemen from Gujarat and Rajasthan over the fake encounter death of Sohrabuddin Sheikh and his wife, Kausarbi, which exemplifies not just the police-underworld nexus but also the top brass of the police becoming a willing tool of the political executive.[29]

B. REASON FOR GROWING CRIMINALIZATION OF POLICE

1) CRIMINALIZATION OF POLITICS: POLICE SEEMS TO HAVE CAPITULATED

Members with criminal background who are reaching the Parliament have increased with successive elections. According to National Election Watch the fifteenth Lok Sabha has 154 members with criminal background. These tainted politicians form a nexus, with corrupt police officials who serve each other's ends in different ways. The following examples substantiate the same:

First, Police tends to turn a nelson's eye to the acts of political leaders. They are frightened of these leaders as their rift might contribute towards their shunted postings, or hinder their promotions. Political leaders in turn act like umbrella for police officials to provide them support in all

"Police Overhaul: Courts and Reforms", *Economic and Political Weekly* May 5, 2007, ? 1584.

hours of need. Second, Police plays a vital role towards mitigating the evidences in those cases where political leaders are involved. Police officials get benefits in return for helping out the political leaders Thirdly, when political leaders are in captivity, police officials try to treal them in the best possible ways. They are provided with all kind ol amenities and comforts within the prison, which becomes far more comfortable and secure than the outside world. Probably, the officials dc it with the hope that once the leader is released in any manner the leader shall oblige them. Fourthly, There are also reports that in many acts oi crime planned by political leaders police organization also becomes collaborators and executors of the act of crime and corruption.

2) NEXUS BETWEEN POLITICAL LEADERS AND POLICE OFFICIALS

There exists a strong nexus between police and politicians evidently surfaced on most occasions of high profile crimes. For instance in Ruchika's case, the leadership was barely interested in taking the investigation to its logical end and punishing Rathore, if his guilt was proved. Moreover, the way the matter was hushed up and ignored, it provides one with strong reasons to believe that Rathore may have been privy to the wrong acts of political leaders who in turn tried to protect him. The lust for power is considered as the worst of all the lust as one goes to any extent to grab the power. Therefore, politicians may have been using all kinds of foul means to score over their opponent and in the process they must have been using other institutions of the state. Therefore, as the famous maxim goes 'birds of the feather flock together',

3) INDIFFERENCE OF PEOPLE

India is a democracy which claims to be 'of the people, for the people and by the people'. However, with successive elections it seems to have degenerated as if it is hardly 'by the people' and in most cases it is certainly 'over the people'. The connotation used today is "by the criminals, of the criminals, and for the criminals'. The obvious reason for such degeneration is that people in general have largely become indifferent. They wake up only for such issues and protest where their personal interest is directly involved. They are mostly indifferent in cases where in the human rights of common men are encroached upon especially the cases of police atrocities. Voters still vote back to power their caste-men or acquaintances even though their image and background is highly tainted. The people do not fulfill their obligations of civility by casting their votes and contributing their might to uphold

the institutions of states. For every ill they simply blame it on the government and shun their own responsibility.

4) ROLE OF MEDIA

With growing commercialization and capitalism media has ceased to be the watchdog of the society and protector of the people. Media is simply another corporate organization whose sole motive happens to be profit. Consequently, the Indian soap opera includes only those news and programs which shall entertain the people. Today yellow journalism is becoming rampant. Media discusses news only to the extent that it can draw the attention of the target audience. Media neither provides follow-up about the cases nor ensure that they are taken to the logical end. Media would sell only those things which would enhance its Television Rating Points (TRP) and would not invite the wrath of any of the institutions of the state. Media has lost its courage under the pressures of capitalism. Therefore, the cases of police atrocities are reported when they are brought to the fore by some whistleblowers, but soon fade away from the media and its place is taken over by some other flashings and people are left in the lurch with hardly any knowledge about the happenings in the life of the whistleblower or the deliverance of justice to the victim and punishment to the culprit.

5) ROLE OF JUDICIARY

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When other institutions are on the verge of degeneration people look towards the courts as Judiciary is considered the temple of justice. However, in the recent past judiciary seems to have become lopsided and capitulated too. Many judges of High Courts and Supreme court have been found with cases of allegations which have contributed towards the unmaking of this institution. The reason for this degeneration is existence of an illegitimate nexus among judges, politicians and police. Judiciary is also made a party to the corrupt activities of police and politicians. It is because when the matter goes into the court then police and politicians are to be given a clean chit by the judiciary. Many judges look for proper rehabilitation once they retire from their job. They get interested in making money. All these expectations could be fulfilled through wrong channels, only when they accept politicians as their masters and corroborate with police and politicians to serve their own vested interests. They take years to deliver justice in such cases. By the time the justice is delivered all endeavors are made to mitigate the evidence and weaken the cases. They are providing loopholes along the corridors of law and legal provisions to let the criminals go scot free. The organization which

is to protect law and justice is fast becoming a broker and trader in the business of law enforcement and justice delivery.

C. CONSEQUENCES OF POLICE CAPITULATION

1) Rule of Law is over

The most immediate consequence of the crisis of credibility of the state institutions is damage to the 'Rule of Law'. With each case of police atrocities and corruption by any of the institutions of the state, the people's faith in the Rule of Law stands shattered. People start believing that instead of 'Rule of Law' there is now the 'Rule of Jungle' that exists. All institutions are functioning for the rich and mighty and none for the poor and week.

2) Crisis of Credibility

As mentioned above the state and its institutions have lost the faith of the people and there is no compliance to the laws of the state by its citizens. State is passing through a phase of 'crisis of legitimacy' in the eyes of the people. The several cases of crime and corruption have eroded the credibility of almost all the institutions of the state.

3) Loss of civility

The erosion and degeneration of state and its institutions have provided a wrong example before the common populace and they have developed a thinking that when leaders and officers are busy in making money then why they should lag behind? Consequently, what is existing today in the society is *"kill whom you can, take what you can",* i.e. survival of the fittest. Honest and upright people are rare as well as endangered species. There is thus, complete loss of civility and it is almost established that we are no more a member of the civilized society.

4) Loss of Liberty and Freedom

The liberty and freedom which is enshrined in the preamble to the Constitution of India has become the biggest casualty. Sensible and concerned citizens are frightened of saying anything against the state and its several institutions. Women and children consider themselves insecure as cops are turning out to be rapists and the kidnapping industry is burgeoning. Thus, the state which was supposed to ensure freedom and liberty to its citizens is fast becoming an organized prison for the common people.

D. Ways and Means to Contain and Mitigate the Problem

1) Political Will

The solution to the growing problem lies in consolidation of strong political will. Those political leaders who are upright and honest need to **take** cudgel in their hands the requisite authority to wage a movement to strengthen the political will. Such leaders should not succumb to the will of the party bosses and corrupt leaders. Still it could not be a very mature solution as such leaders are in great minority. We are perplexed on the issue of generating and strengthening political will to this effect.

2) Role of Political Parties

The most important solution to this problem could come from political parties. If political parties negate seats to the candidate with tainted background, such leader would fail to enter inside parliament. Once they **fail** to enter into parliament the members would not be under any kind of obligations to protect the police officials and members of the judiciary **and** other organizations. It is high time the good and concerned political leaders across different parties should come together and form a party of **their** own and wage a movement in accordance with the Gandhian principle of civil disobedience and non-cooperation. They should try all means to educate the people to their cause.

3) Police Reform

Police is the most visible arm of the state's authority. Therefore, the **police** force inspires the strongest reactions from citizens. With each successive case or scandal the immediate topic of discussion happens to be the 'issue of police reform'. There have been several committees and commission to prepare the report for police reform. Responding to a public interest litigation (PIL) filed by a retired director general of police (DGP), the Supreme Court (SC) on September 22, 2006 directed the states and center to initiate police reforms.[30] Filed in 1996, the PIL sought the enforcement of *the* National Police Commission's (NPC) recommendations. The court's orders took into consideration the reports **of** the NPC 1977, the Julius Rebeiro Committee, the K. Padmanabhaiah Committee, the Justice Malimath Committee and the Soli Sorabjee Committee or the Police Act Drafting Committee.[31]

The Police Act of 1861, the central legislation, was framed following the 1837 war of independence and hence has many authoritarian and

[30] *Ibid.* no. 25, p. 1584 [31] *Ibid.* no. 25, p. 1584

repressive features. Apart from these committees the NPC has submitted eight reports over the years.[32] The SC ordered that each state should set up a state security commission (consisting of the home minister, chief secretary, opposition leader, the DGP and five independent persons whose recommendations would be binding on the state) as a watchdog over the police administration, the DGP should be selected from the three senior most officers empanelled by the Union Public Service Commission (UPSC) for a two-year tenure, there should be clear separation between law and order maintenance duties and crime investigation, police establishment boards should be set up to decide the transfer, promotion, posting and other service-related matters of those below the rank of deputy superintendent of police, a police complaints authority in every district and a national security commission to appoint heads of central police organization.[33]

The SC's directives are supposedly aimed at weakening the politicians-bureaucrat hold over the police. But the human rights activists warn that it should be replaced with independent civilian control (UK has the best such mechanism) to prevent further chaos.[34] Given the high number of custodial deaths, rape and police brutality, replacing political control with that of toothless agencies will only worsen the situation.

4) Role of Media

Media has tremendous role to play towards checking the degeneration of the institutions of the state. It can perform the role of vigilante in society. However, it can do so only when it exists as a social service organization and not a profit-making organization. Media is required to purge itself of such temptations and comprehend its role in society and should not become another industry and play in the hands of capitalists. Media's role and job to society is extremely sacrosanct, it must live up to expectations of the citizens.

5) Training and Education

Any mechanism to check the degeneration of the police through reforms is bound to fail and it would not lead the policy-makers to any logical solutions. The best method within the existing infrastructure would be to evolve a comprehensive method of training and education of the police force. There should be arrangement for periodic training of the entire

Ibid, no. 25, p. 1584
Ibid, no. 25, p. 1584
Ibid, no. 25, p. 1584

police force. The training should be to train the body, mind and spirit. For every one year of service the recruits should be sent to training camps for compulsory training where they should be given some credit points. These performance based credit points should be given weightage during their promotion. The training mechanism should include yoga (both physical as well as mental); physical exercises; training in law and philosophy to train their mind. Through such mechanism their nature could be engineered and they could be made physically and mentally fit to serve the society. There should be separate training schools for officers and sub-ordinates or line and staff within the police organization. Before every annual increment in their salary they should submit their two-months training certificate along with the grade card of the training. Their annual increment should be subject to completion of training. Same mechanism should be there for the legislators and judges to further rectify the system and to remove the rot that has penetrated deeply the system.

6) Legal **Provisions**

There should be draconian law for police personnel and its effective implementation. The criminals should be made to go for more or extra training with punitive measures. The legal provision should take into account that the provision must contribute towards changing the heart of the personnel rather that hanging the personnel. This is because provisions of corporal punishment become breeding grounds of corruption. It could be misused by one police officer to settle the score against the other thereby further rotting the system. Therefore, legal provision to rectify the ills through training and education is required to be made.

7) **Constructive Approach**

As discussed in the previous section, rather than adopting a retributive approach to punish the police official the system should adopt constructive approach towards the problem. Identifying the culprit and punishing him could be made easier through legal provisions, but adopting a constructive approach to make the police personnel relevant to a civilized society is far more challenging. If we can make the police or any other personnel realize his mistake and train him as well as help him to rectify his ills we would contribute more to the society. Therefore, the need of the hour is to adopt a positive approach of training and educating the police personnel to conduct th,eir behavior and become a good citizen and a responsible and accountable human being.

D. CONCLUSION

Autonomy for the police force is a double-edged sword given the police's record of human rights violations in the country. Reforms are needed but the rot has gone too deep to be uprooted by court deadline-enforced measures. Over police establishment board the argument is put forth that a police complaint authority will guzzle money when there are already the state human rights commission, the women's commission, and the courts to entertain complaints against the police. It is extremely difficult to buy the arguments because the matter is not about the credibility of the police alone, rather the credibility of the judiciary, the bureaucracy, the elected representatives are also under the scanner and stands eroded in the eyes of the people. Thus far the stories of one institution of the state against the other institution of the state has been the story of maligning the justice and punishing the victims and adding further torments to already tormented victim and its near and dear ones. There is no guarantee that the establishment of the state security commission will be panacea for all ill that it suffers from. No doubt it would undermine the authority of the elected representatives as its decision would be binding on them, but the point to be taken note of is that there is no guarantee that the members of the state security commission shall have no nexus with the police officials. It is difficult to digest that when the judiciary with tremendous power has failed to check the atrocities being committed by the police then it is almost next to impossible to contain the problem by instituting any other organization or even with plethora of legal provisions. More organization and more laws would further add to the complexity and worsen the situation.

As suggested above the only way out lies in the exhaustive, rigorous and consistent periodic training of the line and staff of all the organs and institutions of the government. The training should precede the annual increment of the personnel. There should be a discourse on the means and mechanism of comprehensive training. The training should aim at training the body, spirit and mind as mentioned above. The rot is a mental malady and it can be cured only through a mental medicine. Human engineering is the greatest need of the hour which shall contribute towards citizen-building which is the key to the civilized society.

AFFIRMATIVE ACTION PROGRAMME IN INDIA : THE ROAD AHEAD

A.P.SINGH*

Inequalities are created in a society by a limited number of privileged people, who have always dominated the State and used its power for their own purpose. Equality therefore means, first of all, that special privileges of all kinds should be abolished. All barriers of birth, wealth, sex, caste, creed and colour should be removed so that no one suffers from any kind of social or political disability. The framers of Indian Constitution were aware of the persistent inequalities due to the caste system in India and that's why the Principle of equality was given a place of pride in the scheme of things under Indian Constitution. Art. 14, 15, & 16 taken together provided for a system of protective discrimination, popularly known as reservation system. This has come to be equated with affirmative action programme in US system. In Indian system this system of benign discrimination or compensatory discrimination was very methodically and meticulously designed and was in line with the most humane and advanced constitutional principles. This was expected to remove the evils of caste system, distorting the face of India's socio-political system. It was probably for this reason that Glanville Austin, in his celebrated work "Indian Constitution; the cornerstone of a nation", described Indian constitution as "more of a social than political document".

But the development that took place in the post-independence period did not follow the lines expected by the founding fathers of Indian Constitution. Reservation system soon became a tool to garner political dividends rather than a tool of social engineering and a provision designed as a temporary measure became a permanent feature of Indian Constitution. This paper makes an attempt to clear some of the cobwebs that appear to have developed around the

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system of affirmative action programme in India and seeks to articulate an argument that the validity, effectiveness and utility of affirmative action programme in India, lies in the fact that it slowly and gradually annihilates itself on its own.

INTRODUCTION

'Equality' has been accepted as the basic organizing principle and cardinal value of India's socio-political system. And this has been don against the background of elaborate, valued and clearly perceived in equalities inherited from India's ancient past. If we look at the concept c equality from a common man's point of view, the principle of equalit was originally, a common man's protest against the gross inequalitie created by the superior claims of the nobility in ancient societies. Thes inequalities and privileges persists even today. Inequality, as such, refer to the conditions created in society by a limited number of privilege! people, who have always dominated the State and used its power fo their own purpose. Equality means, first of all, that special privileges o all kinds should be abolished. All barriers of birth, wealth, sex, caste creed and colour should be removed so that no one suffers from any kin< of social or political disability.

The framers of Indian Constitution were aware of the persistent inequalities due to the caste system in India and that's why the Principle of equality was given a place of pride in the scheme of things under Indian Constitution. Art. 14, 15 and 16 provided the basics of equalizing principles under Indian Constitution, extending an umbrella of protective or benign discrimination for the members of scheduled caste and scheduled tribes whereby they could be provided with special treatment in various sectors of socio-economic and political life of the country. These provisions of the Constitution have come to be recognized as the basis of reservation system in India, very often equated with the affirmative action programme of US origin. However, what is important is to note that these provisions are not exhaustive of the affirmative action programme in India which is much more elaborate and comprehensive. This paper makes an attempt to bring together various provisions constituting the affirmative action programme of India and seeks to articulate an argument that its relevance and effectiveness would lie in a slow and gradual annihilation of the system of affirmative action programme itself. Accordingly the paper has been divided into four parts. Part-I after the introduction, would seek to make clear the understanding of affirmative action programme in India, part-II would put the affirmative action programme

in a new frame of classification and bring together various provisions relating to affirmative action programme in India. Part-Ill, would make an attempt to articulate an argument that the affirmative paction programme in India was never intended to be a permanent feature of the constitution and the framers of the constitution wanted the system to fade away slowly and part IV would conclude the discussion with certain observations on India's tryst with affirmative action.

Part-I

UNDERSTANDING AFFIRMATIVE ACTION PROGRAMME

Affirmative Action Programme, as it is understood in United States of America, where this term is said to have originated, basically refers to the policies aimed at addressing the problems of historically and socially deprived sections of society in order to promote their access to education or employment. The motivation for affirmative action is a desire to redress the effects of past and current discrimination that is regarded as unfair and serves to encourage public institutions such universities, hospitals and governmental and non-governmental organizations including the police forces to be more representative of the population. Professor James E. Jones, Jr. defines affirmative action as "public or private actions or programs, which provide or seek to provide opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups." According to Professor David Benjamin Oppenheimer the practice of affirmative action is comprised of five methods: quotas, preferences, self-studies, outreach and counseling, and anti-discrimination[1]. As an extension of Professor Oppenheimer's categorization-based definition, affirmative action can and often is divided into "hard" and "soft" affirmative action, with the former consisting of quotas and preferences and the latter encompassing various outreach, self-evaluations, marketing, and labor market development.[2]

It may be noted that the idea of affirmative action programme has germinated from the principles of Distributive Justice. It is worth noting that philosophers of various hues may have differences of opinions as to die conception of justice and equality, they would all suggest some or the other kind of distributive justice mechanism to shape the society in the mould of their philosophy. In fact the idea of distributive justice is not

[1] Jed Rubenfeld,Affirmative Action, J07, Yale L.J.427, (1997)
[2] Ibid, 1407.

something new. Aristotle himself talked about distributive justice. According to him justice is of two types-complete justice and particular justice. He further subdivides particular justice, into Distributive justice and Corrective Justice. Distributive Justice consists in proper allocation of reward to each person according to his worth and desert. It thus looks beyond equality in purely formal sense. Its central concern is to redress the bias of contingencies in the direction of equality. In a democratic world it is taken for granted that policies for the redress of severe social and economic disadvantages are in themselves desirable. Such policies of distributive justice aim at different sectors of society and at the widest possible base. Either we call such policies as protective discrimination, benign discrimination or preferential policies, they are the means for achieving the ideals of distributive justice. Justifications for affirmative action lies in the needs either to remove the grossly unjust inequalities in the system or to raise particular sections of the society to the level of human existence and assure them their due dignity.

Indian Constitution, adopts justice and equality as the basic organising principles of India,s socio-political system. The equality has come to be embraced as a cardinal value againstthe background of elaborate, valued and clearly perceived inequalities[3]. What is laid down in terms of equality is a twin concept, i.e. equality before law and equal protection of laws, while the former ensures equal status to everybody, from a prince to a pauper, the later concept, is aimed at achieving substantial equality by classifying the advantaged and disadvantaged and provide the disadvantaged ones with affirmative action programmes. The result has been an array of programmes that are termed here" as policy of affirmative action or protective or compensatory discrimination. In fact the measures for ensuring equal protection of laws involve the element of protection as well as that of compensation or reparation to offset the systematic and cumulative deprivations suffered by lower castes in the past. These protective discrimination policies are authorised by. constitutional provisions that permit departures from norms of equality, such as merit, even-handedness and indifference to ascriptive characteristics.[4]

[3] Marc GaHanter, Law and Society in Modern India, Oxford University Press, New Delhi, 1990,P.185.
[4] Ibid.

AFFIRMATIVE ACTION PROGRAMME IN INDIA

The array of affirmative action programmes in India can roughly be divided into three broad categories. First are Reservations which allot or facilitate access to valued positions or resources; such as reservations in legislatures, including the reservations for Scheduled castes and scheduled tribes in Lok Sabha (House of the People; the lower house of Indian Parliament),[5] reservations in government services and reservations in educational institutions. Second type of protective measures are employed though less frequently in land allotment, housing and other scarce resources like, scholarships, grants, loans and health care etc. Third type of protective measures are specific kinds of action plans for removal of untouchability, prohibition of forced labour etc. In the classification of Prof David Benjamin Oppenhiemer, the first type of affirmative action would be 'hard' affirmative action and second and third type of affirmative action would be a typical case of soft affirmative action.

For the purpose of providing protection in terms of political representation, article 330 of Indian Constitution provides that seats in proportions to the population of scheduled castes and scheduled tribes in particular states are reserved in the Lok Sabha. The states which .are predominantly tribal are excluded from the operation of article 330. Earlier section 2 of 23rd amendment of the constitution 1969, excluded the operation of article 330 to the tribal areas of Nagaland , but the exclusion has now been extended in respect of the state of Meghalaya, Mizoram and Arunachal Pradesh by 31st amendment Act as these states are predominantly tribal in nature.[6] Similarly under article 332, seats are reserved in the legislative assemblies of the states in favour of scheduled castes and scheduled tribes in proportion of their population in that particular state. Once again the state of Meghalaya, Nagaland, Mizoram and Arunachal Pradesh are excluded from the operation of article 332, simply because of the predominant tribal population in those states. Article 331 and 333 does the same in favour of members of Anglo-Indian Community.

It may be noted that initially these reservations were provided for only 10 years from the commencement of the Constitution under article 334. But

[5] Indian Parliament is a Bicameral Legislature. Rajya Sabha is the upper chamber of the Parliament having 250 members elected indirectly for 6 years. Lok Sabha is the lower chamber, consisting of 544 members elected directly for five years. * V.N.Shukla, Constitutional law of India, Eastern Book Company Lucknow, 1990.

this duration has been extended continuously since then by 10 years each time. Now the period of reservations in Lok Sabha and State legislative assemblies stands for 60 years from the commencement of the constitution. [7] It is felt that the handicaps and disabilities under which these people live have not yet been removed and that they need this reservation for some time more so that their condition may be ameliorated and they may catch up with the rest of the nation. The number of Lok Sabha seats reserved in a state of Union territory for such castes and tribes is to bear as nearly as possible the same proportion to the total number of seats allotted to that state or Union Territory in the Lok Sabha as the population of the scheduled castes and scheduled tribes in the concerned state or Union Territory bears to the total population of the state or the union territory.[8]

The fact that reservation of seats for scheduled castes and scheduled tribes in the legislatures is not on a permanent basis, but is at present provided for 10 years period at a time, shows that it is envisaged that the scheduled castes and scheduled tribes would ultimately assimilate themselves fully in the political and national life of the country so much so that there would be no need for any special safeguards for them and there would be no need to draw a distinction between one citizen and another. Their condition would improve so much that they would feel their interests secure without any kind of reservations.

Reservatiojn in government services as a measure of protective discrimination has been incorporated under article 16 (4) of theJndian constitution. This particular provision falls under the head of "Right to Equality". In order to give effect to general right to equality under article 14, the constitution secures to all citizens a freedom from discrimination on grounds of religion, race and caste. In the specific application of this equality guarantee; the state is further forbidden to discriminate against any citizen on grounds of place of birth, residence, descent, class, language and sex.[9] Untouchability has been abolished and the citizens are protected against discrimination even on the part of the private persons and institutions.[10] The constitution after guaranteeing the general right of equality under article 14 defines equality in terms of justice by non discrimination provisions contained in article 15 (1) and 16(1) and proceeds to incorporate provisions of preferential treatment

[7] This has been effected vide, 79th Constitutional Amendment Act 1999, brought into force wef.25.1.2000.
'Article 330 and 332 of Indian Constitution.
[9] Article 15 (1), and 15 (2) of Indian Constitution.
[10] Article 17 of the Indian Constitution, also see the Protection of Civil Rights Act 1957.

so as to permit the state to achieve equality to disadvantaged sections by giving them preferential treatment in all its dealings and particularly in the area of public employment. While article 16(1) guarantee equality of opportunity for all citizens in matters of employment or appointment to any office under the state, article 16 (2) provides that no citizen shall on grounds only of religion, race , caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of any employment or office under the state and article 16 (4) which provides for protective measure of reservations of seats in government employment lays down, that nothing in this article shall prevent the state from making any provision for reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the state is not adequately represented in the services under the state.

Provisions for reservations in educational institutions to deprived sections of scheduled castes and scheduled tribes has been secured under article 15(4). Article 15 (1) specifically bars the state from discriminating against any citizen, race, caste, sex, place of birth or any of them. Article 15 (4) on the other hand lays down that the state is not prevented from making any special provision for the advancement of any socially and educationally backward classes.. The expression "making any special provision" is evidently an open ended provision and government can really go on providing a whole array of facilities for promoting the interests of socially and educationally backward classes, for example waiver of fees, waiver of age requirements, special coachings, scholarships, grants, loans etc. Interestingly, however, the use of article 15 (4) has exclusively been made so far for providing reservations in educational institutions.

Two important points or arguments, I intend to make with respect to these measures' of affirmative action programmes under Indian Constitution. First is about the a new kind of classification that I put all these provisions into and the second is about the presumed limit, set for the operation of these affirmative action programmes that has now become a topic of hot discussion after Indian Supreme Court has adopted a definite line of argument on the point and which offshoots into a argument to start some kind of roll-back process of affirmative action programmes in India.

Part-II

HARD AND SOFT AFFIRMATIVE ACTION

A new kind of a classification that I put, is derived from the basic classification of Prof. Davis Banjamin Oppenhiemer, who puts various types of affirmative action programmes into 'hard' and 'soft' law categories. Under Indian Constitution as well the whole array of affirmative action programmes are divisible into hard and soft law categories. Article 330 to 334, 340-342 and 15 & 16 can be categorized as 'hard' law approaches as they prescribe certain legal norms whereby the historical injustices have sought to be done away with or provided with some kind of reparation element by way of protective action or affirmative action. These provisions have already been talked about. Article 15 partly, and preferences in resources distribution and amelioration programmes that I now discuss are divisible into 'soft' law category affirmative action programmes for the reasons that I argue now.

First, the expression under article 15 (3) "Any special provision for the advancement of ...." Is an open ended and very wide provision. This particular provision can be used both as a 'hard' as well as 'soft' law affirmative action programme. It is unfortunate that it has not been utilised for other purposes. The underlying assumption of the interpretation of article 15 (4) so far appears to be that unless posts, including promotional posts are reserved for backward classes in public employment, their status can never be improved. It cannot be said that there are no other methods to consider by which that status can be improved because to say this is to overlook the wide scope of article 15 (4). The language of article 15 (4) shows first that reservations as such are not expressly mentioned in article 15 (4), but fall within the wide expression "special provisions for the advancement of..." It is overlooked that special provisions include every kind of assistance which can be given to backward classes and scheduled castes and scheduled tribes to make them stand on their feet or as is commonly said to bring them into the mainstream of Indian life. Illustratively those measures would include grant of land either free or on nominal rent the supply of seeds and agricultural implements, the supply of expert advice as to how to improve the yield of land, provisions for marketing the produce and the like". Those measures would also include schemes for training the backward classes to pursue trades or small business which would fetch a

[1] Parmanand Singh, Equality, reservations and discrimination in India, Deep & Deep Publications New Delhi, 1985.

reasonable income. In relation to education itself, under article 15 (4) the state can give free education, free text books free uniforms and subsistence allowance, merit scholarships and the like, starting from the stage of primary education and going right up to University and post graduate education. Once this is realised, how vast and varied are the powers at the disposal of the state if it really takes care to improve the lot of scheduled castes and scheduled tribes, and backward classes. The controversies of reservations, of preferring less meritorious to the more meritorious one, or of impairing the efficiency of administration for the purpose of providing protective discrimination, which more often than not are accused to be governed by political considerations shall lose much of their shine.

Preferences in Resource Distribution ; The Soft AAP.

The second group of soft affirmative action programmes can be constructed out of Directive Principles of State Policies. It may be noted that the Preamble to the Indian Constitution of India, has enjoined the "sovereign, socialist, secular[12], democratic Republic of India, to secure to all its citizens, social economic and political justice". Reserving seats and ensuring a minimum representation to deprived and exploited sections of society in the legislatures and other political bodies ensure political justice.[13] Social and economic justice is intended to be achieved by the state in pursuance of the Directive Principles of state policy contained in chapter IV of the Constitution, which command the state to remove existing socio-economic inequalities by special measures. All these provisions are intended to promote the constitutional scheme to secure equality. These provisions set forth a programme for the reconstruction and transformation of Indian Society by a firm commitment to raise the sunken status of the pathetically neglected and disadvantaged sections of our society. Before we note how the reconstruction and transformation of Indian society is intended to be realised, it must be noted that the provisions included in Directive Principles of State policy are not enforceable in the courts, however the principles laid down in this part of the Constitution are fundamental in the governance of the country.

These provisions may better be described as the active obligations of the state[14]. The State shall secure a social order in which social, economic

[12] The word Secular was added in to the Preamble by 42nd Amendment, 1975.
[13] See Articles 330 to 334 of Indian Constitution.
[14] V.N. Shukla, Constitutional Law of India, Easern Book Company, Lucknow, 1990.

and political justice shall inform all the institutions of national life.[15] Wealth and its source of production shall not be concentrated in the hands of the few but shall be distributed so as to sub-serve the common good. And there shall be adequate means of livelihood for all and equal pay for equal work. [16]The state shall endeavour to secure the health and strength of workers, the right to work, to education and to assistance in cases of want, just and humane conditions of work and living wage for workers [17]a uniform civil code[18], and free and compulsory education for children.[19] The state shall take steps to organise village panchayats,[20] promote the educational and economic interests of the weaker sections of the people, raise the level of nutrition and standards of living, improve public health, organise agricultural and animal husbandry,[21] separate the judiciary from executive [22]and promote international peace and security.[23] Article 46 which specifically refers to the obligation of the state towards the weaker sections and scheduled castes and scheduled tribes etc provides that "The state shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the scheduled castes and scheduled tribes and shall protect them from social injustices and all forms of exploitation".

In pursuance of these directives , various land re-distribution and allotment programmes have been initiated. In fact so great was the enthusiasm of the government in this particular respect that hundreds of land reform laws were passed in the first five years of Indian Republic. This ensued a spate of litigation in the courts, as the land reforms laws infringed the right to property of the land owners.[24] However the government was so determined to effect land reforms that the right to property which was provided under article 31 of the constitution was modified six times and finally was done away with for the purpose of avoiding litigation in land reform measures of the government[25].

[15] Article 38 of Indian Constitution.
[16] Article 39 of Indian Constitution.
[17] Article 41, 42 and 43 of the Constitution.
[18] Article 44.
[19] Article 45.
[20] Article 40.
[21] Article 47 and 48.
[22] Article 50.
[23] Article 51.
[24] See Kameshwar Singh v. State of Bihar, AIR, 1962, SC 1116.
[25] 44rth Constitutional Amendment Act of 1978 abolished the Right to Property from Indian Constitution.

For the purpose of providing legal aid to the poor and indigent a vast network of legal aid programmes involving judicial officers, Bar Councils and law Schools, have been established all over the country. Legal Services Authority Act, 1987 which was meant to provide legal aid to all those who cannot afford access to legal services either due to poverty indigence or illiteracy or backwardness, has been a big success and apart from legal services authorities at the central and state level various legal aid committees have been successfully and effectively working at the district and taluka level.

Apart from this various health care programmes such as primary health centres all over the country have been established and various scholarships grants, loans etc for the deprived sections of the population have been contributing their bit towards the socio-economic transformation of the country. These distributive schemes are accompanied by efforts to protect the backward classes from exploitation and victimisation.

Action Plans and Amelioration Programmes.

In the third group of affirmative action policies, the aim is at protective discrimination in various action plans for the removal of in-capabilities on the part of the underprivileged groups. Constitution itself talks about prohibitions of forced labour under article 23, in pursuance of which Bonded Labour Abolition Act was passed in 1976. In recent years there have been strenuous efforts to release the victims of debt bondage, who are mostly from scheduled castes and scheduled tribes. Anti-untouchability programme is another area of governmental concern. Constitution itself abolished untouchability vide article 17 which lays down that " Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence, punishable in accordance with law. It is noticeable that the word "Untouchability" is not to be construed in its literal sense which would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as their suffering from an epidemic contagious disease or on account of social observance such as are associated with birth or death etc. On the other hand, untouchability is to be understood in the sense of a practice as it has developed historically in India. The word refers to those regarded as untouchables in the course of historical developments in this country.

Anti-untouchability propaganda and the Protection of Civil Rights Act, attempts to relieve untouchables from the social disabilities under which they have suffered. These measures may not strictly be called compensatory discrimination in the formal sense of the term, but in substance it is special undertaking to remedy the disadvantaged position of the untouchables and certainly be designated as affirmative actior programmes as part of state's larger obligation of ushering into sociall) egalitarian order.

MEETING THE ANTI-MERIT ARGUMENT

About the reservation system which, as we have noted above, has come to be equated with affirmative action programme, one of the arguments against the system has always been that it compromises with merit and leads to the neglect of talented candidates, who in due course of time fade into oblivion amounting to national loss. As far as soft affirmative action programme is concerned such an allegation is simply beyond question, because the programme does not meddle with the recruitment aspect of services. Rather it creates conditions where the disabled candidate can compete with the best in the system, by training such a candidate and by taking care of his other incidental disabilities, such as lack of money etc. As far as objection as to the lowering of standards by way of reservations, which has been the hallmark of all agitations that have taken place in this country, the Constitution has taken care of that by inclusion of article 335 of the Constitution, which lays down that the claim of the members of the scheduled castes and the scheduled tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with affairs of the union or the states.

Supreme Court has taken note of article 335 in the interpretation of article 15 (4) and has ruled that selection for the post graduate course in Medical sciences should be inconsistent with article 335, as these entrants occupy posts in teaching Hospitals. The element of public interest in having the most meritorious students is also present at the stage of post graduate level in medical specialities like superspecialities. Those who have specialised medical knowledge in their chosen brancfc are able to treat better and more effectively. Patients who are sent to th» hospitals are treated by these students who enroll for such speciality! courses. At this level an ability to assimilate and acquire specttH knowledge is required. Therefore selection of the right calibre of tfclfl students is essential in the public interests at the level of specialised

postgraduate education.[26] In view of the supervening public interest which has to be balanced against the social equity of providing some opportunities to the backwards who are not able to qualify on the basis of marks obtained by them for post graduate learning. It is also for an expert body such as the medical council of India, to lay down the extent of reservations. Lowering of the marks, if any, are to be consistent with the broader public interest in having the most competent people for specialised training and the competing public interest in securing social justice and equality. Supreme Court in the recent case of Ashok Kumar Thakur v. Union of India, has once again emphasized that "once a candidate graduates from a university, he is said to be educationally forward and is ineligible for special benefits under article 15(5) of the Constitution for post-graduate and any further studies thereafter.[27] This is obviously for the purpose of balancing the requirements of article 15, 16 on the one hand and article 335 on the other.

Part-Ill

PERMANENCY FACTOR OF AAP

A very important point that is required to be understood and has remained a point of controversy is as to how long the scheme of reservation would continue. From the above discussion one might have noticed that out of the three broad types of classifications of affirmative action programmes it is only in case of reservations in legislative bodies under article 330 that some kind of time limit under article 334 has been talked about i.e. 10 years to begin with, which has been consistently extended and now stands at 60 i.e. until the end of 2010. Applying the principle of interpretation *"expressio unius est exclusio alterius",* i.e. that the express rule of similar nature in one provision of the statute excludes a similar reading in an alternative provision of the same statute, would result in an inference that the express mention of time limit in one type of affirmative action excludes the similar reading in other type of affirmative action programmes. This apparent position, as I argue here-under is not the reality. The constitutional position is rather different and the framers of the constitution intended to limit the application of the affirmative action programme. The affirmative action programme that we have under Indian Constitution, was never intended

* Preeti Shrivastava v. State of M.P., (1999) 7 SCC 120.

[:7] Vide Justice Dalveer Bhandari, in Ashok Kumar Thakur v. Union of India, Manu/SC/1397/2008

to be a permanent feature of Indian Constitution and that would also be the jurisprudential dictate on the issue.

Justice O'Connor's, one of the judges in the now famous case of Grutter v. Bollinger,[28] sought to articulate the legal position as to the longevity of affirmative action programme. He observed "We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.". Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, howevef compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that governmental use of race must have a logical end point. The Law School, too, concedes that all "race conscious programs must have reasonable durational limits."[29] Obviously Justice O'Connor is talking about the duration of affirmative action plans.

The fact that the framers of Indian Constitution too wanted that the affirmative action programme should not become a permanent feature of India's political system can be evidenced by the fact that they had included provisions like 340-341 in the Indian Constitution. Article 340 contemplates appointment of a commission to investigate the conditions of socially and educationally backward classes and such other matters as are referred to the commission.[30] Article 341 provides mat the President

[28] 123 United States Supreme Court, 2325 (2003)
[29] Quoting Palmore v. Sidoti, 466 US 429 (1984)
[30] **Appointment of a Commission to investigate the conditions of backward classes.** -
(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.
(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.
(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

may by notification in a particular state; after due consultations with governor in a particular state specify the castes, races or tribes which shall for the purpose of this constitution be deemed to be scheduled castes in relation to that state. The second clause of this article provides that the list of scheduled castes specified in the notification issued under clause (1) may be amended by a law passed by the Parliament. Article 342 provides a similar provision for Scheduled Tribes. However it may be noted that the courts are not precluded from going into the questions whether the criteria used by the state for the purpose are relevant or not.

The provisions of article 341 and 342 would also imply that if some new castes and tribes can be included by way of presidential order, some others may also be struck out on the basis of the rational that they have now ceased to be backward and therefore no more need the protective umbrella of affirmative action programme. The concept of creamy layer, enunciated by the Supreme Court in Indira Sawhney v. Union of India[32] and endorsed in the recent case of Ashok Kumar Thakur v. Union of India[33], whereby the affluent sections of the society have to be skimmed off and are not be considered eligible for affirmative action programme, is another instance which evidences the fact that the basic scheme of the constitution is not to treat the affirmative action programme as permanent feature of the constitution. Rather the intention of the framers of the constitution was to ensure that the scheduled castes and scheduled tribes would ultimately assimilate themselves fully in the political and national life of the country so much so that there would be no need for any special safeguards for them and there would be no need to draw a distinction between one citizen and another. Their condition would improve so much that they would feel their interests secure without any kind of reservations.

Further, it must be noted that the intention of the framers of the constitution by introducing provisions like article 17 and number of provisions for affirmative action programme as we have seen above, was to ensure the establishment of egalitarian social order by removing the evils of caste and race etc. If we continue to adhere to caste-lines for the purpose of providing benign discrimination the ideals of egalitarian social order would continue to evade us. Supreme Court in a number of judgments have been underlying this. In the recent case of Ashok

[31] Moosa v. Kerala, AIR 1960, Ker 355.
[K] AIR, 1993 SC 477 "Manu/SC/1397/2008

Kumar Thakur v. Union of India[34], Supreme Court once again emphasises that "As long as caste is a criterion, objective of casteless society can never be achieved — Exclusively economic criteria should be used — Government needs to ensure that for a period of ten years caste and other factors such as occupation/income/property holdings or similar measures of economic power may be taken into consideration and thereafter only economic criteria should prevail". This, once again can be taken as an affirmation of the fact that affirmative action programme in any form was not intended to be a permanent feature of the Constitution.

Part-IV

Concluding Observations:

It may be summed up by way of concluding remarks that the present model of affirmative action policies presents a very perplexing conundrum, which can be said to be sui generis. In such a system nothing can remain sans controversies. However an impartial observer of the Indian scene may not have difficulty in concluding that the contemporary discrimination policies have vigorously been followed in post independent India. And they have produced substantial redistributive effects as well. Reserved seats provide a substantial legislative presence and swell the flow of patronage, attention and favourable policies to scheduled castes and scheduled tribes. The reservation in jobs and educational institutions has given to a sizable portion of the beneficiary group earnings, and the security, information, patronage and prestige that go with government job in India. However this has not gone without costs. In fact the costs have been enormous. Lot of frustration amongst those who have been deprived off the jobs, which they would have got in the absence of preferential policies, undermining the efficiency of administration, underlining the differences and leading invidious discriminations, making the beneficiary groups dependent and blunting their development and initiative etc could be said to be costs of these preferential policies in the form of affirmative action programmes. The criticism that these policies have evoked and the~ debates that take place in India today, represent the vivacity of the India's democratic experiment. However to ensure that this vivacious experiment moves on a stronger footing, certain directions need be given to the process of affirmative action programmes and time appears to be ripe now to start some kind of roll-back process of reservation system as

'.Manu/SC/1397/2008

it has come to be established now so as to usher into a healthy democratic order.

INDIAN SEZ POLICY VIS-A-VIS SUSTAINABLE DEVELOPMENT: AN EVALUATION

ANANNYA GHOSH'
MADHUMITA SESHADRI"

Special economic zones have come into being from the year 2000. These zones are especially demarcated areas which are deemed as foreign territory for the purposes of trade, tariffs and duties. It is expected to lead to increased employment. However, issues like ecological degradation Human displacment, loss of agricultural land are posing problems for SEZs. It may prove to be quite expensive for the future generations.

1.0 INTRODUCTION

In the year 1991, India sought to liberalize its economy to lure foreign investments with newly introduced economic reforms which however did not result in any substantial growth. In order to remedy the situation the government reverted to EPZ's (Export Processing Zones) which unfortunately did not succeed. It was then that India took a leaf out of the significant success of the Chinese economy with the introduction of the SEZ scheme in 2000.

A Special Eeonomic Zone (SEZ) is an especially demarcated area of land, owned and operated by a private company, which is deemed to be foreign territory for the purpose of trade, duties and tariffs.'The main difference between an SEZ and EPZ is that the former is an integrated

* 5th Year, (2009), National Law University, Jodhpur
** 5th Year, (2009), National Law University, Jodhpur
[1] *SEZs and Land Acquisition: Factsheet for an Unconstitutional Economic Policy* available at <http://www.sacw.net/Nation/sezland_eng.pdf>, visited on 23rd July 2007.

township with fully developed infrastructure whereas an EPZ is just an industrial enclave.[2]

The commencement of the SEZ Act 2005 in February 2006 symbolized the dawn of a new economic regime. The SEZ Act is expected to elicit a large quantum of foreign and domestic investment in SEZs in infrastructure and productive capacity, leading to generation of additional economic activity and creation of employment opportunities.

Out of a total of 500 SEZ's which are in the pipeline, the government has already approved 237 in 19 states with 63 having been notified.[3] For this purpose, almost 150,000 hectares of land have been acquired by the government for this purpose thereby causing mass displacement instigating various protests and violence. Apart from displacement, the SEZ's have been instrumental in large scale environmental tribulations which however have not been accentuated so far.

The present article seeks to explore the various facets of the ramifications of such economic development. In this paper SEZs and their correlation with Eminent Domain has been discussed with specific reference to tribal displacement, agricultural and piscicultural annihilation. Sustainable development and the effect of SEZ's have been dealt with in the latter part of the paper. In conclusion, the paper seeks to provide a policy framework to manage trade liberalisation while preserving the environment.

2.0 EMINENT DOMAIN : A CONCEPT

The earliest references to this concept can be found in the work of Hugo de Groot ("Grotius") who first encapsulated the concept "eminent domain" as the power of government to take property from a citizen against that citizen's will in 1625.[4] The right of the state to expropriate private property for public use is regarded incidental to the state's sovereignty. It is founded on the superior claims of the whole community over an individual citizen[5]. Eminent Domain is a doctrine that has been upheld and cherished by almost every constitution in the world.

[2] Adarsh Ramanujan, *Legal Ruminations On Property Rights And SEZs In India: Despotism or Principled Governance?* (unpublished manuscript, on file with author)
[3] Ibid.
[4] Hugo Grotius, De Jure Belli Ac Pacis [On The Law of War and Peace] 219 (Francis W. Kelsey trans., 1925) (1625)
[5] *Central Control Board* v. *Cannon Brewery Co. Ltd.* (1919) AC 744

Examples include the Fifth Amendment to the U.S. Constitution,[6] Section 51 of the Australian Constitution,[7] Article 29 of the Japanese Constitution[8] and Article 14 of the German Constitution.[9] In India the 44th Amendment Act of 1978 to the Constitution replaced the Fundamental Right to Property under Article 19 (1) (f) and the related prqvisions in Article 31 by Article 300A[10] While the omnipresence of this concept vouches for its significance, the requirement of public purpose and the provision for adequate compensation ensure that the exercise of power does not go unbridled.

Eminent domain being accepted as an important attribute of sovereignty has not deterred debates as its propriety, especially considering the same is used in furtherance of economic development particularly in light of the popularity of Special Economic Zones. The policy so far being followed by the government of India has led to widespread displacement of indigenous tribes coupled with acquisition of fertile agricultural land. A hornet's nest has been kicked with the acquisition of residential and revenue-generating land for sustaining the same, which are private industries generating profit unto themselves, at the exclusion of the exchequers.

3.0 ANNIHILATION OF AGRICULTURE

Agriculture is a way of life; a tradition, which, for centuries, has shaped the thought, the outlook, the culture and the economic life of the people of India. Agriculture, is therefore central to all strategies for planned socio-economic development of the country. Rapid growth of agriculture is essential not only to achieve self-reliance at national level but also for household food security and to bring about equity in distribution of income and wealth resulting in rapid reduction in poverty levels. The nurturing of an agrarian economy which ensures food and nutritionJto its ever-growing masses, raw materials for its expanding industrial base and surpluses for exports, and a fair and equitable reward system for the

[6] No person shall be deprived of property without due process of law nor shall private property be taken for public use without just compensation .

It empowers the Federal Government to make laws with respect to "acquisition of property on just terms from any state or person for any purpose for which Parliament has power to make laws."

[8] The right to own or to hold property is inviolable and that private property may be taken for public use upon just compensation

[9] The right to ownership and/or inheritance is guaranteed and expropriation of private property is permitted only in the public weal and only upon payment of just compensation.

[10] No person shall be deprived of his.property save by authority of law.

farming community for the services they provide to the society, remains the mainstay of reforms in the agriculture sector.

Agriculture in India is one of the most prominent sectors in its economy. Agriculture and allied sectors like forestry, logging and fishing accounted for 18.6% of the GDP in 2005 and employed 60% of the country's population." Agri-exports account for about 13 to 18 percent of total annual exports of the country.[12] About 43 % of India's geographical area is used for agricultural activity.[13] Agriculture has been the largest economic sector and plays a significant role in the overall socio-economic development of India.

Important as agriculture is in India, with the advent of the new economic policy of liberalisation (SEZ's in particular), it has been given a backseat by the state. Fertile agriculturally potent lands are being acquired by the state to be bestowed on private parties under the garb of setting up the economically viable SEZ's. Almost 150,000 hectares of land are in the process of being acquired for the same,[14] which being typically multicropped and capable of producing close to 1 million tons of foodgrains will endanger the food security of the country.

Estimates show that at least 10 lakh (1,000,000) people, including 114,000 farming households (each household on an average comprising five members) and an additional 82,000 farm worker families who are primarily dependent upon agriculture for their livelihood and survival, shall have to be evicted for the same resulting in a total loss of income amounting to at least Rs. 212 crores a year notwithstanding the loss on other incomes due to the demise of local rural economies.[15] While compensation (monetary or otherwise) is sought to be paid for the loss incurred, doubts remain as to the adequacy of the same.

According to the NSSO's (National Sample Survey Organisation) sixth survey on Consumer Expenditure and Employment & Unemployment conducted in the 55th round (July 1999-June 2000), in rural India, 31% of

[1'] Asis Kumar Pain, Agrarian Crisis In India: An Overview (page number of source?) (2007)
[12] <http://indiabudget.nic.in/es2001-02/chapt2002/chap816.pdf> as visited on 26th July 2007
[13] *Supra* note 11
[14] As per the Ministry of Commerce & Industry [15]
Supra note 2

the population was engaged as agricultural labourers.[16] As of July, 2004 to June, 2005, 241 out of every 1000 households are employed as agricultural labour.[17] While compensation is being discussed only for those who hold titles to land, no provision has been made for those who don't such as the wage paid manual laborers. On an average, the people associated with the agriculture and allied activities, are educationally and economically backward.[18] Thus they might not possess the necessary skills to accommodate themselves into an urban economy. That apart, the ability of the agriculture sector to generate employment is dwindling[19] making it futile to consider similar employment elsewhere.

4.0 TREPIDATION OF THE INDIGENOUS

People everywhere, often without realizing it, have been influenced by the cultures and achievements of indigenous peoples. From the food on our tables, the words in our languages and the medicines we use daily for everything from headaches to heart disease, the contribution of indigenous peoples to modern civilization is pervasive. Indigenous peoples are descendants of the original inhabitants of many lands, strikingly varied in their cultures, religions and patterns of social and economic organization. At least 5,000 indigenous groups can be distinguished by linguistic and cultural differences and by geographical separation, all of who retain a strong sense of their own distinct cultures, the most salient feature of which is a special relationship with the environment.[20] The world's estimated 300 million indigenous people are spread across the world in more than 70 countries, of which China and India together house more than 150 million.

Indigenous people popularly referred to as *Adivasis,* have been christened as "Scheduled Tribes" by the government of India. The 2001 census formally classified 84.33 million persons as members of

[16] NSSO, NSS Report NO. 472: Differences In Level Of Consumption Among Socio-Economic Groups 13-14(1999-2000)
[17] NSSO, NSS Report No. 515: Employment And Unemployment Situation In India 27 (2004-05)
[18] NSSO, NSS Report No. 473: Literacy And Levels Of Education In India 3 (1999-2000); NSSO, NSS Report No. 498: Indebtedness Of Farmer Households 10, 25 (2003)
[19] Planning Commission, Special Group on Targeting 10 Million Employment Opportunities, per year (2002)
[20] <http://www.ciesin.columbia.edu/docs/010-000a/Year_Worlds_Indig.html> as visited on 26th July 2007

Scheduled Tribes, corresponding to 8.2% of the total population.[21] While the census recognizes only 461 groups as tribes, estimates indicate that the number reaches up to 635. India's tribal people are among the poorest in the country. A 1991 census showed that 52.17% of them live below the poverty line.[22]

The degradation of the physical environment of the territories of indigenous peoples by outside economic development acts as a persistent concern.[23] In order to foster economic development, there remains ever extending demand of lands and resources that may include those that lie within the territories of indigenous peoples confronting the governments with choosing between protecting indigenous land policies and pursuing development.[24] Under this march of national economic development at a relentless pace indigenous groups have seen their traditional cultures eroded and their landholdings confiscated or signed away as part of the economic coercion to which they were subjected. Compensation, return, and restitution to undamaged traditional lands are ideal solutions which remain unimplemented in many instances. In such a backdrop it would not be an exaggeration to say that some indigenous peoples live under the threat of extinction. The most fundamental step toward protecting indigenous people is to guarantee their legal right to their traditional territory

Consequent to displacement, when indigenous people are forced to assimilate into new areas they might have to endure discrimination, if not outright hostility, from the local population. Unquestionably, the disruption of the relationship between indigenous peoples and their environment threatens their very existence as a people, not only their cultural existence, but also their physical well-being.[2] These issues have been addressed by various International human rights treaties.[26] Both

[21] Christian Erni & Shimreichon, *Indigenous and Tribal Peoples in India,* ILO (Desk Review) (2001) as cited from <http://iwgia.inforce.dk/swl8239.asp> visited on 25th July 2007

[22] *Ibid*

[23] Johanna Son, *Asia-Development: ASDB, Indigenous Groups Size Each Other Up,* 1996 WL 7881028

[24] Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia,* 30 COLUM. J.L. & Soc. PROBS. 529

"" William Andrew Shutkin. *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment,* 31 VA. J. INT'L L. 479 (1991) "[6] See the International Bill of Human Rights, which includes the Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217 A (111), U.N. Doc. A/810 (1948); the International Covenant of Civil and Political Rights, adopted Dec. 16, 1966,

ILO conventions 107 and 169 address the question of displacement. The provisions attempt to restrict arbitrary forced removal from the land and provide for basic guarantees, such as the participation of the affected group in the processes that affect them.[27] Convention 107 assumes both that assimilation should not be too harsh and that it will be more effective if indigenous peoples are willing participants while Convention 169 ostensibly aims at ensuring "respect for the cultures, ways of life and traditional institutions of these peoples," as well as "effective involvement of these peoples in decisions that affect them."[28] While both conventions taken at face value, recognize the rights of indigenous peoples over their traditional lands and resources, however they can be criticized for tolerating, if not legitimizing, dispossession whenever a government wishes to put indigenous peoples' lands to alternative use.

While the UN failed to promulgate a binding instrument to serve the rights of the indigenous people, it crafted a Draft Declaration on the Rights of Indigenous Peoples which includes a number of extraordinarily progressive clauses.[29] This apart, the Rio Declaration refers to indigenous peoples and their communities wherein Agenda 21 provides, inter alia, for the recognition and strengthening of the role of indigenous peoples and their communities, for the protection of their lands from environmentally unsound policies, and for the development of "national dispute-resolution arrangements in, relation to settlement of land and

G.A. Res. 2200A (XXI), art. 49; and the International Covenant of Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 2200 (XXI), art. 27.

[27] Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Jun. 26, 1957, 328 U.N.T.S. 247 [hereinafter ILO Convention 107]

[28] Chris Tennant, *"A Permanent Hope for Humanity": The Representation of Indigenous Peoples in the International Legal Literature from 1945-1992,* HUM. RTS. Q.; I.L.O., Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report VI (1) at 65. International Labour Conference, 75th Sess. (1988)

[29] Report of the Working Group on Indigenous Populations on Its Eleventh Session, U.N. Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Protection of Minorities, 11th Sess., Annex I, Agenda Item 14, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993);

Article 27: Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status. Article 28: Indigenous peoples have the right to the . . . restoration ... of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation.

resource-management concerns." However, the cumbersome mechanisms available under UN and other intergovernmental regimes, compounded by the lack of a definition of and consensus on the term "collective rights" in the case of indigenous peoples, render the right to their environment nonjusticiable.[31]

With the acquisition of tribal inhabited lands throughout India, it is ultimately upon the municipal legislations to make a significant impact in alleviating the position of these indigenous tribes in the context of land acquisitions for SEZ's. While The National Policy on Relief and Rehabilitation, 2006 has been formulated by the government, a lot depends on the effective implementation of the same.

5.0 PUBLIC PURPOSE?

It is imperative to evaluate the requirement of public purpose for the acquisition of land considering both in municipal law and international law, a coherent definition of public use has proven to be elusive, varying with time and place. This can be perceived from the varying definitions of the same given by eminent authorities. While Grotius observed that property of individuals was subject to sovereign power to augment what he termed "public utility"[32], Pufendorf states that there is no occasion for exercising the right of eminent domain unless the States' *necessity* requires it.[33]

In the case of *Daulat Singh Surana and Ors.* v. *First Land Acquisition Collector and Ors.*[M], the Apex Court of India defined public purpose as:

> *"Public purpose will include a purpose in which the general interest of community as opposed to the interest of an individual is directly or indirectly involved. Individual interest must give way to public interest as far*

[30] Agenda 21, United Nations Conference on Environment and Development, U.N. Doc.A/CONF. 151/26 (1992), § III, chap. 26, at 15-18 paras. 26.1, 26.3, 26.6 (a).

[31] Maria Stavroupoulou, *Indigenous Peoples Displaced From Their Environment: Is There Adequate Protection?,* 5 Colo. J. INT'L ENVTL. L. & POL'Y 105

[32] Supra note 4

"Samuel Von Pufendorf, de officio hominis et civis juxta legem naturalem [on the duty of man and citizen according to natural law] Ch. 15 (on the power of sovereign authority over property within the state) 166 (Michael Silverthome trans. & James Tully ed., 1991) (1673), available at <http://www.constitution.org/puf/puf-dut_215.txt> [34] 2006 (11) SCALE 482

> *as public purpose in respect of acquisition of land is concerned."*

Whether Economic Development can be included under this definition has been a cause of debate for a long time. There have been cases holding that the taking of private property for industrial or economic development is a valid public purpose. [5] At the same time, Courts have also held that mere economic development by transferring the property to private developers and private business houses will not amount to "public use".[36] The *Idaho* Supreme Court elucidated the link between economic growth and a government's taking of property for public use in *Potlatch Lumber Co.* v. *Peterson?*[1] The court observed that:[3]

> *"...To follow it in the application of that power in many instances would greatly hamper, retard, and, in many instances, defeat the development of the great natural advantages, resources, and industrial opportunities of many of the states of the Union. "*

The Michigan Supreme Court, however, revisited this view in 2004 in County of *Wayne v. Hathcock.*[39] Overruling its previous decision, the Court found that the use of the power of eminent domain to transfer the property to private entities was justified only under three circumstances:[40]

[35] *General Bldg. Contractors. L.L.C.* v. *Board of Shawnee County Com'rs, Shawnee County,* 66 P.3d 873 (Kan. 2003); *Prince George's County* v *Collington Crossroads, Inc.* (1975) 275 Md 171, 339 A2d 278; Cannata v New York (1962) 11 NY2d 210, 227 NYS2d 903, 182 NE2d 395, app dismd 371 US 4, 9 L Ed 2d 48, 83 S Ct 28; *Northeast Parent & Child Soc.* v *Schenectady Industrial Dev. Agency* (1985, 3d Dept) 114 App Div 2d 741, 494 NYS2d 503; Re *Petition of Port of Grays Harbor* (1982) 30 Wash App 855, 638 P2d 633, reviewed in 97 Wash 2d 1010

[16] *County of Wayne* v. *Hathcock,* 684 N.W.2d 765 (Mich. 2004) overruling *Poletown Neighborhood Council* v. *City of Detroit,* 410 Mich. 616; *Little Rock* v *Raines* (1967) 241 Ark 1071, 411 SW2d 486; *Housing Authority of Atlanta* v *Johnson* (1953) 209 Ga 560, 74 SE2d 891; Opinion of Justices of Supreme Judicial Court, etc. (1957) 152 Me 440, 131 A2d 904; *Amen* v *Dearborn* (1973, ED Mich) 363 F Supp 1267, reviewed on other grounds (CA6 Mich) 532 F2d 554, 21 FR Serv 2d 669, later app (CA6 Mich) 718 F2d 789, cert den 465 US 1101, 80 L Ed 2d 127, 104 S Ct 1596 (applying Michigan law); Hogue v Port of Seattle (1959) 54 Wash 2d 799, 341 P2d 171

[37] 88 P. 426 (Idaho 1906)

[38] *Id,* at 430-431

[39] 684 N.W.2d 765 (Mich. 2004)

[40] *Id.* at 782-784: The Court followed the analysis in the dissenting opinion of Judge Ryan in Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616

- Where "public necessity of the extreme sort" requires collective action;
- Where the property remains subject to public oversight after transfer to private entity; and
- Where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred

Thus, as laid down by the Supreme Court of India in *Chairman, Indore Vikas Pradhikaran* v. *Pure Industrial Cock and Chem. Ltd. and Ors.* [41] Public purpose has to be determined as per the facts and circumstances of the case. In *Municipal Corporation of the city of Ahmedabad and Ors.* v. *Jan Mohammed Usmanbhai and Anr.,*[42] a Constitutional Bench of the Court held that the question of the interest of general public is of wide import comprehending, among other things, *economic welfare* of the public. According to K.S. Hedge J., *"...there is no denying the fact that starting of a new industry is in public interest... There is also no denying the fact that the industrialization of an area is in public interest"*[47.] Later cases have affirmed this view.[44] However, it needs to be noted that with the already mammoth population, Loss of land to SEZ's is especially grave, as available land per capita is already relatively low.

In view of the above and the latter discussion it is worth a thought as to whether any public purpose is finally being served at **all.**

6,0 ENVIRONMENTAL CONCERNS

It is imperative in any state seeking sustainable development that a balance be achieved between economic development and environmental protection. It is accepted that in a country like India, the act of balancing the right of future generations to a healthy environment with the current needs of India's burgeoning population is no easy task, therefore leading to conflicting interests resulting from the need for economic development as also the protection of natural heritage. It is for this reason that the government ought not to loose sight of the long term goals of sustainable development.

[41] Decided On: 15.05.2007 para 64
[42] (1986) 3 SCC 20
[43] *Jage Ram* v. *State of Haryana,* (1971) 1 SCC 671
[44] *R.L. Arora* v. *State ofUttar Pradesh.* AIR 1964 SC 1230; *Pratibha Nema and Ors.* v. *State ofM.P. and Ors..* (2003) 10 SCC 626

The rapid growth of industry and population in the formerly agrarian and local fishing economies of the SEZs has created intense environmental pressures on land, water, and air.[45] India being populous as it is, a further increase in population due to SEZ's does not help abating the environmental strain in any way. An increase in the population leads to generation of additional waste from industry, animals, and humans, which in turn defile air, water, and land resources creating conditions of poor hygiene. Rapid depletion of water resources by industries plagues the country with water pollution and shortages. Ambitious plans for waste recycling and reutilization have proven derisory due to the poor implementation of the same.[46] The creations of a world class infrastructure in these areas cause additional stress on the already fragile ecology. Areas in the SEZs previously filled with crops and forests are being bulldozed to make room for landfills, deforestation and soil erosion. These environmental pressures in the world's second most populous country ought to ring the knell of alarm because Indian urbanization and industrialization are only in their infancy.[48] Because pollution does not respect national boundaries, environmental degradation in the SEZs and the rest of this modernizing country has the potential to create global problems: greenhouse gas-induced climactic change, destruction of ozone layer and hampering the terrestrial and aquatic ecosystems.[49]

The Indian Constitution is one of the few in the world that contains specific provisions on the environment. The Directive Principles of State Policy[50] and the Fundamental Duties[51] explicitly enunciate the national commitment to protect arid improve the environment. Article 21 protects the right to life as a fundamental right has been interpreted to include the protection and preservation of environment, ecological balance, free

[45] H. Jeffrey Leonard, *Confronting Industrial Pollution in Rapidly Industrializing Countries: Myths, Pitfalls, and Opportunities,* 12 ECOLOGY L.Q. 779, 781 (1985).
[46] Armin Rosencranz & Kathleen D. Yurchak, *Progress on the Environmental Front: The Regulation Of Industry And Development In India,* 19 HASTINGS INT'L & COMP. L. REV. 489
[47] Joseph R. Profaizer, *Economic Development and Environmental Law In China's Special Economic Zones,* 28 TEX. INT'L L.J. 319
[4] Zhou Dadi, *Environmental Considerations in the Economic Development of China,* 9 ARIZ. J. INT'L & COMP. L. 221, 224-25 (1992)
[49] John E. Bonine & Thomas O. Mcgarity, The Law of Environmental Protection 586 (1992); see also Alan Neff, *Not in Their Backyards Either: A Proposal for a Foreign Environmental Practices Act,*\l ECOLOGY L.Q. 477, 480 (1990)
[50] Article 48A
[51] Article 51A: Article 51-g states: "it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.

from pollution of air and water sanitation without which life cannot be enjoyed. In Pursuance of the above, the legislature has enacted-various environmental legislations, rules and notifications.

The Environment (Protection) Act of 1986 defines "Environmental pollution" to include any solid, liquid, or gaseous substance present in such concentrations that may be, or tend to be, injurious to the environment.[52] That apart specific forms of pollution are sought to be redressed through legislations such as The Water (Prevention and Control of Pollution) Act of 1974, The Air (Prevention and Control of Pollution) Act of 1981, The The Hazardous Waste Management and Handling Rules of 1989, The Public Liability Insurance Act of 1991, The Environmental Impact Assessment Notification of 1994 and so forth. Therefore, apart from the constitutional guarantees, India's legislation also provides a check on environmentally degrading practices. However, these regulations have proven only marginally effective at controlling pollution and preventing harm.[53] This is often the result of industries disregarding the regulatory scheme and government officials neglecting to enforce it.[54] Even when precautionary measures are enforced, the results of such measures are often disregarded in hopes of attracting investment, even at the cost of the environment.[55]

A three pronged approach can be used to consider the bungled working of the environmental policies. Firstly, owing to the weight attached to alluring foreign investment to bring about brisk economic development, environmental concerns inevitable occupy a backseat. This can be seen from various legislative policies and the interpretation bestowed by the judiciary. Neither the SEZ Act nor any subsequent notifications make provisions for the preservation of the environment with the exception of the latest 2007 notification which merely mentions the need for SEZ's to comply with environmental requirements. Therefore, the SEZ's approved before March 2007 have had no need to comply with the environmental regulations. It is worth mentioning that the EIA notification exempts SEZ's from public hearing. Further, with the mushrooming of SEZ's in coastal areas, the CRZ notifications are fast loosing relevance.

Section 2(c)
Supra note 46

The otherwise active judiciary remains firm on its stance of non interference with economic policies of the government.[56] That is to say, in matters involving economic development, the Courts are inclined towards wide deference to legislative determination. In *Shri Sitaram Sugar Co. Ltd. and Anr.* v. *Union of India and Ors.,*[57] it was held that judicial review is not concerned with matters of economic policy. The opinion of the Court in *Delhi Science Forum and Others* v. *Union of India and Anr.,*[58] clearly summarizes the concerns of the Court:

> *What should be the role of the state in the economic development of the nation? How the resources of the country shall be used? How the goals fixed shall be attained? What are to be the safeguards to prevent the abuse of the economic power...All these questions have to be answered by a vigilant parliament. Courts have their limitations-because these issues rest with the policy makers for the nation. "*

In innumerable number of cases, although on a different context regarding environment, the Apex Court has consistently maintained that economic development cannot be sacrificed.[59] Thus the Judiciary has put economic development on a higher pedestal than environmental protection.[60] Secondly, the general coverage of issues by the Constitution and the Environmental Protection Laws fail to keep pace with the enormous environmental stress arising due to SEZs. The Environmental Protection Act, 1986 does not address issues of deforestation, soil erosion and so forth, which are the direct implications of SEZ's and are no less important than the other forms of pollution. This is further elucidated by the fact that environmental clearance is not required for the purpose of setting up information technology SEZ's which though does pollute the environment in a conventional way but leads to widespread deforestation and soil erosion.

[56] Premium Granites and Another v. State of T. N. and Others (1994) 2 SCC 691 (715) (Para 54); Narmada Bachao Andolan v. Union of India and Others, (2000) 10 SSC 664 (762) (Para 229)
[57](1990)3SCC223,para.57
[58] (1996) 2 SCC 405, 413; *cited approvingly in* BALCO Employees Union (Regd.) v. UOI, AIR 2002 SC 350
[59] *Indian Council for Enviro-Legal Action* v. *Union of India,* (1993) 5 SCC 281, 296; *Consumer Education and Research Society v. Union of India & Ors.,* (2000) 2 SCC 599; *Essar Oil Ltd.* v. *Halar Utkarsh Samiti and Ors..* (2003) 8 SCC 369
[60] *K.M Chinappa v. Union of India,* AIR 2003 SC 724

Finally, Environmental Impact Assessments which have been made mandatory by the Environmental Impact Assessment Notifications, 1994, are carried out ineffectively, if at all paid heed to. The EIA in India has been largely discretionary. Businesses and investors have approached the process lightly and government officials have disregarded the results in the name of development. The mandated EIA category has been narrowed to construction projects, thereby deregulating other activities such as felling of trees, acquisition of land, and other project phases that do not explicitly involve construction.

7.0 ECONOMIC LIBERALISATION VS. SUSTAINABLE DEVELOPMENT

"Humanity stands at a defining moment in history".

So started the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in June 1992 where the nations of the world agreed to an ambitious and unprecedented global plan of action for addressing the related and growing problems of environmental degradation and poverty[61] and along came the concept of sustainable development in Agenda 21. Sustainable development as a concept was first coined by the World Commission on Environment and Development (WCED) in their report *"Our Common Future"* (commonly referred to as Brundtland Report). The report sought to recapture the spirit of the United Nations Conference on the Human Environment i.e. the Stockholm Conference, which had introduced environmental concerns to the formal political development sphere. The report defines sustainable development as *"Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."* Sustainable development is a conceptual framework for achieving economic development that is socially equitable and protective of the natural resources and seeks to refute the conservative view that environmental degradation is a small price to pay for progress. While inaugurating the principle of sustainable development, the Rio Declaration provided for various principles to attain the same.[62]

UNCED makes sustainable development an internationally recognized normative framework for guiding and evaluating the behavior of national

John C. Dernbach, *Sustainable Development as A Framework For National Governance,* 49 CASE W. RES. L. REV. 1

<[62] See Polluter Pays Principle, Precautionary Principle, Common but Differential Responsibility, Technology Transfer and so forth.

governments. To a great extent, domestic acceptance of international norms (binding or otherwise) is based on acceptance of the values on which those norms are premised. India has accepted sustainable development as a part of its customary law as was held by the Apex court of India in the case of *Vellore Citizen's Welfare Forum* v. *UOi* and has been declared *"Magna Carta of our environment"*[65].

Notwithstanding the fact that sustainable development is ingrained in our customary laws, while faced the choice between sustainable development and economic development, the government steers towards the latter. Customary International Law empowers every state with the right to use its resources to pursue its own economic development needs.[66] However, the complex and transboundary nature of current environmental problems cropping out of economic needs has turned into a global issue thereby intricately linking ecology, economics and politics hence demanding attention. Taking into account the inherent economic need as well as international obligations, the Apex Court of India ruled in *Intellectual Forum, Tirupathi* v. *State ofA.P. and Ors.*[67],

> "*... merely asserting an intention for development will not be enough to sanction the destruction of local ecological resources. What this Court should follow is a principle of sustainable development and find a balance between the developmental needs which the respondents assert, and the environmental degradation...*"

As has been categorically stated in the Stockholm Conference, economic and social development is essential for ensuring a favorable living and working environment for man. Three main focus with respect to the above issue can be found in the planning and management of human settlements; natural resources and aspects of development, which could be seen to include developing countries; and the identification and control of pollutants.[68] While all the attention has been focused on SEZ's

Philippe Sands, *International Law in the Field of Sustainable Development,* 1994 BRIT. Y.B.INT'LL. 303,361

[64] (1996) 5 SCC 647

[65] *Essar Oil* v. *Halar Utkarsh Samiti* (2004) 2 SCC 392 para 26-28

Seidl-Hohenveldern, *International Economic Law: General Course on Public International Law,* 198 R.C.A.D.I. 21, 50; Declaration on The Right To Development, G.A.Res.41/128, U.N.G.A.O.R., 41st Sess., U.N. Doc.A/RES/41/128 (1987), at 21; Permanent Sovereignty Over Natural Resources, G.A.Res.l803(XVII), 2 1LM 223 (1963)

[67] (2006) 3 SCC 549 para 58

[68] Patricia Birnie, *Environmental Protection and Development,* 20 MELB. U. L. REV. 66 (1995)

as pathways to prompt economic development, the social and environmental issues arising from the same are being largely neglected.

The right to livelihood is part of a person's right to life.[69] The essence is captured by Justice Chandrachud. He says:[70]

> *"An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. "*

Thus in case of an agriculturalist, acquisition of his land directly affects his occupation and thus his livelihood.

In lieu of the reports quoted priori, and those on literacy establish that alternative employment would be unfeasible for the large number of displaced agriculturalists. The latest survey of literacy[71] indicates that: on an average, only 56% of rural India is literate; out of this, 19% are literate, but below primary education. Hardly 6% are educated up to the secondary level, 3% up to higher secondary and only 2% graduate and above. Thus on an average, the people associated with the agriculture and allied activities, are educationally and economically backward. Thus they do will not possess the necessary skills to accommodate themselves into an urban economy.

According to the WTO Secretariat, a large share of the industries approved to operate in the SEZs seems to be information technology based industries.[72] The jobs the SEZs are likely to create will be of the high skill variety, which the displaced farmers (with different skills or with low skills) would not be able to perform. Thus, the cost effectiveness of the schemes in generating incremental investment and employment is open to question.[7]

[69] *DTC v. DTC Mazdoor Congress* AIR 1991 SC 101, paras.223, 243, 259, 264; *M. Paul Anthony* v. *Bihar Gold Mines Ltd.* (1999) 3 SCC 679

[70] *Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SGC 545 at para.32

[71] NSSO, NSS REPORT NO. 473: LITERACY AND LEVELS OF EDUCATION IN INDIA 3 (1999-2000)

[72] Secretariat, WTO, *Trade Policy Review - India,* WT/TPR/S/182, p.66 (2007) [hereinafter TPR-India]

[73] TPR-India, supra note 146, at p.ix "...These figures suggest that the amount of investment generated by SEZs falls far short of the associated tax revenues forgone and

It has been recognized by the international community that the eradication of poverty is an indispensable requirement of sustainable development. With a total 150,000 hectares of land being acquired and loss of livelihood as mentioned earlier, poverty is an inevitable consequence as is the endangering of the food security of India.

The Stockholm and Rio declarations, as well as in the World Charter for Nature[74] and Agenda 21 are pertinent to displacement issues and though cannot be considered binding law, the process has led to the evolution of the following principles, some of which may already be considered customary law: [5]

- Attention and efforts should focus on safeguarding sustainable development, especially in the most vulnerable areas more prone to disaster and to generating refugees and displaced persons.
- Appropriate assessment in planning and carrying out development policies and projects should be ensured. This assessment should include the participation of those affected, especially if policies and projects result in displacement and forced resettlement.
- International organizations, states, nongovernmental organizations, and the like should cooperate fully and effectively, especially where they are involved in activities that may have adverse effects on the environment.
- To provide for the preceding principles, legislation should be adopted that makes the "right to the environment" justiciable.

Balance between economic development and rights of the displaced population can be achieved by a Four Criteria approach involving the commitment of state parties, institution of land claims procedures, secure titles to land, and the control of and participation in development projects by indigenous peoples.[76]

that the average cost of the jobs created is very high, all of which casts doubt on the cost-effectiveness of SEZs. The Reserve Bank of India has also noted that the revenue loss in providing incentives may be justified only if the SEZs ensure forward and backward linkages with the domestic economy."

[74] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/1995/2 (1994) (hereinafter Draft Declaration).

[75] Supra note 24

[75] Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm,* 16 Yale J. Int'l L. 127, 145, 155-64 (1991); Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?,* 7 HARV. HUM. RTS. J. 33, 34(1994)

The probability of any newly industrialized developing country seeking to enter the world market without destroying the land, air, and water on which all life depends is marginal. This is owing to green protectionism which is not beneficial to a developing economy for the inherent fear of alienating foreign investments and annihilation of its competitive position within the international community. However complete disregard of the environment might still result in deterring Trans-National corporations from setting up business.

While the government may have instituted economic reforms that have opened up large foreign investment opportunities in all sectors of India's economy, legislation designed to protect the environment remains largely aspirational. India's current emphasis on economic development seems to eclipse its environmental protection efforts.[77]

Therefore, even under circumstance of existing legislations, the implementation of the same is hardly more than a sham. A major setback in the system remains the fact that while Transnational corporations are the primary holders of technologies and are not bound by any agreement to provide them on special and/or preferential terms to developing countries, no liability can be fixed on them unilaterally by the host country for violations of national environmental legislations, thereby leaving a lot to be desired.

8.0 MAKING SEZS SUSTAINABLE: A PROSPECTIVE ROADMAP

The authors would like to articulate that while importance is being placed on economic development, it ought not to be to such an extent that it results in complete disregard to the other aspects of sustainable development. In furtherance of this objective, the authors suggest a three fold recommendation for sustainable development in relation to SEZs.

8.1 Environment

- Green belts must be structured around the areas hosting the SEZs to counter-balance any ill-effects which might result.
- Corporate-Environmental-Responsibility ought to be imposed on the Transnational Corporations to sustain a healthy environment in the host nation.
- Transnational corporations must be made to comply with provisions relating to transfer of technology as mentioned by Agenda 21 of the Rio Declaration.

Supra Note 46

8.2 Displacement

- Wastelands could be reserved for the SEZs instead of allotting fertile agricultural belts and fisheries.
- Social Impact Assessment ought to be undertaken with public-hearing being made mandatory. Disregard of the same should be made punishable with substantial fine, if not for cancellation of approval. Provisions of the Central Government Policy on Relief and Rehabilitation 2006 have to be complied with.
- Alternate lands must be provided for displaced agriculturalists.
- Landless agricultural labourers should be provided training adequate for them to be absorbed by the SEZs.
- Assimilation issues of displaced tribal population ought to be appropriately addressed.

8.3 Legal Framework

- The regional and local governments in which SEZs are located should create independent institutions to assist in protecting the region from the effects of the same.
- Environmental Laws ought to be amended to cater to the problems posed by the growth of SEZs and ought to be enforced with greater efficacy and severity in these areas..
- Additional regional laws should be adapted and made effective to the specific issues of the SEZs.
- Compliance being the backbone of the successful working of any legislation, the laws relating to SEZ need to be made more stringent by introducing methods of sizeable penalties in the form of fines and cancellation of approval for better implementation.
- Tax benefits must be made to vary with the degree of conformity with the relevant legislations.
- If an institution is found guilty of pollution, the unit must assume the expenses for eradicating the pollution, and compensate for the damages.

9.0 CONCLUSION

SEZ's as a concept has been outlined and the role played in nature is well understood.The pursuit of these infrastructural developments leads to displacement inducing poverty, loss of livelihood, an imminent threat to food security due to reasons of annihilation of agriculture, and results

in large scale pollution of our natural resources. It can be seen as to how in the name of economic innovation and progress, rampant destruction of the natural eco-system is being systematically undertaken.

The government has become keener than ever to attract foreign investment since the launch of the market reform program in 1991 leading to burgeoning of SEZ's all over the country. The Indian aspiration of the Chinese scenario might have ignored the seminal factor that China managed to limit the number of SEZ's to seven and further allowed them to be set up mostly in coastal wastelands. Indian has taken economic liberalisation to an extreme by seeking to approve close to 500 SEZ's most of which are based on fertile agricultural lands. With the huge tax holidays and immunities from national legislations provided to the SEZ's, any economic advantage arising for the development of the same has been inconsequential at the same time leading to a not-so sustainable development.

Environmental legislations designed to guard India's environment and citizens from environmental obliteration have proven to be inadequate due to either inherent defects in the legislation or dismal implementation policies. The Indian Government aspiring to achieve a competitive advantage in the world market, has ignored irresponsible multinational behaviour, at the expense of our future generations.

THE ROLES FOR SCIENCE & TECHNOLOGY ON PATENT LITIGATION

MEI-HSIN WANG
&
ALEXANDER, SEA-CHERN, CHIU*

Litigation plague has become a major worry for investors, assignees, inventors and related personnel, even holding a quality patent may not be enough' to secure freedom from patent litigation. As long as the patented technology involves considerable profits, competitors will try every possible measure to take over the market, sales order or technology, sometimes aiming to merge or probing core technology, moreover for marketing awareness or brand promotion. Patent infringement allegedly takes place through complicated technical data or wordings, invalid patents through anticipation by 35 U.S.C. § 102 or obviousness by 35 U.S.C. § 103, or based on details such as priority dates, publicizing dates, references, filing dates, etc. Inequitable conducts are a new fashion with various tactics like attacking missing labels on embodiments,[1] unsupported specification[2], obvious to try,[3] experimental details,[4] chemical structure's similarity upon biological efficacy,[5] similarity between dehydrated form and un-dehydrated form,[6] formulation or

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[1] Aventis Pharma v. Amphastar pharmaceutical & Teva Pharmaceutical, 2007-1280, www.uscourts.cafc.gov, decided on 14 May 2008

[2] Genentech, Inc. v. Novo Nordisk, 108 F.3d 136142 U.S.P.Q.2d 1001 , 1997

[3] Merck & Co., Inc v Biocraft Laboratories Inc., 874 F.2d, 804-811 (Fed. Cir. 1989)

[4] Apotex Corp. v. Merck & Co., Inc, 2006-1405, www.uscourts.cafc.gov, decided on 16 November 2007

[5] Takeda Chemical Industry v. Alphapharm PTY & Genpharm, 2006-1329, www.uscourts.cafc.gov, decided on 28 Jun., 2007

[6] Tap Pharmaceutical & Takeda Chemical Industry & Wako Pure Chemical Industries & Abbott Laboratories v OWL Pharmaceuticals & Oakwood Laboratories, 2003-1634-1635, www.uscourts.cafc.gov, decided on 18 May 2005

excepient differences.[7] To a certain extent even late filing information disclosure statements (IDS)[8] for new references and crime fraud exception to the attorney-client privilege[9] are common tactics in intellectual property disputes. The counteractions will be described in details with cases.

I. BACKGROUND

1.1: *Rationale*

Filing of patent lawsuits to attack the competitors is usually done in order to take over the market, sales order or technology, but is sometimes aimed at merging or probing competitor core technology. Moreover, marketing awareness or brand promotion can be the purpose for an enterprise against competitors using accusations of patent infringement, anticipation, using references to invalid patents, obviousness, obvious to try, etc, as common tactics during intellectual property disputes. However, science & technology does play an important role in patent litigation. Patents are approved based on advanced, improved or innovative findings, therefore understanding the foundation of the science and technology is a basic preparation before going to the courts. In addition, the basic attacking tactics in litigation require a careful study of the definitions and legal rationales together with the technology related to patents. The following are commonly argued intellectual property issues.

1.2: *Infringement*

Infringement, literally as well as under the Doctrine of Equivalents, is the most common case in patent litigation. It is a genuine issue requiring material fact, and the court will request a paticularized testimony and linking argument to the ʳinsubstantiality of the differencesj between the claimed invention and the accused device or process, or with respect to the function, way, result test to support a finding of infringement under the Doctrine of Equivalents. The evidence must be presented on a limited-by limited basis, however generalized testimony for the overall similarity between the claims and the accused infringer's product or process will not suffice.

[7] In re Omeprazole, AstraZeneca v Andrx pharmaceutical & Genpharm, 04-1562-1563-1589, www.uscourts.cafc.gov, decided on 18 May 2005
[8] See Supra note 6
[9] See supra note 4

Infringement under the the Doctrine of Equivalents does not raise a genuine issue of material fact,[10] "paticularized testimony and linking argument as to the ""insubstantiality of the differences j between the claimed invention and the accused device or process is requested. In addition, the outcome of the function, way, result test presented to support a finding of infringement under the Doctrine of Equivalents is acceptable. Such evidence must be presented on a limited-by limited basis. Generalized testimony as to the overall similarity between the claims and the accused infringer's product or process will not suffice." "

1.3 : *References*

References are the simplest tools to be applied for attacking competitor's patent inval. According to 35 U.S.C. §102[12], a reference[1] is defined as the following:
35 U.S.C. §102 (a) defines the reference as "prior use or knowledge to be considered including the invention must be known or used, by others in the United States before the date of the invention", "prior patent or printed publication to be considered including patented or disclosed in a printed publication by others anywhere in the World before the date of the invention."
35 U.S.C. §102 (b) defines the reference as one year period of public knowledge or use or commercial exploitation before patent application filed
35 U.S.C. §102 (e) defines the reference as described in a US patent & published application, or patent & publication filed by PCT entering US stage invention by another filed before the date of the applicant's invention PCT published application
References must be either in the field of the inventor's endeavour or reasonably pertinent to the specific problem with which the inventor was involved, available at the time of the invention.

Reference can also be applied to test for obviousness. Whether the features of one reference may be bodily incorporated into another reference will not be decisive, but rather "whether combined teachings render the claimed subject matter obvious."

Tex. Instrument Inc. v. Cypress Semiconductor Corp., 90 F.3d 1558, 1567 (Fed. Cir. 1996)
PC connector Solutions LLC v. Smartdisk Corp., 406 F.3d 1359,1364 (Fed.Cir. 2005)
[12]37C.F.R. § 1.107 [13] 1952 Patent Act for 35 U.S.C. Section 102

A prior art reference is analogous if the reference is in the field of applicant's endeavour or, if not, the reference" is reasonably pertinent to the particular problem with which the inventor was concerned.[15]

A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that the applicant took. The degree of teaching away depends on the particular factors, a reference teaches away if it suggests that the line of development flowing from the reference's disclosure is unlikely to be productive for the result sought by the applicant. The nature of the teaching is highly relevant, and must be weighed in substance.[16]

A prior art reference that "teaches away" from the claimed invention is a significant factor to be considered in determining obviousness.

1.4: *Anticipation*

Anticipation is often obscure and hard for people to consider whether the arts are analogous but it is a question of fact. However, there are two relevant criteria in determining whether prior art is analogous:

(1) Whether the art is from the same field of endeavour, regardless of the problem addressed, and (2) If the art is not within the same field of endeavour, whether it is still reasonably pertinent to the particular problem to be solved.

The test for analogous arts is based on the similarity of elements, problems, and purposes. All disclosures of prior art are relevant to that extent if "the references are in analogous fields of endeavour and thus have been considered by a person of ordinary skill in the field of invention."[17] In order to claim on non-analogous references, based on previous description, references will not be within the field of the inventors endeavour, but rather patentability determinations.

"Analogous art," by common sense means a person of ordinary skill would reasonably have consulted those references and applied their

[14] MPEP Section 2141.01 (a) for case law pertain ing to analogous art
[15] In re Oetiker, 977 F.2d 1443, 1446,24 USPQ2d 1443,1445 (Fed. Cir. 1992)
[16] In re Gurley 31 USPQ2d 1130 (Fed. Cir. 1994)
[17] In re Young, 927 F.2d 588, 591, 18 U.S.P.Q.2d 1089,1091 (C.A.F.C. 1991)

teachings *in seeking* a *solution to the problem that the inventor was* attempting to solve.[18] References, of course, is within the scope of prior art, the "content of the Prior Art" and relevant in determining obviousness which is reasonably pertinent to the particular problem with which the inventor was involved.[19] Analogous prior art has to be the art related to one seeking a solution for particular problem, or attempting to achieve a particular result, would look for the purpose of finding the answer to that problem, or suggestions as to the attainment of that result. The test for analogous art is practiced on the " similarity of elements, problems and purposes."[20] During this type of disputes, the 1952 Patent Act[21] does state upon U.S.C. § 103[22] : "A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negative by the manner in which the invention was made."[23]

1.5: *Obviousness*

In determining obviousness, the invention must be considered "as a whole", in its entirety rather than piecemeal. The process of determining obviousness has been characterized as not one of merely comparing the claims and the accused embodiment for details to see if they match, but rather one of examining the claimed subject matter as a whole to see if, in light of the prior art, it would have been obvious to one skilled in the art. The "difference" between the prior art and the claimed issue is what is constituted under 35 U.S.C. § 103.

The other point to pay attention to is the trend of technology, which provides suggestion or motivation for minor changes. A trend might very well constitute a suggestion or teaching to one of ordinary skill in the art to make "minor" change from the prior art in accordance with that trend

Heidelberger Druckmaschinen AG v. Hantscho Commercial Prods., 21 F.3d 1068, 1071,30U.S.P.Q.2d 1377, 1379 (C.A.F.C. 1994)

[19] In re Deminski, 796 F.2d 436, 442, 230 U.S.P.Q. 313, 315 (C.A.F.C. 1986)

[20] Plastic Container Corp. v. Continental Plastics of Okla., 515 F. Supp. 834, 214 U.S.P.Q. 530, 541 (W.D. Okla. 1980)

[21] 1952 Patent Act for 35 U.S.C. Section 103

[22] American Inventors Protection Act of W99 (AIPA) (Pub. L. 106-113, 113 Stat. 1501 (1999))

[23] Intellectual Property and High Technology Technical Amendments Act of 2002 (H.R. 2215) (Pub. L. 107(2002))

to produce the claimed invention. The existence of a trend depends on the content of the prior art. What the prior art would have taught one of ordinary skill in the art at the time of this invention? Evidence cutting against a trend includes various different methods used in the prior art to solve the problem faced by the inventor.

Under 35 U.S.C. §103, teachings of references can be combined only if there is some suggestion or incentive to do so while the prior art of record fails to provide any such suggestion or incentive. Although couched in terms of combining teachings found in the prior art, the same inquiry must be carried out in the context of a purported obvious "modification" of the prior art. Unless the prior art suggested the desirability of the modification, the mere fact that the prior art may be modified suggested by the examiner does not make the modification obvious.

Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching, suggestion or incentive supporting the combination.[25] It is not allowed to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious. When considering the obviousness, "one cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention."[26]

Failure to provide the necessary suggestion or motivation will create a presumption that the combination of references selected by the examiner to support the obviousness rejection were based on hindsight.[27] Defining the problem in terms of its solution reveals improper hindsight in the selection of the prior art relevant to obviousness.

1.6: *Obviousness to try*

What Constitutes "Prior Art" Under 35 USC 103?

(1) it must be deemed pertinent or relevant to the claimed subject matter

(2) it must be deemed prior in time to the date the claimed invention was made

[24] Monarch Knitting Mach. Corp. v. Sulzer Morat GmbH, 45 USPQ2d 1981. In re CHU, 36 USPQ2d 1089 (Fed. Cir. 1995)

[25] In re Geiger 2 USPQ 2d 1276 (Fed. Cir. 1987)

[26] In re Fritch 23 USPQ2d 1780 (Fed. Cir. 1992)

[27] In re Rouffet 47 USPQ2d 1453 (Fed. Cir. 1998)

"obvious to try" is not the standard under Section 103 that has been directed mainly at two kinds of error. In some cases, what would have been "obvious to try" would have been to vary all parameters or try each of numerous possible choices until one possibly arrived at a successful result, where the prior art gave either no indication of which parameters were critical or no direction as to which of many possible choices is likely to be successful. "Obvious to try" meant to explore a new technology or general approach that seemed to be a promising field of experimentation, where the prior art gave only general guidance as to the particular form of the claimed invention or how to achieve it."[28]

"The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference, rather the test is what the combined teachings of those references would have suggested to those of ordinary skill in the art."[29]

The totality of the prior art must be considered, and proceeding contrary to accepted wisdom in the art is evidence of non-obviousness. ° Furthermore, known disadvantages in old devices which would naturally discourage search for new inventions may be taken into account in determining obviousness.[31]

1.7: *Patentability*

A prima facie case of non-patentability is established when the information compels a conclusion that a claim is non-patentable under the preponderance of evidence, burden-of-proof standard, giving each term in the claim its broadest reasonable construction consistent with the specification, and before any consideration is given to evidence which may be submitted in ah attempt to establish a contrary conclusion of patentability.[32]

Granting a patent on the discovery of an unknown but inherent function "would remove from the public that which is in the public domain by virtue of its inclusion in, or obviousness from, the prior art.[33]

"The mere age of the references is not persuasive of the unobviousness

[28] In re OTarrell, 853 F.2d 894, 903, 7 USl'Q2d 1673, 1681 (Fed. Cir. 1988)
[29] In re Keller, 642 F.2d 413,425,208 USPQ 871, 881 (CCPA 1981)
[30] In re Hedges, 783 F.2d 1038,228 USPQ 685 (Fed. Cir. 1986)
[31] United States v. Adams, 383 U.S. 39, 52,148 USPQ 479,484 (1966).
[32] 37 CFR. 1.56(b)(2)(ii) effective as of March 1992
[33] 596 F.2d at 1022, 201 USPQ at 661

of the combination of their teachings, absent evidence that, notwithstanding knowledge of the references, the art tried and failed to solve the problem."[34] The claimed combination cannot change the principle of operation of the primary reference or render the reference inoperable for its intended purpose.[35] One cannot show non-obviousness by attacking references individually where the rejections are based on combinations of references.[36] Reliance on a large number of references in a rejection does not, without more, weigh against the obviousness of the claimed invention.[37]

The fact that a combination would not be made by businessmen for economic reasons does not mean that a person of ordinary skill in the art would not make the combination because of some technological incompatibility.[38]

References teach away from the invention or render prior art unsatisfactory for intended purpose. However, the nature of the teaching is highly relevant and must be weighed in substance.

A known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product for the same use.[39] It is improper to combine references where the references teach away from their combination.[40]

II. CASE DISCUSSION

2.1: *Aventis Pharma* v. *Amphastar pharmaceutical & Teva Pharmaceutical*

This is a very tricky case, as many years later, the inventor was called back to the court to explain the complicated science and missing label on comparative experiments. Finally, due to the missing label and titration based comparison for low molecular weight heparins ("LMWHs") to find out the best mode, Aventis' expert witness and inventor was considered to have "intent to deceive".

[34] In re Wright, 569 F.2d 1*124, 1127,193 USPQ 332, 335 (CCPA 1977)
[35] MPEP Section 2143.01
[36] In re Keller, 642 F.2d 413, 208 USPQ 871 (CCPA 1981)
[37] In re Gorman, 933 F.2d 982, 18 USPQ2d 1885-(Fed. Cir. 1991)
[38] In re Farrenkopf, 713 F.2d 714,219 USPQ 1 (Fed. Cir. 1983)
[39] In re Gurley, 27 F.3d 551, 554, 31 USPQ2d 1130,1132 (Fed. Cir. 1994)
[40] In re Grasselli, 713 F.2d 731,743, 218 USPQ 769,779 (Fed. Cir. 1983)
[41] See supra note 1

Missing label in embodiments could happen very often in patents, which are very minor yet extremely important details. The question is whether ignoring the profound science in the whole patent and focusing on one or two missing labels is fair?

Judge Rader filed a dissenting opinion to express his few comments on the decision for "intent to deceive" that (1) patent was written by patent agent not the inventor. (2) Highly respected scholar will not risk his reputation by hiding one or two label just for the patent.

Were these two missing labels absent minded mistakes or purposeful behavior? Writing mistake or laboratory mal-management? Intent to deceive is a state of mind; it is indeed hard to find the truth. Unexpected results not proportional to the chemical structure concentration sometimes happen, especially for protein products. Biological effects cannot always be rationalized.

2.2: *Merck & Co., Inc* v *Biocraft Laboratories Inc*[42]

In this case, the main argument was about Amliloride hydrochloride (K+ conserving) combining with hydrochlorothiazide (Na + excreting), both being well known diuretics used to treat hypertension. In old days, the concept was that since Amliloride hydrochloride and hydrochlorothiazide both are already known diuretics, therefore, there is no doubt that the combination must be a more powerful diuretic and more effective to treat hypertension. Thus it seemed **"obvious *to* try",** *prima facie* obvious. Judge Bissell even filed dissenting, a composition must be assessed for obviousness only after consideration of its chemical structure as well as its pharmaceutical and biological properties. Hindsight is not the standard for determining obviousness. **"Obvious to try"** which is not barred by 35 U.S.C. § 103. An invention is " obvious to try" where the prior art gives either no indication of which parameters are critical or no direction as to which of many possible choices is likely to be successful.[43]

2.3: *Apotex Corp.* v. *Merck & Co.*[44]

Apotex asserted state law claims against Merck for common law fraud and tortious interference with prospective economic advantage, and

See supra note 3 See
supra note 28 See
supra note 4

sought to compel discovery pursuant to the **crime fraud exception to the attorney-client privilege.** During patent litigation, competitor sometimes played games to distract attention, or attacked just for the purpose of attack. However, Federal Rule of Civil Procedure 60(b)(3) could also be pursuant for the certain strategy in order to obtain this exception to the privilege, Apotex had to make a prima facie showing of some foundation for the asserted fraud but in vain.

"Fraud upon the court should embrace only that species of fraud which does or attempts to subvert the integrity of the court itself, or is a fraud perpetuated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication", fraud upon the court is typically limited to egregious events such as bribery of a judge or juror or improper influence exerted on the court, affecting the integrity of the court and its ability to function impartially.

Apotex's United States patents No. 5,573,780 (the '780'patent) although specified its own process involving the detail steps, as set forth in claim 1 of the '780' patent:

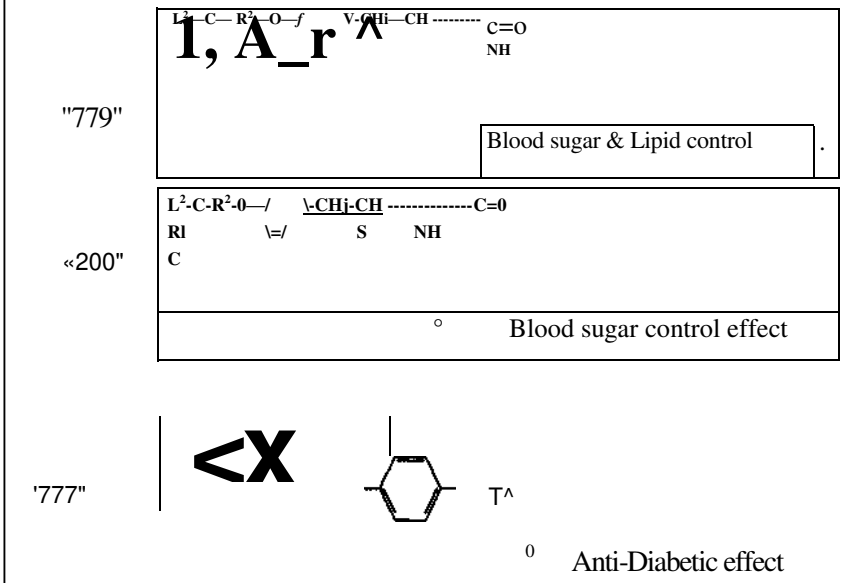
1. A process of manufacture of a pharmaceutical solid composition comprising enalapril sodium, which process comprises the steps of: (i)(a) mixing enalapril maleate with an alkaline sodium compound and at least one other excipient, adding water sufficient to moisten, and mixing to achieve a wet mass, or

(b) mixing enalapril maleate with at least one excipient .other than an alkaline sodium compound, adding a solution of alkaline sodium compound in water, sufficient to moisten and mixing to achieve a wet mass;
thereby to achieve a reaction without converting the enalapril maleate to a clear solution of enalapril sodium and maleic acid sodium salt in water;
(ii) drying the wet mass, and;
(iii) further processing the dried material into tablets.

However, Merck had market enalapril (the leading ACEI for treating hypertension, heart failure, ...etc) for years globally, so no matter how good this patent could be, the timing of filing a patent and publicizing the information were the key issues in this case.

TZD was a new type of anti-diabetic medicine which[45] claimed additional benefit on insulin resistance. Competitors used Takeda's own patent to attack Takeda's patents for obviousness. Whether an invention would have been obvious under 35 U.S.C. §103 is a "question of law", review de novo, based upon underlying factual questions which are reviewed for clear error following a bench trial. If we compare three of Takeda's US patents, nos: 4,687,777(the '777' patent), 4,287,200(the '200' patent), 4,444,779(the '779' patent) in Fig. 1, they have indeed made progress from time to time.

Thereafter, the competitors turned the direction to chemistry on the C2H5 substitution. The argument was whether the ethyl subsitution is the skills in the art. Luckily, the witness suggested that chlorination on Pyridyl ring is common but not methylation. Takeda also proved unexpected result on low toxicity which was the key.



If the differences between the subject matter sought to be patented and the prior art are such that the subject matter sought to be patented and the

[45] See supra note 5

prior art are such that as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art. 35 U.S.C. § 103(a), a patent is presumed to be valid, 35 U.S.C. §282, the evidentiary burden to show facts supporting a conclusion of invalidity, which rests on the accused infringer, is one of clear and convincing evidence.

2.5: *Tap Pharmaceutical & Takeda Chemical Industry & Wako Pure Chemical Industries & Abbott Laboratories* v *OWL Pharmaceuticals & Oakwood Laboratories**[6]

The Product in question was a 9 amino acid sequence, more potent than a natural version. Takeda sucessfully recevied five indications approved from FDA on Prostate cancer, Endometriosis (suggested 6 months treatment), uterine myoma (suggested 3 months treatment), central precocious puberty (CPP), Pre-menopause breast cancer. Takeda also developed 1 month depot vial, 3 months depot vial, 6 months depot vial, vial plused syringe, formulation without gelatin forms with patents respectively.

However, competitors attacked on the differentiation for reaction adding dehydrated form (glycolide or lactide) and un-dehydrated form (glycolic acid or lactic acid). Takeda was too conservative during the claim construction which led to too narrow explanation. Competitors tried to rule out one selection, then leave themselves room for business.

For scientists, both dehydrated form (glycolide or lactide) and un-dehydrated from (glycolic acid or lactic acid) can be used for reactions with minor adjustment, as they should be considered as the skills in the art. However, since people in the legal profession do not see things in this way, it would be totally different entities for them as they are different structures with different names. Again, it would be more tricky for scientist to answer whether they are the same or they are different. In fact, dehydrated form of glycolide or lactide is not quite the same as the un-dehydrated from of glycolic acid or lactic acid, but they are also not so different. But in the court, during the deposition, if you were the scientist, shall you answer they are the same or they are different? Truly tough.

The other important issue in this case is proper language in patent writing, never use containing in the claim which could be attacked as

* See supra note 6

non-professional writing. In Takeda's US patent no: 5476663 (the "663 patent): Claim 1

A prolong release microcapsule for injection, which comprises particles containing a water-soluble drug, the particle being dispersed in a spherical microcapsule matrix composed of a copolymer of lactic acid and glycolic acid having a comonomer ratio within the range of about 100/0 to 50/50 and an average molecular weight within the ranged of about 5000 to 200,000, the spherical microcapsule matrix having an average diameter of 2 to 200 um and an excipient selected from the group consisting of mannitol, sorbital, lactose and glucose, which particles are produced by in-water drying.

With profound scientific evidences and conservative characters, Takeda managed to succeed in the past litigations. However, this time, Takeda was attacked on inequitable conduct, simply because two papers added information disclosure statement (IDS), competitors could exaggerate that Takeda purposely delayed submitting important information, with an intent to deceive in case of a negative approval decision by examinor. Although, those two papers were considered to be non-influential for the decision of patent approval but because of the time consuming litigation, increase in expenses, tension and pressure for the stock price...etc, the cost was huge.

2.6: *In re Omeprazole, AstraZeneca* v *Andrx Pharmaceutical & Genpharm"*

AstraZeneca is one of the leading pharmaceutical companies in the world. Omeprazol generated billions in revenue for the company for years, and the new version of omeprazole with new slow release form, continually in its services contributed tons of cash into AztraZeneca with more than five indications on Duodenal ulcer, Gastric ulcer: short term treatment, Treatment of gastroesophageal reflux disease (GERD), Maintenance of healing of erosive esophagitis and Phtologcal hypersecretory conditions. Not only did it perform the legendary litigation role model in intellectual property, AstraZeneca also made a brilliant track records on medical/clinical trials and marketing planning.

Till date, there are more than three waves of ongoing litigation for generic companies, with most generic companies either trying to change coating polyers or excipients. However, when considering the primary

[47] See supra note 7

concern for the invention, if the key ingredient remain the same, without major process/ manufacture improvement or new formulation, it is hard to survive when confronting the top tier attornies hired by AstraZeneca. Let us compare Astrazeneca's US patent no 4,853,230 (the '230 Patent) and 4,786,505(the '505' Patent) with the patents from generic companies:

Claim 1 of Astrazeneca's '230' patent

An pharmaceutical preparation comprising

(a) a alkaline reacting core comprising an acid-labie pharmaceutical active substance and an alkaline reacting compound different from said active substance, an alkaline salt of an acid-labile pharmaceutical active substance, an alkaline salt of an acid-pharmaceutically active substance and an alkaline reacting compound different from said active substance;
(b) An inert subcoating which rapidly dissolves or disintegrates in water disposed on said core region, said subcoating comprising one or more layers of materials selected from among tablet excipients and polymeric film-forming compounds and alkaline compounds; and
(c) an enteric coating layer surrounding said subcoating layer, wherein the subcoating layer isolates the alkaline reacting core from the enteric layer that the stability of the preparation is enhanced.

(2) Genpharm's formulation:
a sugar core;
an active drug layer (containing micronized omeprazole) sprayed onto the sugar core;
a protective coating layer of HMPC (hydroxypropyl methy;cellulose) sprayed onto the active drug layer; and
an enteric coating sprayed onto the protective coating

(3) Cheminor's formulation:
a core pellet (containing omeprazole and *meglumine* [N-methylglucamine], an alkaline compound);
a coating made of polyvinylpyrrolidone ('PVP');
an enteric coating (made of eudragit L100-55, triethyl citrate and magnesium stearate).

(4) Andrx's formulation:
a sugar core;
a homogenized suspension of micronized omeprazole, sodium laury sulphate (dispersant), disodium hydrogen phosphate (stablizer), lactose

(filler)m providone (binder), and water, sprayed onto the core; A homogenized enteric coating containing hydroxypropyl methylcellulose phthate ("HPMCP"), acetyl alcohol, talc, acetone, and isopropyl alcohol.

(5) KUDCo's formulation:
(a) a microtablet core (containing omeprazole, HMPC, and lactose particles);
(b) a subcoat (same as that of the'505 and'230 patents); and
(c) an enteric coat (same as that of the'505 and'230 patent)

(6) Claim 1 of Astrazeneca's '505 patent
An oral pharmaceutical preparation comprising
(a) a core region comprising an effective amount of a material selected from the group consisting of omeprazole plus an alkaline reacting compound, an alkaline omeprazole salt plus an alkaline reacting compound and an alkaline omeprazole salt alone
(b) An inert subcoating which is soluble or rapidly disintegrating in water disposed on said core region, said subcoating comprising one or more layers of material selected from among tablet excipients and polymeric film-forming compounds, and
(c) an outer layer disposed on said subcoating comprising an enteric coating

Only RUDCo was not infringed. Both '230 and '505 patents made small change of formulation or excipients although made the wording was made different. However, if the nature of the technology (using polymer for coating the capsule) is not improved with differentiable advancement, the patentability will be challenged if the profits are considerably attractive.

III. CONCLUSION

3.1. *How to overcome Obviousness:*

In order to overcome the obviousness, evidence from those of ordinary skill is that they are skeptical of the advantages of the invention which may show "unexpected result". General skepticism of those in the related art is not only amounting to teaching away but also "relevant and persuasive evidence" of non-obviousness.[48] An inventor who has probed the strengths and weaknesses of the prior art and discovered an

[48] Gillette Co. v. S.C. Johnson & Son 16 USPQ2d 1923 (Fed. Cir. 1990)

improvement that escaped those who came before is indicative of non-obviousness.[49]

It is not sufficient for establishing obviousness that the separate elements of the invention existed in the prior art, in the absence of some teaching or suggestion in the prior art regarding combining the elements.[50] The evidence that the combination was not viewed as technically feasible must be considered, since conventional wisdom that a combination should not be made is evidence, of non-obviousness. The motivation in the prior art to combine the references does not have to be identical to that of the application to establish obviousness.[51]

It is not required to support an obviousness rejection if a prior art reference explicitly contains all the necessary features of the claimed invention. The key is that "inherent teaching of a prior art reference can be used to overcome an obviousness rejections."[52]

3.2. *How to overcome anticipation:*

There are few suggestions for overcoming anticipation, as listed below:

A factor cutting against a finding of motivation to combine or modify the prior art is when the prior art teaches away from the claimed invention. A person of ordinary skills, upon reading the reference, would be discouraged from following the path set out in the reference, unexpected results are often applied tactics.

Applicants may argue that the examiner's conclusion of obviousness is based on improper hindsight reasoning. However, "any judgement on obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time the claimed invention was made and does not include knowledge gleaned only from applicant's disclosure, such a reconstruction is proper."[53]

As discussed in Manual of Patent Examination Procedure(MPEP) Section 2143.01 there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one

Fromson v. Anitec Printing Plates, inc. (Fed. Cir. 1997)
[50] Arkie Lures, Inc. v. Gene Larew Tackle, Inc. 43 USPQ2d 1294 (Fed. Cir. 1997)
[51] In re Kemps, 40 USPQ2d 1309 (Fed. Cir. 1996)
[52] In re Grasselli, 218 USPQ 769 (Fed. 1983)
[53] In re McLaughlin 443 F.2d 1392, 1395,170 USPQ 209, 212 (CCPA 1971).

of ordinary skill in the art, to modify or combine reference teachings. The federal circuit has produced a number of decisions overturning obviousness rejections due to lack of suggestion in the prior art of the desirability in combining references. In addition to the material in MPEP Section 2141.02, prior art must be considered in its entirety, including disclosures that teach away from the claims and MPEP Section 2143.01 proposed modification cannot render the prior art unsatisfactory for its intended purpose or change the principle of operation of a reference.

3.3 *What are the most important lessons after all:*

Based on the previous cases, in order to defend the infringement, obviousness or anticipation, the following legal countermeasure experiences are recommended:
(1) The literal infringment must be prevented before submission, it is unforgiveable to be found with exactly the same figures or description in the prior art as belonging to the applicant.
(2) Applicant's FTP (file transfer protocol) and website will also be considered as proper public communication case by case.
(3) Filing date and publicity date are crucial details requiring extra attention even during the paper submission through internet/e-mail.
(4) Laboratory management shall be carefully maintained and monitored for all data and writing.
(5) Carefully communication with patent agent throughout the whole patent writing process.

CISG: FUNDAMENTAL BREACH AND ADVANTAGE INDIA!

RJSHABH CHOPRA*

A worldwide approval has bee achieved on the United Nations convention on contracts for the international sale of goods (CISG). This convention governs the sales of goods between two parties situated in different nations. CISG differentiates between a general and a fundamental breach. In this article, an attempt has been made to explain the concept of fundamental breach as enshrined in CISG and to discuss the merits and demerits of the ratification of CISG by India

1.0 CISG: INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is- one of the most successful examples of unification in the area of International Commercial Law[1]. The CISG governs the sale of goods between private parties whose places of business are in different nations and whose nations are the Contracting Parties to the CISG[2]. Therefore, the Convention applies where[3]:

- A sales contract is between parties from two different Contracting States, or
- The rules of private international law call for the application of the law of a Contracting State

This Convention is a milestone in the movement to codify the private international law of the sale of goods and has achieved strong world-wide approval[4].

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1 http://www.cisg.law.pace.edU/cisg/biblio/koch.htm#int as on December 30,2008. Also *see,* Franco Ferrari, *Specific Topics of the CISG in the light of Doctrinal Writings and Judicial Applications,* 15 J.L. & Com. 1 at 13

2 Article 1, CISG

3 Kevin Bell, *The Sphere of Influence of Application of the Vienna Convention on the Contracts for the International Sale of Goods,* 8 Pace Int'l L. Rev. 237 (1996) Alejandro M. Garro, *Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods,* 23 Int'l Law. 443 at 444

The article firstly tries to explain the concept of fundamental breach of contract enshrined in Article 25 of the CISG and then seeks to reach a conclusion as to the advantage for India in ratifying the CISG by discussing in brief the merits and demerits of ratifying the same.

2.0 FUNDAMENTAL BREACH: MEANING

Fundamental Breach is an important concept of the United Nations Convention for the International Sale of Goods (CISG) as it is a necessary pre-requisite for avoiding a contract under Articles 49 (1) (a)[5] and 64 (1) (a)[6]. At this juncture, it becomes imperative to define the term fundamental breach. The term 'fundamental breach' has been defined under Article 25 of the convention as:

> *"A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.'[1]"*

It is interesting to note that the CISG distinguishes between a general and a fundamental breach. While a general breach entitles the aggrieved party to claim damages, the party is only entitled to the remedies of contract avoidance or the delivery of substitute goods if he can prove that the breach is fundamental[7].

The CISG does not use fundamental breach as a tool of interpretation and the term fundamental breach as used in the CISG has no familiar counterpart in any other jurisdiction and therefore it is not burdened with history[8] which in other words means that such a treatment of

[5] According to which the *buyer* may declare the contract avoided if the failure by the *seller* to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract.

[6] According to which the *seller* may declare the contract avoided if the failure by the *buyer* to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract.

[7] Buyer's remedies: Article 49(l)(a), Article 51(1) & (2) (avoidance), and Article 46(2) (substitute delivery); seller's remedy: Article 64(1)(a) (avoidance); common remedies: Article 72(1), Article 73(1) & (2) (avoidance in case of anticipatory breach and installment contracts)

[8] Bianca & Bonell *{ed), Commentary on the International Sales Law,* (Milan, 1987) p. 210.

fundamental breach is a unique and a fresh legal concept having no parentage in other jurisdictions[9].

According to PETER SCHLECHTRIEM there is a fundamental breach of contract justifying avoidance or demand for substitute goods, *if the injured party has no further interest in the performance of the contract after the particular breach*[10]. This can be explained with the help of an example: When the other party would be unable to use the late delivery for the purpose envisaged in the contract then, a violation of the time for performance can constitute a fundamental breach of contract,.

2.1 Fundamental Breach: Essentials

In this regard, JOSEPH LOOKOFSKY has rightly pointed out that Article 25 attempts to define *fundamental breach* in terms of *foreseeable substantial detriment'.* In the light of the definition of fundamental breach set forth in Article 25, it seems correct to affirm that the distinction is primarily based on the detrimental effects of the non-compliance with the contractual obligations, provided that those effects are foreseeable as would be explained later in the article.

2.1.1 Substantial Deprivation:

Under the CISG, the basic criterion for a breach to be fundamental is that it results in substantial detriment to the injured party[12]. A breach must cause a detriment that *substantially deprives* the aggrieved party of what he is *entitled to expect under the contract* in order for it to be fundamental[13].

[9] *ibid*

[10] Peter Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* as cited from http://www.cisg.law.pace.edU/cisg/biblio/schlechtriem.html#a35 as on December 30, 2008 at page 59.

[11] Joseph Lookofsky, *Understanding the CISG in the USA,* (Kluwer Law International, 1995) p. 70.

[12] *Commentary on the Draft Convention on Contracts for the International Sale of Goods,* prepared by the UNCITRAL Secretariat (Doc. A/ CONF. 97/5), Official Records, 26 as cited from http://cisgw3.law.pace.edu/cisg/text/anno-art-25.html as on December 28, 2008

[13] Robert Koch, *Remarks on Whether the UNIDROIT Principles of International Commercial Contracts December Be Used to Interpret or Supplement Article 25 CISG* as cited from http://cisgw3.law.pace.edU/cisg/text/anno-art-25.html#711 as on December 28, 2008; Chengwei Liu, *The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law,* 9 VJ 123 at 125

It has been aptly put forward by JACOB S. ZlEGEL, that to determine the degree of a-given detriment, it needs to be seen that the breach has gone *to the root* of the contract[14]. Furthermore, for a breach to be fundamental; the breach must nullify or essentially depreciate the aggrieved party's justified contract expectations[15] and for this very reason, defects are considered fundamental when the buyer is substantially deprived of what he was entitled to under the contract[16].

2.1.2 Foreseeability

Article 25 adds objectivity into the determination of whether a breach is fundamental by asking two questions[17]:

> (1) did the party in breach foresee the substantial detriment (i.e., loss of expectation interest) it caused to the non-breaching party; and
> (2) would a *reasonable person of the same kind in the same circumstances*[18] foresee that the breach of contract would cause the non-breaching party substantial detriment.

[14] Jacob S. Ziegel, *The Remedial Provisions in the Vienna Convention: Some Common Law Perspectives,* in: Galson.Smit (ed.), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods,* (1984) ch.9 at 9-14 as cited from http://cisgw3.law.pace.edu/cisg/text/anno-art-25.html as on December 28, 2008 - »

[15] *The UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods,* A/CN.9/SER.C/DIGEST/CISG/25 as cited from http://cisgw3.law.pace.edU/cisg/text/anno-art-25.html#udfii32 as on December 28, 2008; Also see: Franco Ferrari, *Fundamental Breach Of Contract Under The Un Sales Convention -25 Years Of Article 25 CISG,* 25 J.L. & Com. 489 at 493

[16] Larry A. DiMatteo, Lucien Dhooge (et al), *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence* 24 Nw. J. Int'l L. & Bus. 299 at 414. See also: *ICC Arbitral Award 1994,* ICC International Court of Arbitration Bulletin Vol. 6, No. 2, 67, CLOUT Case No. 304, as cited from http://cisgw3.law.pace.edu/cases/947531il.html as on December 28, 2008; *LG Saarbrucken* 8 O 49/02, July 2, 2002 (FRG), as cited from http://cisgw3.law.pace.edu/cases/020702gl.html as on December 28, 2008; OLG Hamburg 1 U 31/99 (Nov. 26, 1999 Germany) as cited from http://cisgw3.law.pace.edu/cases/991126gl.html as on December 28, 2008. See also *Delchi Carrier S.p.A.* v. *Rotorex Corp.,* 71 F.3d 1024 (2d Cir. 1995) at 1027-29

[17] Andrew Babiak, *Defining Fundamental Breach Under The United Nations Convention On Contracts For The International Sale Of Goods,* 6 Temp. Int'l & Comp. L.J. 113 at 121

[18] Grigera Naon, *The U.N. Convention on Contracts for the International Sale of Goods,* in Horn, Schmitthoff (eds), *The Transnational Law of International Commercial Transactions: Studies in Transnational Economic Law* (Deventer: Kluwer 1982) p. 105; Chengwei Liu, *The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law,* 9 VJ 123 at 133; Franco Ferrari, *Fundamental Breach Of Contract Under The Un Sales Convention -25 Years Of Article*

Therefore it can be inferred that foreseeability is not just a burden of proof rule, but it also requires taking into account the breaching party's knowledge or foreseeability of the harsh consequences of the breach in determining whether or not it is fundamental[19].

The actual foreseeability of the detriment caused by the breach will depend on the breaching party's knowledge of the facts surrounding the transaction[20].

Therefore it can be concluded that the definition enshrined in Article twenty-five includes two tests for determining whether a breach is fundamental: First in relation to substantiality and secondly in relation to foreseeability. The substantiality test is satisfied if the aggrieved party can prove that a substantial deprivation of his expectation from the performance of the contract has occurred or will occur because of the breach. Furthermore, the foreseeability test dictates that even if the breach is substantial it will not be considered *fundamental* unless the detrimental effect of the breach was foreseen by the breaching party or was foreseeable by any reasonable person in the same circumstances.

3.0 Fundamental Breach & Avoidance of Contract

After discussing the ingredients of the fundamental breach, it would be interesting to note the consequence in case a party breaches the contract fundamentally in light of Article 25 of the CISG. As far as the *avoidance of contract* is concerned, the CISG expressly allows one party to declare a contract avoided only if the other party's failure to perform its obligations amounts to a fundamental breach. ' Moreover, with respect to

25 CISG, 25 J.L. & Com. 489 at 499; Eric C. Schneider, *The Seller's Right To Cure Under The Uniform Commercial Code And The United Nations Convention On Contracts For The International Sale Of Goods,* 7 Ariz. J. Int'l & Comp. L. 69 at 87

[19] Bruno Zeller, *Fundamental Breach and the CISG - a Unique Treatment or Failed Experiment?,* 8 VJ 81 at 88; Schlechtriem (ed.), *Commentary on the U.N. Convention on the International Sale of Goods* (Clarendon Press, Oxford, **1998)** Art. 25, Comment 11; Also see, Enderlein & Maskow, *International Sales Law* (New York Press, Oceana 1992), Art. 25, Comment 4.1

[20] CM. Bianca, M.J. Bonell (et. al.), *Commentary on the International Sales Law,* (Giuffre, Milan, 1987) p. 217

[21] Honnold, J.O., *Uniform Law For International Sales,* (Kluwer Law International, The Hague; 1999) p. 205. Also see William S. Dodge, *Teaching The CISG In Contracts,* 50 J. Legal Educ. 72 at 91; Bruno Zeller, *Fundamental Breach and the CISG - a Unique Treatment or Failed Experiment,* 8 VJ 81 at 90-92; CM. Bianca, M.J. Bonell (et. al.), *Commentary on the International Sales Law,* (Giuffre: Milan, 1987) p. 359; Ulrich Magnus, *The Remedy Of Avoidance Of Contract Under CISG—General Remarks And Special Cases,* 25 J.L. & Com. 423 at 424-25 Also see: Articles 49 and 64 of the CISG.

the buyer's remedies, only in the case of fundamental breach can he reject non-conforming goods[22] and still be entitled to remedies[23]. Avoidance of a contract is a powerful remedy, which releases both parties from their obligations under the contract, *subject to any damages.*[24]

The remedy of contract avoidance is supposed to be a remedy of last resort, and a court is supposed to try to save the deal as much as possible[25]. Indeed, only in the case of a fundamental breach can the buyer declare the contract avoided[26], and only in that same case'can he claim substitute goods[27]. Similarly, the seller is entitled to declare the contract avoided only when the buyer's non-performance (that is, his refusal to take delivery or, more commonly, his failure to pay the price) amounts to a fundamental breach of the contract[28].

As a result, it is correct to affirm that the CISG favours the performance of the contract as far as possible, and thus limits avoidance to exceptional cases of 'fundamental' breaches[29]. Hence, only if there is a fundamental breach, then the party who is not in fault can avoid the contract.

Marco Torsello, *Remedies for Breach of Contract under the 1980 UN Convention on Contracts for the International Sale of Goods, 9* VJ 253 at 264-67; John C. Duncan, *Nachfrist Was 1st? Thinking Globally and Acting Locally: Considering Time Extension Principles of the UN Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code,* 2000 B. Y. U. L. Rev. 1363 at 1379-81; Ingeborg Schwenzer, *The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents,* 36 Vict. U. Wellington L. Rev. 795 at 799

[23] Speidel, R.E., *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on the International Sale of Goods,* (1995) 16 Nw. J. Int'l L. & Bus 165 at 176-177; Marco Torsello., *Transfer of Ownership and the 1980 Vienna Sales Convention: A Regretful Lack of Uniform Regulation,* (2000) 16 Int'l Bus. L. J. 939 at 943

[24] Andrew Babiak, *Defining Fundamental Breach Under The United Nations Convention On Contracts For The International Sale Of Goods,* 6 Temp. Int'l & Comp. L.J. 113 at 114

[25] Clemens Pauly, *The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law,* 19 J.L. & Com. 221 (2000) at 225

[26] Article 49(1)(a) CISG

[27] Piliounis, P.A., *The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?* as cited from http://www.cisg.law.pace.edu/cisg/biblio/piliounis.htmI as on January 3, 2009

[28] Article 64(1)(a) CISG

[29] Mullis, A.C.L., "Termination for Breach of Contract in C.I.F. Contracts Under the Vienna Convention and English Law; Is there A Substantial pifference?" in Lomnicka, E. and Morse, R., (eds.), *Contemporary Issues in Commercial Law: Essays in honor of Prof A.G. Guest,* (Sweet & Maxwell, London, 1997) p. 137

4.0 CISG: A CRITICAL ANALYSIS

This part of the article would in brief explain the merits and loopholes in the CISG in order to understand if India should ratify the convention. The Convention is the product of more than two generations of international negotiation, which has produced a document unanimously approved by delegations representing sixty-two national legal systems at a diplomatic conference convened by the United Nations General Assembly in Vienna in 1980. Now the root problem which needs to be addressed is whether CISG has been successful due to its advantageous nature or unsuccessful because of various loopholes.

It is submitted that the basic advantage of CISG is that it is simplified and has achieved unification as far as the law on the international sale of goods goes as far as two-thirds of the trade counties have already ratified it[30]. Following are some of the advantages in ratifying the CISG:

(a) With the acceptance of the CISG, the playing field is leveled a little bit in that there will only be one set of rules that will be applicable as it is indeed better to apply an internationally recognized law instead of any unknown foreign domestic laws like German/Russian Law[31]. It has to be further noted that the codified nature of the rules, the simplicity of their formulation, the exclusion of conflicts intricacies and foreign law, and the availability of sources, all help to create greater legal certainty for importers and exporters in international trade relations and negotiations[32].
(b) CISG by taking into account modern trade practices and realities contains provisions on the interpretation of contracts which are wider than the Common Law rules which in turn facilitate cross-border trade and save time, expense and avoid uncertainty[33].
(c) As Peter Winship puts it *CISG has provided the required flexibility to allow for the catering for individual needs and the preservation of*

[30] V. Susanne Cook, *CISG: From the Perspective of a Practitioner,* 17 *J.L.C.* (1998) 343 as cited from http://www.cisg.law.pace.edu/cisg/biblio/cook.html as on January 7, 2009.
[31] Sieg Eiselen, *Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa,* 116 *South African Law Journal,* Part II (1996) 323-370 as cited from http://www.cisg.law.pace.edu/cisg/biblio/eiselen.html as on January 7, 2009
[32] G A Barton *The United Nations Convention on Contracts for the International Sale of Goods* (1985) 18 *CILSA* 22 at 23
[33] Sarah G Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common Law and Civil Law Principles,* (1988) 13 North Carolina International Law & Commerce Register 109 at 114

trade customs and usages by acknowledging the concept of Party Autonomy? . (d) Another major advantage of CISG that it is available in six major official languages, all with equal authority, and thereby it seeks to provide a common understanding of the transaction and the rights and duties of the parties[35].

However, as there are two sides of a coin, the CISG also has another side encompassing certain loopholes, some of which are being discussed below:

(a) CISG's character is very much of *compromise* in nature, which benumbs the solution and dodges many of the real issues[36]. Moreover, as has been argued by Rosset, the compromise character of the CISG has resulted in a code with no underlying principles and is accordingly *largely a cut-and-paste job* where grand principles and transcendent values are largely pretence[37]. It tends to makes compromises conceptually and linguistically to accommodate the conflicting demands of the civil law and the common law, leading to lack of clarity[38].
(b) The biggest fear as was also highlighted in the case of *James Buchanan & Co Ltd* v *Babco Forwarding and Shipping (UK) Ltd*[39] is not really about the difference in style of interpretation but rather whether courts will be able to rise above their national laws and resist the temptation to refer, to the familiar concepts and doctrines of their national law in cases of uncertainty[40].
(c) Furthermore, as many traders have excluded the CISG from their standard contracts, the apprehension of CISG being rendered irrelevant is turning out to be a reality.[41].

[34] Peter Winship, *International Sales Contracts under the 1980 Vienna Convention,* (1984)17UCCLJ57
[35] C M Bianca & M J Bonell *Commentary on the International Sales Law—The 1980 Vienna Sales Convention* (Milan, 1987) p. 15
[36] Gyula EOrsi *A propos the 1980 Vienna Convention on Contracts for the International Sale of Goods* (1983) 31 American Journal of Comparative Law 333 at 345
[37] Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods* (1984) 45 Ohio State LJ 265 at 289
[38] Shishir Dholakia, *Ratifying the CISG: India's Options,* as cited- from http://www.cisg.law.pace.edu/cisg/biblio/dholakia.html as on January 4, 2009
[39] [1977] 1 All ER 518 (CA); See also *Air France* v *Saks* 470 US 392 (1985)
[40] John O Honnold, *The Sales Convention in Action - Uniform International Words: Uniform Application?* (1988) 8 J.L.C. 207 at 208
[41] Sieg Eiselen, *Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa,* 116 *South African Law Journal,* Part II (1996) 323-370 as cited from http://www.cisg.law.pace.edu/cisg/biblio/eiselen.html as on January 4, 2009

(d) One of the pitfalls of ratifying the convention should be seen from the view of a common law jurisdiction. ARTHUR ROSSETT described it as using *language which, first of all, is foreign in regard to the law of contract and therefore has no clearly defined meaning and, secondly, is too wide and inexact and therefore leads to uncertainty*[42]. Hence, there have been varied interpretations and to add to this difficulty, as identified by RA BRAND & HM FLECHTNER, there is no international court that administers CISG making it one of the most *serious obstacles to achieving the uniform international sales regime at which CISG aims.*[A3]

5.0 CONCLUSION

Under Article 25, a fundamental breach of contract occurs when an act by one of the parties results in the other party being substantially deprived of what it expected under the contract However, the detriment caused by the breach must have been foreseeable. Moreover, a breach must concern the *essential content of the contract* in order for it to be considered fundamental. A fundamental breach gives the non-breaching party the *right to avoid the contract or to require the delivery of substitute goods.* Thus,"it can be easily inferred that in case of fundamental breach the aggrieved party must have suffered such detriment as to substantially deprive it of what it was entitled to expect under the contract.

Moreover, it can be argued that it would be advantageous for Indian Commercial scenario if India ratifies CISG. Just on the grounds that UK being a common law country has not ratified the convention, should not form the basis of India not ratifying the same as there is a substantial difference in the scope of commercial development in the two countries. Furthermore, it is submitted that any shortfalls of the acceptance of the CISG to date should not obstruct the view of its advantages.

India should ratify the Convention- the great merit of the CISG is that it removes a substantial barrier to international trade by providing a unified and simplified legal framework within which international sales can operate^ Any shortfalls due to the acceptance of the CISG should not hinder its advantages. Furthermore, it offers a viable solution to the

Arthur Rossett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods,* (1984) 45 Ohio State Law Journal 265-305 Monika Kilian, *CISG and the Problem with Common Law Jurisdictions,* (2001) 10 (2) J. Transnational Law & Policy 217 at 242

harmonization of ASEAN international trade law and takes into account modern trade practices and realities. It contains provisions on the interpretation of contracts which are wider than the Common Law rules. The Convention does provide a common legal basis and legal certainty, for any transaction it governs.'It is very well appreciated and successful and therefore, there is no harm *per, se* for India to become a signatory to the Convention.

CHILD SOLDIER: AN INNOCENT VICTIM OF WAR CRIMES AND ARMED CONFLICTS

KUSH KALRA

Recently there has been increased international concern over the increasing participation of children in armed conflicts. This growth in international concern has resulted in significant legal development, including the conclusions of new treaties on the subject. The emphasis has been on seeking to regulate the recruitment and use of child soldiers and raising the minimum legal age of recruitment. In addition, however, there has been a shift in focus with regard to whose actions the law seeks to regulate. Initially, prohibitions with regard to recruitment and use of child soldiers ■ were directed against States and, to a lesser extent, non-state actors such as armed opposition groups; but more recently, the individual recruiters themselves have been targeted. Child recruitmerit is now a crime in international law and a number of prosecutions are in progress and more are anticipated. The unfortunate reality is that large numbers of children are participating in a number of armed conflicts ongoing around the world today. This article, reviews the development in international law relating to child soldiers, identifies the legal and conceptual discrepancies in the child soldiers phenomenon and their implications. It reviews developments within international humanitarian law and human rights law in regard to matters relating to child soldiers.

INTRODUCTION

In recent years, the participation of children in armed conflicts has become an issue of national and international concern. There are a large number of child soldiers in the world today and it is believed that the number is growing rapidly.

The phenomenon of actively recruiting minors, by persuasion or coercion, to fight in, or otherwise provide support for non-state parties, in armed conflict is a disturbing and challenging global development. Historically unprecedented both in terms of scope and the almost inconceivable levels of abuse, it is a trend that is becoming increasingly

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apparent. This increase is taking place primarily with non-state armed political groups, most of which operate well outside of and in flagratit disregard for any notions of human rights or international humanitarian law.[1] Admittedly, minors are still recruited into many States armies as well, but the mechanisms available for addressing the problem at the State level are generally more conventional, direct, and institutional in nature. Addressing non-State cases is more problematic, however, and not only because non-state entities exist and operate beyond legal reach. Although, for example, it may appear advantageous to apply both human rights and humanitarian traditions to minors in cases of both international and non-international armed conflict, yet there are shortcomings within them as well as discrepancies between them. It is so because both branches of law, historically speaking, were unprepared for the emergence and growth of the child soldier's phenomenon, which evolved as patchwork developments, resulting in some of the inconsistencies, contradictions, legal gaps, and lack of clarity which beset the phenomenon even today.[2]

Every child has the right to enjoy a normal childhood but in several countries around the world, children have become direct participants in war. As many as 3,00,000 children under the age of eighteen years serve in government forces or armed rebellions. The participation of child soldiers has been reported in 33 on-going recent armed conflicts in almost every region of the world.[3] Children are uniquely vulnerable to military recruitment because of their emotional and physical immaturity. They are easily manipulated and can be drawn into violence that they are too young to resist or understand. Technological advances in weaponry and the proliferation of small arms have contributed to the increased use of child soldiers. Light weight automatic weapons are simple to operate, often easily accessible and can be used by children as easily as adults.

Children are most likely to become child soldiers if they are poor, separated from their families, displaced from their homes and are living

[1] The term international humanitarian law is deliberately used here rather than laws of war or laws of armed conflict. This usage implies a focus on the treatment and protection of individuals and avoids the non-humanitarian aspects of the laws of armed conflict. For a discussion of this distinction, see ADAM ROBERT & RICHARD GUEFF, DOCUMENTS ON THE LAWS OF WAR 1-2 (2000>

[2] HENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE CHILDREN IN ARMED CONFLICT 24-30 (1994); JENNY KUPER, INTERNATIONAL LAW CONCERNING CHILD CIVILIANS IN ARMED CONFLICT (1997)

[3] www.hrw.org/compaigns/crps/facts.htm. Visited on 1 June 2009.

in a combat zone or have limited access to education. Orphans and fefugees are particularly vulnerable to recruitment.

THE WORLD OF CHILD SOLDIERY

Although the drastic spike in child soldiers globally has captured the attention of many, the problem is hardly recent. Tens of. thousands participated in the "Children's Crusade" of 1212, and Napoleon had divisions of young boys in his army. During World War II, Nazis employed child fighters to carry out underground missions on a large scale.[4] After the war, the British established "Small Boy Units" in various colonies, including Sierra Leone.[5] By the 1980s, national armies and non-national armed groups all over the world freely used and recruited children; Iran, Cambodia, and Colombia are a few of many examples. The Iranian Minister of Education claimed that 150,000 children "volunteered" to fight for the Iranian army, 60% of all recruits. Due to the rapid expansion of this practice after the Cold War, the last fifteen years have come to be known as the "era of the child soldier."

Under current international law, a "child" is generally defined as anyone under the age of eighteen years.[6] As for "soldier," it is important to remember that the concept encompasses more than machine-gun toting boys.[7] Rather, the term "child soldier" has also been used to encompass "any person under the age of eighteen who is or has been associated with any kind of regular or irregular armed group, including those who serve as porters, spies, cooks or messengers, and including girls recruited for sexual purposes and many others."[8] So even if the term "child soldier" evokes an image of a heavily-armed boy, it also includes girls and unarmed children carrying out various tasks behind the front lines.

[4] Sarah L. Wells, Crimes Against Children in Armed Conflict Situations: Application and Limits of International Humanitarian Law, 12 TUL. J.-INT'L & COMP. L. 287, 290 (2004)

[5] William A. Schabas, .Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Committee and the Special Court, 2 J. INT'L CRIM. JUST. 1082, 1087(2004)

[6] Convention on the Rights of the Child art. 1, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]

[7] See, e.g., NEW YORK REVIEW OF BOOKS, Dec. 1, 2005, at 1

[8] Christine knudsen, The Problem of Re-Acclimating Child Soldiers into Society Assuming Peacekeeping is Successful: Demobilization and Reintegration During an Ongoing Conflict, 37 CORNELL INT'L L.J. 497 (2004). Knudsen notes that the more inclusive phrase "children associated with fighting forces" has gained currency in discussions of child soldiers.

THE GROWING PREVALENCE OF CHILD SOLDIERS

The issue of child soldiers came to the fore of international consciousness with Graca Machel's stunning report, "Impact of Armed Conflict on Children".[9] After the U.N. General Assembly adopted Resolution 48/157, which sought to protect children from armed conflict, it appointed Ms. Machel to survey comprehensively this social pandemic. Her report outlines the scope of child soldiery, the methods of recruitment, and the reasons children enlist.[10] It has become an oft-cited touchstone for subsequent scholarship carried out by non-governmental organizations (NGOs), U.N. bodies, and academics. By combing through the voluminous, though incomplete, academic litefature, one catches a daunting glimpse of the world of child soldiery.

The most recent estimates suggest that between 250,000 and 500,000 children engage in armed conflict around the globe, with some 300,000 actively engaged in combat.[11] These numbers are "deliberately vague and conservative," however, because "no one keeps real statistics" on child soldiers. While the number of troops in national forces is readily ascertainable, no one knows how many children are presently Engaged in armed conflict.

Of the estimated 300,000 children actively engaged in combat, some 120,000 are thought to be in Africa.[12] Though this figure represents a sizeable proportion, it also demonstrates that the problem is far more widespread than media reports and popular images might intimate, this is neither a solely African issue nor a "third world" issue.[13]

[9] The Secretary-General, Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, U.N. Doc. A/51/306 (Aug. 26, 1996) [hereinafter **Machel** Report]; available at http://www.unicef.org/graca/a51 -306_en.pdf.

[10] See generally Machel Report, supra note 10. The Report has exerted **considerable** influence on debates- over child soldiers both in the United Nations and in **the** international community. See Marsha L. Hackenberg, Can the Optional Protocol for **the** Convention on the Rights of the Child Protect the Ugandan Child Soldier?, 10 **IND**L INT'L & COMP. L. REV. 417,420 (2000).

[1] Compare Olara A. Otunnu, Ending Wars Against Children, INT'L HERALD **TRIB,** August 6, 2005, at 4 (putting the number at 250,000), with Franklyn Bai **Kargbo,** International Peacekeeping and Child Soldiers: Problems of Security and Rebuilding, 37 CORNELL INT'L L.J. 485,487 (2004). The figure of 300,000 children engaged in **active** combat is cited in numerous sources.

[12] Africa Recovery, *The Road From Soldier Back to Child,* 15 AFR. RECOVERY 3, 10 (2001), available at http://www.un.org/ecosocdev/geninfo/afrec/voll5no3/153chil2.htm.

[13] See Ernst M.H. Hirseh Ballin, Children as World Citizens, in GLOBALIZATION** CHILD LAW: THE ROLE OF THE HAGUE CONVENTIONS 10 (Sharon Detrick * Paul Vlaardinger,rBroek eds., 1999). See also COALITION TO STOP THE USE OF

Rather, the problem has spread to the farthest corners of the globe. In the past decade, children serving in national armies or rebel factions have actively participated in wars on five continents; and have been recruited from six continents. National governments that sent children to the frontlines include those of the Democratic Republic of Congo (DRC), Rwanda, Sudan and the United States.[14] Other governments, such as those of Colombia and Zimbabwe, vicariously engaged in the practice by supporting militias and local armed groups that employed child soldiers. Even though information about children in national armed forces is difficult to obtain, Myanmar,with over 70,000 recruits, is reported to have the largest number of child soldiers serving in its national military.

INTERNATIONAL LEGAL STANDARDS GOVERNING CHILD SOLDIERS

The proliferation of child soldiers has been matched only by the explosion of treaties outlawing the practice. The prohibition of child soldiery was on the map of international concern in th» late 1970s, appearing in a vaguely worded provision of the Additional Protocols to the Geneva Conventions. Since then, and concurrent with the global attention devoted to children's rights, international law has gradually hardened the interdiction against child soldiers. Presently, the prohibition is firmly entrenched in various bodies of law: international humanitarian law, international human rights law and international criminal law.

Additional Protocols to the Geneva Conventions

Initial condemnations of the practice of child soldiery can be found in both the Additional Protocols to the Geneva Conventions (hereinafter, AP I and AP II).[15] While the original Geneva Conventions viewed

CHILD SOLDIERS, CHILD SOLDIERS: GLOBAL REPORT 152-54, 156,266-70, 285-88 (2004) [hereinafter GLOBAL REPORT].

[14] The Director of Military Personnel Policy of the U.S. Army told Human Rights Watch (HRW) that scores of seventeen year-old soldiers served "in all capacities" in Afghanistan in 2004. The U.S. Marines and Air Force did not respond tff HRW requests for information about child soldiers, leaving their practices open to speculation. See Id., at 153. - .

[15] See Protocol Additionaf to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 77(2), opened for signature Dec, 12 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and-Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4 (3) (c), opened for signature Dec. 12, 1977, 1125 U.N.T.S. £09 [hereinafter AP II]. Additional Protocol I (AP I) pertains to international conflict while Additional Protocol II (AP II) pertains to internal conflict.

children as persons requiring special protection,[16] the subsequent Additional Protocols significantly altered, or perhaps updated, the notion of a child's needs. Article 77(2) of AP I provides:

> *The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen -. years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.*

In fact, AP I clearly envisions that parties will continue to recruit children under fifteen. It extends "special protection" to children under fifteen who "take a direct part in hostilities and fall into the power of an adverse Party ....."[17] Children "detained or interned for reasons related to the armed conflict" must be housed separately from adults.[18]

Convention on the Rights of the Child

The 1989 U.N. Convention on the Rights of the Child (CRC) strongly condemned the recruitment-Lof child soldiers. The most quickly and widely ratified international treaty in history,[19] it took less than a year to enter into force and won nearly global acceptance in less than a decade.[20] Given the universality of the CRC, one might think that the age of majority as established at eighteen years has attained global status and that anyone under eighteen qualifies as a child. The CRC, however, adopts a more flexible approach to age in the realm of child soldiery. The murky commitments enshrined in Article 38 of the CRC sound familiar:

1. States Parties [to the CRC] undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

[16] See Geneva Convention Relative to the Protection of Civilian Persons in Time of War Wt. 14, opened for signature Aug. 12, 1949, 6 U.ST. 3516, 75 U.N.T.S. 287. [17] API,art. 77(3). "Art. 77(4).

[19] See P.W. SINGER, CHILDREN AT WAR 141 (2005).

[20] See Yuri Kolosov, The Rights of the Child, in HUMAN RIGHTS: CONCEPT AND STANDARDS 260 (Jariusz Symonides ed., 2000). Only the United States and Somalia have not ratified the Convention on the Rights of the- Child (CRC). http:7/www.ohchr.6rg/english/c6untires/ratification?[t]H.htm (last visited June 15, 2009).

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. *Sates Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among4hose persons who have attained the of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest...*

A. The Rome Statute

In many respects, the Rome Statute establishing the International Criminal Court marked a great leap forward in the international legal protection of children: (1) international attacks on educational institutions became war crimes; (2) children under eighteen years were exempted from the Court's prosecution; (3) special measures for taking evidence from children became part of the Court's procedural machinery; and, most importantly for these purposes, (4) the conscription, of children under the age of fifteen years into armed groups or national armed forces became a war crime.[21]

The Rome Statute, which entered into force in 2002, bans both "conscripting and enlisting children under the age of fifteen"[22] and "using them to participate actively in hostilities."[23] While this language is drawn largely from the CRC and AP I, the Rome Statute nevertheless enhances the safeguards to children in one important respect. The use of the phrase "conscripting' or enlisting" suggests that both actively recruiting thildren and passively allowing them to sign up are banned. In other words, the "terms used seem to encompass every act, formal or *de facto,* of including persons in the armed forces."

[21] An excellent summary of these developments can be found on the website of Human Rights Watch. See HUMAN RIGHTS WATCH, PROMISES BROKEN: AN ASSESSMENT OF CHILDREN'S RIGHTS ON THE 10™ ANNIVERSARY OF THE CONVENTION ON THE RIGHTS OF THE CHILD (1999), http;//www.hrw.org/campaigns/crp/promises/.

[22] Rome Statute for the International Criminal Court, Nov. 10, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at http://www.un.org/law/icc/statute/romefra.htm. art. 8(2) (b) (xxvi).

[23] Id. art; 8(2) (e) (vii).

B. Optional Protocol to the Convention on the Rights of the Child

After drafting the CRC, the Committee on the Rights of the Child turned its attention to an issue that the CRC itself merely grazed over: children in armed conflict. The idea of an optional protocol governing children and war first surfaced in 1992, and it gained considerable momentum after the U.N. Commission on Human Rights established a working group in 1994.[24] To date, 104 States have ratified and 121 States have signed the Optional Protocol to the Convention on the Rights of the Child (hereinafter, OP).[25]

The OP enhances the legal safeguards to protect children in several ways, but it does not raise the age limits for recruitment.[26] First, it precludes compulsory recruitment of children under age eighteen,[27] though fifteen and sixteen year-olds may "voluntarily" enter the national armed forces.[28] Second, it asks State parties to "take all feasible measures" to ensure that children under eighteen years do not directly participate in hostilities. Finally, the OP moves beyond simple prophylactic measures by requesting that States create social programs for children currently in armed conflict.

INTERNATIONAL HUMANITARIAN LAW

In international humanitarian law, children are entitled to general protection as persons not taking part in hostilities and to special protection owing to their particular vulnerability. Children taking part in hostilities are, however, also protected. Article 25 of the Universal

[24] See Marsha L. Hackenberg, Can the Optional Protocol for the Convention on the Rights of the Child Protect the Ugandan Child Soldier?, 10 IND. INT'L & COMP. L. REV. 417,442(2000).

[25] See UNHCHR, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, June 9, 2004, http://www.unhchr.ch/pdf/report.pdf.

[26] The United States was among the countries most doggedly opposed to a "straight eighteen" approach to military recruiting. See Frances Williams, Anger at U.S. Stance on Child Soldiers, FIN. TIMES, January 11, 2000.

[27] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflit art. 2, opened for signature May 25, 2000, S. TREATY DOC NO. 106-37, 39 l.L.M. 1285, [hereinafter OP], available at http-JI www.unhchr.ch/htrnl/menu2/6/protoclchild.htm.

[28] For Children under eighteen to join national armed forces, the following conditio* must be- met: (1) the decision to join is "genuinely voluntary"; (2) the military **has** received the "informed consent" of parents or legal guardians; (3) the child is "fuDf informed of the duties involved in such military service"; and (4) the child provida "reliable proof of age." Id., at Article 3(3).

Declaration of Human Rights recognizes that mothers and children are entitled to special care and assistance and that all children have the right to social protection.

Several provisions of international humanitarian law grant children special protection adapted to their needs. This special protection is derived from the general principle which states that

> *"children shall be the object of special respect and shall be protected against any form of indecent assault. " (AP-I, Article 77), and that they "shall be provided with the care and aid they require. " (AP-II, Article 4).*

Apart from the four Geneva Conventions of 12th August, 1949 and Additional Protocols of 1977, the United Nations Convention on the Rights of the Child, 1989 also confers protection on children. In the words of the Preamble to the 1989 Convention on the Rights of the Child, *"the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the charter of the United Nations."*

Article 38(2) of the Convention requires State parties to take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. Further, Article 38(3) requires State parties to refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years, but have not attained the age of eighteen years, State parties must endeavour to give priority to those who are oldest.

Under the Statute of the International Criminal Court, conscripting or enlisting children under the age of fifteen years or using them to participate actively in hostilities is a war crime in both international and non-international armed conflicts (Article 8).

In an ideal world, the child's best interest lies in never having to join an armed group and in never having to live under conditions, which make the battle for survival the only other choice.[29] Article 77(1) of Additional Protocol -1 requires the parties to the conflict to provide children *"with the care and aid they require, whether because of their age or any other*

Child soldiers by Guy Goodwin- Gill & Ilene Cohn. P. 123.

reasons." The reference to *'age or any other reason'* can be interpreted to include the trauma resulting from involvement in combat and therefore, implying an obligation to provide appropriate counseling or other rehabilitation services. Such a view is supported by Article 39 of the Convention on the Rights of the Child:

> *State Parties shall take all appropriate measures to promote the physical and psychological recovery and social re-integration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed* conflicts. *Such recovery and re-integration shall take place in an environment which fosters the health, self-respect and dignity of the child.*

Neil Boothby suggests that the former child solder needs to be forgiven by society, sometimes by the very people who have been victimized by his actions.[30] So, forgiveness and reconciliation of children taking part in hostilities should be the motive of high contracting parties of Geneva Conventions. Torture and hard punishments to children for their war crimes can never be a solution and can be counter productive.

CONCLUSION

International law shows a mixed record in ending the recruitment of child soldiers. On a normative level, there is little doubt around the globe that children should not engage in military activities. The United Nations and several NGOs have succeeded in raising awareness, mobilizing support and helping to reintegrate thousands of former child soldiers with the broad support of many nations. They have also set up an international legal framework, including the CRC, Rome Statute, Optional Protocol, which forbids the use and enlistment of child soldiers.

My suggestion for the protection of children during armed conflicts is that the international community should make the implementation of international humanitarian law more potent. An implementation machinery which is powerful enough to make countries like the United States, Israel, United Kingdom and China accountable for their violations of provisions of international humanitarian laws and humanitarian rights is required so that the civilians of the countries which have been invaded or attacked feel that justice has been imparted.

Neil Boothby, Living in the War Zone, World Refugee Survey-1989 in Review, P.41.

In the present day world, where the States are sitting on a time bomb of war, which is ticking very fast towards explosion, the international statutory bodies, Courts and Tribunals overlooking the justice system for prevention of any war crime or genocide should be more impartial in their actions and transparent in their working. The children of Afghanistan and Iraq should not feel that they are enslaved by an occupying power, the children of Lebanon and Palestine should not live in a constant fear of being attacked by Israel. Such fear and sense of enslavement leaves bad impact on young minds and pushes them to the brink where they are brainwashed by the radicalists and turned into terrorists or human bombs.

But above all, to tackle this problem there is a need of political will on our part. In this rapidly changing age of globalization, taking care of the child's rights at every stage has taken a back seat. This not only affects the whole value system, but also the present social and economic needs of the children. There exists no doubt that the future of humanity depends upon children to a large extent, even then, a very partial and parochial approach has been followed towards bringing them on the mainstream of social and political agenda. Further, there is a need to change the approach of the Government and the society as a whole to accept children as partners and active participants in creating a culture of child rights. Children of today are to be given due respect and their dignity should be protected by ensuring complete protection of their rights, which is essential for their all round development. Only then can they be called the true torchbearers to the future world.

NUCLEAR DEAL AND STRATEGIC CONCERNS: MYTHS AND REALITIES

ALOK KUMAR GUPTA*

There has been lot of heated debate inside and outside the Parliament of India i.e. in print and electronic media, seminars and conferences, talk shows on different news channels etc about the Indo-US Civil Nuclear Cooperation. All along the debate, one issue that was tremendously pertinent was the issue of the Deal leading to a compromise of India's strategic concerns and independence in foreign policy matters as allegedly the Deal is being dictated by the United States. The debate was so intense that it led to the situation where the ruling party was ready to sacrifice the government rather than entering into a compromise with its coalition partner. Compromise on strategic concerns was a major issue. Therefore an attempt to clarify many of the ambiguity surrounding the imaginary argument of "compromise on strategic concerns" in this article has been made.

The Indo-US Nuclear Deal has come a long way by now traversing a tortuous trek since the year 2005. With the final assent by US President George Bush to the HR 7081 better known as "US-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act" on October 8, 2008, all skepticisms about the deal has been set aside. Nevertheless, the Deal has to pass through a burning cauldron of molten magma for most of the time. The opposition to the Deal has not yet subsided; the Left (CPI and CPM) and the Right Bhartiya Janata Party (BJP) in particular are still hell bent on selling it to the Indian people as a complete surrender of India's strategic concerns and a great compromise on India's national sovereignty. The United Progressive Alliance (UPA) Government, however, was very particular about the benefits of the Deal and also put the Government at the altar of sacrifice and refused to enter into compromise with Left to save the Government. All along the argument that this will lead to a compromise on strategic concerns of

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India was extremely pertinent. Therefore, it makes it imperative to analyze the myths and realities around the issue of 'strategic concerns'.

India does require such a Deal became evident from the speech of leader of the Opposition in Parliament, L.K. Advani, "we will renegotiate the Deal when we come to power". This speech was made during the debate on 'Motion of Confidence' moved by Prime Minister Manmohan Singh on the floor of Lok Sabha. Therefore, his objection was related to the present nature and content of the Deal and not about the argument that India has fallen into strategic trap of US. It was Left and its ilk who were obsessed with the argument of "India becoming and ally of US in its strategic Concerns". I would rather like to establish that the entire Indian move has been a highly mature diplomacy and well in context with time and contemporary economic aspirations of the country. This I shall be establishing by warding off the myths surrounding the allegation "India has lost in terms of strategic concerns" by entering into the 123 Agreement with US.

The first myth about the strategic concerns is in terms of Nuclear Deterrence. This is an ambiguous term. No expert on the issue can say it for sure as to how many bombs are required to deter either Pakistan or China. India's nuclear program is guided more by the strategic threats from China. One requires to be pragmatic in this regard. There are several estimates of the number of bombs that China has and it ranges from 75 to 450. Nuclear Deterrence involves a complete weapon system which includes payload i.e. bombs, launching vehicles i.e. missiles and bombers and launching pads (mobile as well as over-ground and underground facilities). India's Agni (which is an Intermediate Range Ballistic Missile) is still at the trial stage and would take lot of resources and time before India develops an Inter-Continental Ballistic Missile (ICBM) so that the whole of China is within its range and can deter China in situations of nuclear standoff. We are living in the age of Multiple Independently Targetable Reentry Vehicle (MIRV) which can drop nuclear bombs on more than one target with acute precision in one go. About the launching pad lesser said is better. Therefore, mere possession of bombs and rights to conduct tests would not provide us a credible deterrence either against China or Pakistan. Therefore, the policy makers and commentators should not try to fool the people, by using such high sounding rhetoric like "Compromise or sell out on Strategic Concerns".

Second myth is that even if we are able to acquire few bombs, it is not going to provide lis a credible deterrence. A credible deterrence presupposes a second strike capability or retaliatory strike, in which India is far behind. India has a long way to go for acquiring such a capability in terms of resources and technology. By the time India acquires such a capability it would be outdated and thus will not be able to keep pace with time and technology. Moreover, in a world mat may hopefully, move towards reduced arsenals and even elimination of nuclear weapons, this is a retrograde proposition. Therefore, one need to be pragmatic while articulating strategic concerns and weigh the pros and cons of a policy in realistic terms. Moreover, the striking feature of the 10 years since the May 1998 nuclear tests is the growing disconnect between nuclear realities and the ongoing peace process between the two countries. Leaders in both countries behave as if the bomb they nurture is marginal to the peace process they claim to be taking forward, even though the nuclear weapons policies they promote at home are geared to destroying the other. Therefore, to their own people they tend to sell the aggressive policy of 'minimum credible deterrence' owing to enhanced threat perceptions and to the outside world they sell the policy of a 'lover of peace'. It makes it certain that nuclear threat or nuclear deterrence is just an eyewash.

Third myth relates to the probability of a nuclear war in the Southern Asian Theater. World community has reached to a stage where Nation-States would never resort to an exchange of nuclear weapons and India, China and Pakistan are no exception to this fact. There are number of border problems in this region and India has been engaging both China and Pakistan constructively and its diplomatic relations with both these countries have come a long way since they fought the last war. Thus, there is not even a remote possibility of a nuclear war in the South Asian Theater, then why so much of investment should be made on nuclear weapons program around the myth of strategic concerns. The reality is that South Asian community requires an increasing investment in the development sector and a diminishing investment on defence. Today, poverty, hunger, illiteracy and unemployment are the biggest threat to the civilized life. Therefore, strategic concerns should be raised in terms of development rather than defence. The strategic community in India must not forget that the main reasons for the collapse of the mighty Soviet Union were the arms race with the US, which bled the country and pushed it towards implosion. With divisive forces working at nation's seams India cannot wish to emulate the same because such forces are escalating on account of unemployment and frustration of the youth of

the country. Individual security thus is the strongest key to national security.

Fourth myth is about the threat perception of nuclear weapon from States as=an actor in international politics. Today, the biggest threat is from non-state actors and there are greater probability that Weapons of Mass Destruction would fall into the hands of non-state actors against which a different kind of preparation is required and not the development of a credible nuclear deterrence. Such a probability raises greater threat perceptions on account of fact like the availability of yellow cake, chemical and biological weapons in black in the international market. The Anthrax spread in the aftermath of 9/11 incident is a case in point. Thus, the Indian strategic community must understand the realities of threat perception that it is more from non-state actors than states. Therefore, the realities make it imperative that against the non-state actors a different kind of defence preparation is required and not the nuclear deterrence.

Fifth myth has been created by the strategic and scientific enclave within India. Since they have to run their business, the so called experts on strategic concerns of India have blown it put of proportion. Left has added fuel to this fire by advancing the 'American Strategic Trap' theory to the people. These so called strategic thinkers do understand that they can create a mass frenzy by blowing the issue of compromise on strategic concerns out of proportion. They have been successful to a great extent. This is because India being a huge population it takes time for a right kind of public opinion to crystallize and then only the public opinion is articulated properly. The fact, however, remains that as per theory of impossibility a unanimous public opinion or even a hierarchy of it is not possible. Therefore, rather than guiding the public opinion the strategic enclave in India often resorts to misguiding the public opinion with vested interests or to achieve political mileage. Therefore, the reality is that the strategic enclave within India is working in a partisan manner and they are more into articulating their self-interest rather than what is in the real interest of the people of India.

Sixth myth is about India falling into the strategic trap of United States. This again is an ambiguous expression and has not yet been articulated properly. The book *Subordinate Ally* by Prakash Karat is too biased in its approach and thus there requires a balanced view. The book amounts to American bashing and nothing else. One theory is that US is engaging

India to encircle China and is working towards making Unipolar World Order a reality. US military presence is already there at Diego Garcia, Afghanistan, Iraq and in West Asia, a reality that such experts must understand. India is not going to invite American forces into India. The foreign policy makers are not immature officers that they must have ignored the strategic trap if any. They are well aware of the intentions of US and must have weighed as to whether it is the military game plan of US or the economic compulsions of US which has forced it to engage India. The Bush administration made it a priority issue before it relinquishes office and they have achieved it. Indian policy makers has successfully bargained in the process and taken full care of their strategic concerns if any involved into it. It was a mistake for India to have parked the nuclear agreement in an Indo-US strategic relationship. It should have been seen as, and justified as, a 'Normalization of Indo-US nuclear relations.' There is no doubt that India was unfairly excluded from international civil nuclear commerce as a result of US policies. With the resumption of such relations with other advanced nuclear countries, India is only getting back its legitimate space. The Left and the BJP must realize that continued exclusion will deprive India of a voice in managing emerging nuclear problems, such as the security of Pakistan nuclear assets if there were to be further internal instabilities in that country, which certainly will not be in the larger and long term interest of India. This becomes more pressing in view of the role played by Pakistan nuclear technologists towards proliferation of nuclear technology and material related to nuclear weapons.

Seventh myth is the need for a test. It means that succumbing to IAEA demands and Hyde Act being binding on US administration, India will be left with no option to conduct a test which is required for continuance of nuclear weapon program. The reality is that the new US administration to take office in 2009 is very likely to be the one headed by a Democrat President. It is almost certain that such an administration would revive the CTBT. If the US, China and Pakistan join the CTBT* India is bound to do the same. Those who argue for a full freedom on future tests they must understand the freedom is not going to live long. Moreover, India has already collected enough and sufficient data, as claimed after the policy makers and scientists together in the aftermath of May 1998 tests, which would help the scientists to design a bomb as per their requirement using computer simulation methods.

Eighth myth is about the preponderance of military capability as the only security against prevailing threat perceptions for a country. There is a change in the paradigm of security concerns with primacy of non-

military security over military security. In the contemporaw world economic diplomacy precedes over military diplomacy. When there is increasing emphasis on economic and individual security why India should keep harping on strategic concerns which is used in military parlance to define the matrix of threat perceptions Of a nation-state. A developed state would automatically lead to security of its people and accelerate growth in the field of trade and commerce. Subsequently, it leads to the growth of security community in different parts of the world and once there is substantial stake involved nation-states refrain from entering into military exchange and rupture their relations with each other. With increased business interest in India, the US would never wish to suffer loss because of loss of stability in the region. US stake in the region will take care of strategic concerns by itself. With the growth of nuclear commerce, security communities would develop within US and India that would act as a safety valve and not allow the countries to enter into war.

Therefore, going by the above-mentioned myths and realities one can firmly say India has not compromised by any standard on its strategic concerns, and will never do so in future as well. India has always struggled for independence in foreign policy matters and has demonstrated it on several occasion: its stand at the WTO and the ongoing Doha Round of Negotiation; its proven stand on discussion and deliberations related to climate change; its struggle for a new international economic order, are to name but a few. Any denial of increased use of nuclear energy, as an option to solve problems of India's growing need for energy, would have been too high a price to be paid for an imaginary fear of compromising on "strategic concerns" and "independence in foreign policy matters."

Moreover, even the critiques of the Deal do agree that the need for energy cannot be denied but they emphasize on alternative sources of energy. However, the policy makers do look for number of alternatives and weigh the pros and cons of all before they zero in on a choice among those alternatives. It is not that India is closing its options of alternative sources of energy; rather India is trying to expand and diversify its source base of energy. The growth of population, and its consequent impact on urbanization, the growth in economy and corporate India has put an increasing burden on India's available energy sources, which in turn has made it imperative to do something concrete about India's ever growing demand for energy. When most critiques of the Deal agree on

this fact that why they should take recourse to imaginary fear of being road-rollered by the US and misguide the people and the policy makers-rather they should have guided the policy makers in their process of bargaining against a mighty nation-state to extract the best.

The concern, thus, has been largely psychological, the critics' doubts and fears in fact can be located in the psychology of an uncertain nationalism of an emotionally insecure society; this nationalism is afraid of its own capacity to make a realistic assessment of its assets and liabilities in the overall calculus of national strength. The bottom line of the argument is whether or not we feel it in our collective bones that we have what it takes to get the better of the Americans and others who want to deny us our legitimate place under the nuclear sun.

The crystallization of the Indo-US Nuclear Deal for Civil Nuclear Cooperation reveals the strength and smartness of Indian Diplomacy. It has effaced the pessimism that has set in among a larger section of the people of India about the Indian Diplomacy. Indian diplomacy and foreign policy deserves a good round of applause for the achievement and has once again proved its worth and might. Such a great achievement should not to be allowed to get embroiled in the quagmire of political bickering. They deserve^ applause for not only making the Deal a success, rather getting most of what it wanted from the multilateral agencies like IAEA and NSG that too using the good offices of Unites States. Isn't it a smart move? Therefore, it is yet another feather in the cap of India, along side many other like dismemberment of Pakistan, containing the movement of seventh fleet by nurturing friendship with the then USSR and pitting one super power against the other, forcing the intruders back in Kargil, sending the relief material to Sri Lankan Tamils by air when the Sri Lankan Navy stopped our ships from entering into their territorial waters, containment of mercenary attack on Mali, development of indigenous nuclear weapon program, and acquiring self-reliance in many sectors of development in spite of adverse circumstances and lack of technology. Hence, the Deal is no mean success and it should not be undermined or be misinterpreted in terms of imaginary threat perceptions and things like sell out of strategic concerns. Today, non-military security precedes military security and the Deal is a step forward in the direction of enhancing human and individual security.

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CONSTITUTIONAL 73RD AMENDMENT: INSTRUMENT OF POLITICAL EMPOWERMENT FOR WOMEN*

MUSHTAQ AHMAD "

The role of women in Panchayati Raj Institutions (PRIs) is attracting a lot of serious attention in the present context. The Constitution 73^ amendment has been welcomed as the step focusing the nation's attention on the political structures and die processes of democratizing rural India and their significance for the vulnerable sections of the rural society. Attitudes have changed a lot today. Women now are not going to remain contended just looking after women's affairs as elected members of Panchayats, whether it be village, block or the district level. If given the chance, they will play a constructive role in all the developmental activities and step into what was hitherto considered man's domain. The very idea that women in such large numbers will have a say in local self-government is a new concept and will not be easily accepted. Difficulties are bound to be mere initially. Statutory empowerment will become a reality and relevant only when they are given adequate, planned and systematic training about their responsibilities, duties and rights which devolve on them as elected representatives. Panchayati Raj Institutions serve as training grounds for the growth of leadership, democratic decentralization of administration and involvement of people particularly women in accelerating the socio-economic development. In this paper an attempt has been made to discuss the steps taken by the Government of India for political empowerment of women through Constitution 73"[1] Amendment and to highlight the constraints which come in the way of such empowerment.

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INTRODUCTION:

Experience reveals that women have lived in two parallel worlds ever since the first community habitation. They have occupied positions of eminence and authority, and even gone into battle.

They have been objects of repression, un-called-for violence and the petty tyrannies of the male bread winner. 'Political empowerment of women'-- an enigma to be desired, mankind has ever been willing to give women everything but equal status. This brazen conspiracy of the menfolk against the women has been perpetrated since all times. Even the human rights have been given to them but grudgingly. And the irony is that the 'man' is hardly ever conscious of the injustice done by him. But today, a stage has arrived that she is almost an equal partner in the voyage of life. The fact is that the match of mankind is irreversibly towards an era of equality and the women is on the threshold of a life hitherto un-charted.[1] It is because of dynamic constitutional and legal provisions and other measures adopted by the government from time to time to transform Indian society to make it gender just. Their visibility in public life is increasing, still they face gender discrimination.

In this paper an attempt has been made to discuss the steps taken by the Government of India for political empowerment of women through Constitution 73rd Amendment and to highlight the constraints which come in the way of such empowerment.

UNITED NATION'S RESPONSE:

Women constitute half of the world's population. But they are the largest excluded category in almost all respects. They have only 0.1 per cent of the global income. They own 0.01 per cent of the means of production. Nearly 70 per cent of the women live below the poverty line. Two-thirds of them are illiterate .They constitute almost invariably a small minority of those holding elected office. In 1980, they made up of just over 10 percent of the worlds parliamentarians. The figure rose to 14.8 percent in 1988 and it came down to 12.7 per cent in 1997 and the situation is by and large same till date.

'Bban, C & Raj. "Women's Empowerment for Gender Equality- A Functional Analysis", *Kurukshetra Vol. 49 No. 11* (August, 2001)

The question of women's participation in politics began to assume special importance only since 1975 when the United Nations declared the decade as the " Women Development Decade" and adopted some resolutions for empowerment of women. The Nairobi Conference(3rd International Conference on Women) held in 1985 called on the participating countries "to take steps for ensuring women's participation in politics through reservation of 35 percent seats in all elections.

In 4th U.N.(World) Conference on Women held at Beijing in 1995, it was asserted by the participating countries that - "women's empowerment and their participation on the basis of equality in all spheres of society are fundamental for the achievement of equality, development and peace!".[2]

INDIAN SCENARIO:

After Independence, even in India, several efforts have been made to increase women's political participation. The participation of women in PRIs was for the first time brought into focus in 1957 by Balvant Rai Mehta Committee, which had recommended nomination/cooption of two women members in Panchayat (at Block level). The principle of nomination, however, did not produce the desired results. Thus, the running theme in the debates from 1957-89 was how to encourage the participation of women in political process. Thus, the next and more significant effort was 33 percent reservation of seats for women in Panchayat & Municipalities through 73 rd and 74th Constitutional Amendments.

"You cannot draw the masses into politics without drawing the women into politics as well".[4]India is perhaps the first country to recognize this social fact underlined by Lenin in 1921 on International Working Women's Day. And to have concrete measures to draw women into politics at the grass-root level by giving them 33 per cent reservation in what may be called the third-tier of governance-the Panchayati Raj.[5]

[2] .Datta, P. "Women in Panchayats", *Kurukshetra* Vol. 50 No. 4 (December, 2001)
'Report of Study Team on *'Community Projects & National Extension Services'* Vol I, Government of India, New Delhi (1957).
[4] Lenin, International Working Women's Day,1921
[5]Hemalath, H.M. 2003. "A Hand that Cradles can also Handle the Panchayat", *Kurukshetra* Vol. 51 No: 5(March)

'Democratic Decentralization' or Panchayati Raj as it is popularly known in India, aims at making the democracy real by bringing millions of people into the functioning of their representative government at the grass-root level. The main responsibility of Panchayati Raj Institutions (PRIs) is to accelerate the pace of development and involve all people, both male & female in this process so that the felt- needs of the people and their development aspirations are fulfilled. Involvement and participation of women in PRIs is essential for efficient, equitable and sustainable people-centered development. Democracy, governance and gender are therefore, interrelated. Democracy is a form of political system, governance is an institution to implement its principles and gender is a part of governance, to be ensured by equal participation of men and women.

In the context of meager representation of women in the Parliament and State Legislatures vis-a-vis their population, the Constitution(73rd Amendment) Act, 1992 shall be considered a significant landmark in the process of political empowerment of women. The 73rd Amendment which became a Part IX of the Indian Constitution and thereby providing constitutional status' to PRIs, has brought a silent revolution in the country by facilitating the entry of 33 percent women into public life. Giving one-third reservation to women in PRIs basically aims at ensuring women's participation in political and development process for socio-economic justice at the grass-root level.

CONSTITUTIONAL PROTECTION OF POLITICAL EMPOWERMENT:

Article 243-D inserted in the Constitution by 73rd Amendment deals with reservation of seats and political offices for women in PRIs. The main features of Article 243-D are:[6]

- One-third of the total number of seats to be filled by direct election in every *Panchayat* shall be reserved for women and such seats may be allotted by rotation to different constituencies in Panchayat (Art.243-D(i));
- One-third of the total number of seats reserved for women under Cl.(i) shall be reserved for women belonging to SCs & STs (Art.243-d(2));
- One-third of the total number of offices of Chairpersons in the Panchayat at each level shall be reserved for women (Art.243-D (4)).

Article 330 and 332 of the Constitution provides for reservation of seats in the Lok Sabha and State Assemblies in favour of SCs and STs.The

[6]Article243(D) of Constitution (73rd Amendment) Act 1992 .

Constitution also provides that these twin types of reservation shall cease at the end of 50 years from the commencement of the Constitution i.e.; in January 2006. However, the reservations introduced for women in the Panchayats shall continue (Art.243-D (5)). This is very significant provision as the reservation for women in PRIs has been made a permanent feature.

As a women welfare measure, the Year 2001 in India was observed as the 'Year of Women Empowerment'. This veritably presupposes the nation's urge to hoist the status of women in the society. The 73rd Amendment may be regarded as a watershed in the history of state initiatives in regard of political empowerment of women. It had indicated a noticeable shift in the approach of the Indian state towards women. Earlier women were generally viewed as objects of development only, but this amendment made women the subjects of development and an indispensable part of the decision making process. As a result of the reservation of seats formal participation of women in politics at the grass-root level has gone up considerably.

THE PRESENT POSITION:

Democratic decentralization would be rendered meaningless unless gender equity is ensured. The pace of development in any society would be slow if women who constitute about 50 per cent of the population are not facilitated to participate in the development process. India with a female population of over 450 million possesses a vast reservoir of women power which exceeds a combined total population of South East Asian countries.[7]

The available data in respect of the first post 73rd Amendment Panchayat elections reveal that, of the total number of 2.92 million elected representatives of Panchayat, at various levels, about 10 lakh (1 million) were women, and a large majority of them were first timers.[8]

The historic Amendment has greatly contributed to the political empowerment of women (including SCs and STs) and has thrown open political opportunities in the *Panchayati* Raj Institutions (PRIs) to these disadvantaged sections. Despite various constraints it can safely be said

[7] Anon, *"Eight Five Year Plan 1992-97",* Vol II Govt, oflndia Planning Commission(New Delhi)

[8]Subramanyam,K.S, "Empowerment of Women and Marginalised Groups in Panchayats", *Kurukshetra* Vol. 50 No. 7 (March, 2002).

that the upsurge of women power in PRIs is noticeable as Panchayats in India are gradually becoming gender sensitive. Women have started asserting themselves leading to a new kind of situation in the society. Reservation of seats has given them an unprecedented opportunity and has created condition for a sort of social revolution without much hue and cry.[9]

CONSTRAINTS:

Unlike other political systems, based on egalitarian values, democracy has more scope for promoting 'gender equality'. But democratic structure being influenced, reflected and determined by historical culture, social, economic and political conditions of society, has some constraints in achieving equality in all walks of life. More than a decade is completed since the passage of the 73rd Amendment Bill, drastic and dramatic changes were expected by increasing women's representation. The dream of feminisation of politics has been achieved in quantitative terms (only at local level), yet to be achieved in qualitative terms.

Most of the women members do not know that they have been selected to represent womenfolk and work on behalf of them. So there is a need for creating feminist consciousness among them. It further includes:

- Identifying women in trouble
- Identifying the requirement of women of the village and try to fulfill their needs through Panchayat.
- Raising women's issues in the Panchayat meetings
- Monitoring development works.

The male members of the Panchayat, viz., bureaucracy, field level officials and functionaries have proved to be gender insensitive. The basic problems among women are illiteracy, ignorance, social and religious barriers and family obligations which prevent them from participating effectively in PRIs. The male members of the Panchayat as well as their husbands keep them away from meetings, take signature at their residence and treat them as dummy participants.

Of late, there is a paradigm shift in development process by incorporating the 'gender concerns' as an important element of

[9]Patnaik, B.K, 2001. "Gender Economic Empowerment and Rural Poverty Alleviation", *Kurukshetra* Vol. 50 No. 2(December, 2001).

development strategy. Duly recognising the importance and involvement of women in participatory model of development, India has taken up the theme of women's empowerment as one of the main agenda items to tackle rural poverty and socio economic issues.[10]

Despite various constraints, one of the significant achievements of the provisions of 73rd Amendment Act concerning reservation of seats and political offices in favour of women is that it has improved their awareness and perceptional levels and had created an urge in them to assert for their rightful share in the decision-making exercise at the local level. They have begun to realize that political empowerment in the ultimate analysis holds the key for their social and economic betterment. Therefore, there is no need to be cynical about the prospects of the constitutional safeguards provided to the women.

CONCLUSION:

If you feel skeptical about this process because of the adverse reports regarding the pitfalls of empowering women who are not ready to take their place alongside men due to inexperience and illiteracy, just visit Eastern India where at least one rustic male has got a card printed describing himself as the *'Sarpanch Pati'*. A more eloquent comment on the kind of change that we are seeing would be hard to find. It may not be appropriate to expect miracles overnight in the historical and cultural context of Indian social system. A brief spell of 14 or 15 years is too small in the history of a nation to judge the rationale of political empowerment of the women. The disabilities suffered by this deprived section of the rural society are bound to disappear in the long run. The women have now to take up the cudgels and reap full advantage of the opportunities, and to participate in rural affairs through the medium of new Panchayat Raj system. By nature they are suited to take cudgels to perform this task but they have to come out with a firm determination. If they do not, there case would go by default for ever and cannot claim that they are being discriminated.

Enacting a law is not enough for ensuring desired socio-economic transformation but an essential pre-requisite for such a change. The traditional and conservative attitude of rural community, illiteracy and ignorance, social forces, economic structure and existing political milieu place obstructions in their effective participation. The women need to be

Rani, L.D., *Women Enterpreneurs,* A H P Publishing Corporation (New Delhi).

properly educated and trained to fulfill their obligations as people's representatives, and actively helped to overcome obstacles they encounter. The genuine women empowerment thus obviously is not a concomitant of their numerical or quantitative presence but depends on their qualitative participation, which, in turn, flows from the gender orientation, a frame of mind, an attitude, a perspective.

BOOKREVIEW

Federal Democratic Republic of Ethiopia, "Comprehensive Justice System Reform Program: Baseline Study Report" (Justice Reform Program Office, Ministry of Capacity Building, Federal Democratic Republic of Ethiopia, PrimaveraQuint, Amsterdam, The Netherlands, 2005), Pp 531.

In 2002, the Government of Ethiopia (GOE), under the authority of the Federal Ministry of Capacity Building (MoCB), established the Justice System Reform Program (JSRP) for 'assessing the performance of the various institutions of justice and to propose appropriate reforms'.

The then Director of the JSRP, in his presentation in a workshop on Justice System Reform in Ethiopia organized in May 2002, highlighted the most blatant deficiencies in the existing justice system in Ethiopia. The major problems, according to him, are: (i) the insufficient number of qualified judges and public prosecutors, (ii) outdated and inefficient methods and procedures of the justice delivery system, (iii) lack of clarity and coherence in the existing laws, (iv) lack of access to justice information, and (v) lack of sufficient number of institutions of legal education and their inability to produce the required number of professionals. He also hinted at the 'measures' and 'reform programs' that need to be taken to overcome the problems.[1] He also felt that 'fragmented and piecemeal approaches in reforming and building the capacity of justice institutions could not solve all problems and bring the desired results'. 'Effective resource utilization in the justice sector', he stressed, 'could only be achieved by working towards a comprehensive justice system reform program, which looks at the system as a coherent whole'.[2]

[1] Ato Mandefrot Belay, Justice System Reform: Preliminary Reform Profile, Program Contents and Objectives, in Justice System Reform Program, *Justice System Reform in Ethiopia* (Ministry of Capacity Building, Addis Ababa, May, 2002) 35. [2] /Z>W., at 41.

Plausibly, the suggestive opinion of the JSRP Director initiated the move of the GOE to 'consult' experts of international repute for overhauling its entire justice system. In May 2003, the GOE, through its MoCB, engaged the Netherlands-based the Center for International Legal Cooperation (CILC) for reviewing its justice system, identifying its shortcomings and suggesting appropriate remedies.

The CILC, in turn, formed five Working Groups of international experts for collating required information, studying relevant documents and interacting with officers from various segments of the Ethiopian Justice System (EJS). The five working groups were: (1) Working Group on Law Making and Law Revision, (2) Working Group on Judiciary, (3) Working Group on Law Enforcement (Prosecution, Police and Penitentiary System), (4) Working Group on Legal Education, and (5) Working Group on Information Flow within and outside the Judiciary. These Working Groups, after having intensive interactions with national experts in the field (identified by the JSRP) and stakeholders in the EJS, and looking into relevant documents and Proclamations, formed their own opinions about 'deficiencies' in the justice system and the possible 'remedies' therefor. These Working Groups also arranged frequent inter-Working Groups meetings for exchanging their opinions and benefiting from their respective analyses.

In May 2004, the CILC forwarded the final draft of its study to the then Director of the JSRP, who circulated it to various stakeholders in the justice system for comments. The CILC answered their questions. Finally, in the joint meeting held in January 2005 between the JSRP Director and representatives of the CILC, the Ethiopian authorities approved and accepted the draft study. In the same year, the MoCB published it as *'Comprehensive Justice System Reform Program: Baseline Study Report''* (hereinafter *the Baseline).*[3]

'Justice System', as perceived by the CILC, comprises not only of the judicial institutions, the institutions charged with enforcement of law (the police & the prosecutors), and custodial penal institutions (prisons) but also the institutions that enact law (the Legislature) and teach law (University Law Schools/Law Colleges). These institutional components

[3] Federal Democratic Republic of Ethiopia, *Comprehensive Justice Reform Program: Baseline Study Report* (Justice System Reform Program, Ministry of Capacity Building, Federal Democratic Republic of Ethiopia, PrimaveraQuint, Amsterdam, the Netherlands, 2005).

of the justice system, according to the CILC, are functionally inter-linked.

The Baseline offers, with critical appraisal, structural and functional anatomy of these inter-linked institutions and highlights their major shortcomings. With a view to having a comprehensive look at the EJS as a whole and to knowing its shortcomings, the CILC resorted to 'vertical' as well as 'horizontal' analysis of these institutions. The former concentrated on the description and analysis of each of the constituent institutions of the justice system separately; identification and highlighting of its shortcomings and proposals for reform. While the latter, concentrated on the analysis of inter-institutional relationship, the system-related issues, and shortcomings and barriers for co-operation in the system. Justifying this approach, the CILC observed:

> The study aims to be comprehensive inasmuch as it covers the whole justice system and all its important institutions. Piecemeal initiatives dealing with one institution or one side of an institution have proved less efficient inasmuch as they neglected the interrelation between the upgraded and non-upgraded parts of the system leading thus to a smaller impact than was aspired. — [W]e have opted for a vertical and a horizontal analysis. — We have opted for this approach in the light of the various and sometimes-flagrant shortcomings identified in the structure and performance of each institution. — Bearing in mind the current bad situation of the Ethiopian justice institutions, one cannot do only with a horizontal analysis that is presented concisely and in a synthesis.[4]

The CILC, in *the Baseline,* offers an extensive 'vertical analysis' of the law-making institutions, the judiciary, the prosecuting agencies, the police, the prisons and the institutions of legal education.[5] In the light of relevant legal instruments, it not only makes an in-depth analysis of each one of these institutions and offers their structural framework but also makes some pertinent 'observations' about, and highlights 'major'

[4] *Ibid.,* at 65-66.
[5] See, chap 9: Assessment of Each Justice Institution, *ibid.*

fundamental 'shortcomings' of, each one of them.[6] It also, in the form of 'recommendations', makes specific proposals for reform.[7]

Analyzing the constitutional and statutory framework of the legislative process,[8] the CILG, *inter alia,* observed, with concern, that: (i) the procedure for initiating and drafting legislation in vogue provides little scope for participation of the public and other stakeholders in the legislative process and thereby for incorporation into draft laws of their views, observations and suggestions,[9] (ii) the provision enabling the judiciary to initiate and submit draft laws to the House of Peoples' Representatives (HoPR)[10] not only goes against the spirit of the doctrine of separation of powers and the constitutional mandate for judicial independence and impartiality but also amounts to an encroachment on the powers of the Legislative and Executive wings of the State," and (iii) the provision empowering the House of Federation (HoF) to submit legislative proposals in the form of Bills to the HoPR[12] is unconstitutional as it contravenes art 62 of the FDRE Constitution.[13]

After sketching structural and operational framework of the EJS,[14] the CILC has identified three 'core' problems and a couple of 'specific' shortcomings of the Judiciary, Referring to the former, it observed:

> The Ethiopian administration of justice has three *core* problems: Firstly, the judicial system is neither accessible by nor responsive to the needs of the poor. The indigent and powerless simply do not see courts as an institution that serves their interests. — Secondly, serious steps to tackle corruption, abuse of power and political interference within the administration of justice have yet to be taken. Thirdly, the inadequate funding of the justice institutions aggravates most deficiencies of the administration of justice.[15]

[6] See, chap 10: Observations and Major Shortcomings, *ibid.*
[7] See, chap 11: Recommendations, *ibid.*
[8] See, *supra* n 3, pp 68-77.
[9] See, *Ibid.,pp* 137-138.
[10] Art 4 (2), House of Peoples' Representatives Legislative Procedure, Committees Structure and Working Proclamation No, 271/2002.
[11] *Supra* n 3, 131.
[12] Art 57, Proclamation No. 25/2001.
[13] *Supra* nil.
[14] See, *supra* n 3, pp 77-90.
[15] *Ibid.,* at 159.

The *'specific"* problems identified and delved into *the Baseline* are: (i) low professional competence of judges, [16] (ii) lack of initial and continuous training of judges,[17] (iii) limited independence of judges, (iv) lack of systems for holding judges accountable for misconduct, (v) poor systems of case management, (vi) limited access by courts to legal information, including to the *Federal Negarit Gazeta,* (vii) limited access of the public ta court decisions and information, (viii) little knowledge of the justice system to the general public, (ix) little access of the public to justice, and (x) poor infra-structure.[18]

Law enforcement institutions in the form of Public Prosecution Service (PPS) and the Police also suffer from certain major shortcomings. The former, among others, suffers from the shortage of qualified prosecutors (at the Federal as well as Regional levels) and lack of independence. The independence of the PPS is at stake as it is headed by the FDRE Ministry of Justice (at the Federal level) and by the Head of the Justice Bureau (at the Regional level), which are formally parts of the Executive branch of the Federal and Regional Government respectively.[19] Further, the Ministry of Justice regulates and controls the Bar as lawyers are required to apply it yearly for license for practicing in a court of law. This practice, according to the CILC, also puts the independence of lawyers at stake.[20] The Police, at the Federal as well as at the Regional levels, like in other countries, wrestle with very poor public image. They work with poor financial and technological resources. Outdated equipments, insufficient communication and information system, and limited mobility hamper their efficiency.[21]

Similar is the case with the penitentiary system. The legal framework of the prison system in Ethiopia is still based on Proclamation No. 45/1944,[22] which, in the light of the changed ideal and philosophy of

[16] Criteria prescribed for a judgeship in Ethiopia are very general. A candidate is hardly required to possess some specialized professional training to be a judge. See, art 8, the Federal Judicial Commission Establishment Proclamation No. 24/1996.
[17] However, subsequent to *the Baseline* the Justice Sector Personnel Training Centre (JTC) is established in pursuance of Proclamation No. 364/2003 in Addis Ababa and is in operation.
[18] For details see, *supra* n 3, pp 159-178.
[19] See *ibid.,pp* 179-188.
[20] *fbid.,5S.*
[21] See *ibid., pp* 188-192.
[22] The Proclamation is now replaced by the Federal Commission Establishment Proclamation No. 365/2003. It is dominated with the idea of reformation and rehabilitation of prisoners. This Proclamation is further supplemented by the Treatment of Federal Prisons Council of Ministers Regulations No. 138/2007.

prison system, is regarded as obsolete. The prison administration is still dominated by the idea of obedience and oppression of prisoners. It, unlike in other democratic countries, lacks systematic reform-oriented programs and independent external supervision. Prisons, at the Federal as well as Regional levels, are manned by less-trained prison officials.[23]

The Baseline, taking stock of the institutions of legal education-University Law Faculties/Departments and private law colleges-observed that these institutions suffer from lack of clearly set out objectives of legal education and of uniform curriculum,[24] lack of intra-institutional co-operation, lack of qualified instructors and adequate finances and infrastructure, and lack of cooperation between them and foreign universities.[25]

Through 'vertical analysis' of the institutional components of the EJS, *the Baseline* exhibits structural and operational facets of these institutions and the constraints - institutional, structural, and physical - within which they operate. And through 'horizontal analysis' of the justice system,[26] it highlights some pertinent system-related aspects, such as mixed civil and common law legal and judicial system, regular judicial system with parallel system of social courts and the police system with militia, independence of the judiciary and of the PPS, and lack of adequate human and financial resources.

A reading of *the Baseline,* thus, reveals the structural and functional paradigm of the EJS. It makes its readers to feel that the EJS suffers from innumerable ills, inbuilt weaknesses, and shortcomings. In fact, *the Baseline* projects a very gloomy structural and functional paradigm of the EJS. Plausibly the CILC was conscious of the fact when it entered into a caveat and observed:

> The current study of the justice system is not meant as a test for the system whereby the involved institutions may succeed or fail. Neither is it meant as an assault on one

[23] See *supra* n 3, pp 192-199. However, the newly established the Human Rights Commission and the Institution of Ombudsman are vested, *inter alia,* with the power of supervisory inspection of prisons.

[24] Recently, the Justice and Legal System Research Institute (JLSRI), established in pursuance of the Establishment of the Justice and Legal Research Institute Council of Ministers Regulations No.22/1997, has designed and introduced common curricula and course material for all the University Law Faculties/Departments and private law'colleges in Ethiopia.

[25] See, *supra* n 3, pp 199-205.

[26] See, chap 8: Observations Relating to the Justice System: Horizontal Analysis, *ibid.*

> or more of the Ethiopian justice institutions. — As independent international consultants, we have worked on the basis of the situation as it was presented to us in meetings and discussions with the national and states' authorities, the national and states' stakeholders, the local experts, the donors and the counterpart i.e. the JSRPO. We have no interest whatsoever in picturing the situation brighter or gloomier than it really is. Our engagement and aim have been to provide an objective study that will help improve the justice system in Ethiopia and thus strengthen justice, the rule of law and democracy in the country. In a study like the current one, one focuses on the shortcomings and highlights them in order to suggest remedies. This does however not mean that the system only consists of shortcomings.[27]

The CILC, in the backdrop of its 'observations' about, and 'major shortcomings' of, the EJS, also offers an intelligently designed comprehensive institution-wise and action-oriented 'Implementation Strategy and Work Plan' (along with the estimated financial resources)[28] to be executed between 2004 and 2010. The whole task of overhauling the justice system, as estimated by the CILC, requires the GOE to spend 55,748,600 Euro (approximately equivalent to 947,726,200 Ethiopian Birr). It is indeed a Herculean task claiming reasonably a big share of the country's limited financial resources. It also involves the difficult policy-prioritization choice of the State-Managers between the suggested overhauling of the entire justice system and other equally, rather more, pressing needs of the hour, such as eradication of poverty, food security, potable water, public health, and so on. It requires the Government to formulate a long-term policy-perspective plan and strategy. The GOE has either to make necessary budgetary allocations every year for undertaking reforms in one or two identified institutions of the justice system or to explore the possibilities of raising requisite funds for undertaking simultaneous reforms in all the justice institutions and thereby to speed-up its quest and zeal for a better justice system and to make it a reality.

Meantime, the GOE may, nevertheless, take appropriate steps, on priority basis, to give effect to some of the recommendations made in *the*

[27] *Supra* n 3, at 65.
[28] See, chap 12: Implementation Strategy, Work Plan and Costing, and Annex A: Implementation Work Plan and Costing, *ibid.,* pp 292-294 & 296-351.

Baseline that do not involve any financial implications, such as carrying out appropriate amendments in the FDRE Constitution and other relevant Proclamations and/or enacting new apt Proclamations. In fact, its latest moves that led to the establishment of the Human Rights Commission and Ombudsman, Judges' Training Center (JTC), and strengthening and revitalizing the existing institutions, like the Police Training Center, unequivocally exhibit its 'serious concern' for the justice system and its reforms. Similarly, some of its latest legislative efforts that culminated in the Prison Proclamation (2003) and the Prison Manual in the making, and the Proclamation No. 454/2005[29] give very strong positive indicators of its quest and zeal for bringing reforms in the justice system. Further, the ongoing efforts of the Justice and Legal System Research Institute (JLSRI) for improving standards of legal education in the country are ostensibly motivated with the idea of building, in due course of time, of human resources (in the form of qualified judges, prosecutors, and lawyers) for efficient and effective justice delivery system in Ethiopia. However, the GOE still has to walk a long way to reach to its intended destination. If it has 'determination', 'will' and 'means' to undertake the journey, *the Baseline* furnishes a road map of success.

KIVIBHUTE*

[29] Federal Courts Proclamation Reamendment Proclamation No. 454/2005 mandates the Federal Supreme Court to publish and distribute decisions of its Cassation Division that contain binding interpretation of laws to all its subordinate courts, *[vide* art 1(3)]

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'Writs : Law fi Practice", by M.R. Mallick, Second Edition 2009, Eastern Law House Private Ltd, 54 Ganesh Chunder Avenue, Kolkata 700013. Pp. 167+1138; Price Rs. 1250/-

If judicial review is the bedrock of the protections available to a citizen in terms of life and liberty and fundamental rights enshrined in part-Ill of Indian Constitution, writ system is the very soul of these protective rights as, in the absence of the mechanism to seek redressal for violations of fundamental rights and freedoms, these rights and freedoms would have ' been mere showpieces in the edifice of the Constitution. It was for this reason that Dr. Ambedkar while describing the importance of article 32 of Indian constitution had said thai if somebody "asks me to point out the most important of the fundamental rights, I would put my finger on this provision of Indian Constitution", because it is the presence of this provision which provides teeth to the rest of fundamental rights making them effective in constitutional sense of the term. "Fundamental right to move this court by way of writs...." as Justice Gajendragadkar put it "....could, therefore, appropriately be described as the cornerstone of the democratic edifice raised by the constitution".

The way writ system provided under article 32 and 226 of Indian Constitution has been evolved by the Supreme Court and High Courts in India, especially by liberalizing *locus standi* rules and thus paving the way for Public Interest Litigation system to grow and flourish in India, presents the single most important example of healthy democratic traditions evolving all across the globe in protecting the fundamental rights of the common man and particularly of the deprived and exploited sections of the society. Public interest Litigation in recent years has assumed a very important part of seeking writ remedies for those who by virtue of their infirmities are unable to seek writ remedies. This has also been misused by the vested interests, thus compelling the Supreme Court and High Courts to adopt measures to prevent the Public Interest Litigation from turning into a publicity interest litigation or private interest litigation. Supreme Court has therefore cautioned the misuse of Public Interest Litigation which has clearly been indicated in the cases where Supreme Court finds the Jitigation not exactly in public interest but to vindicate the personal grudge of some busy bodies in the name of Public Interest imposing exemplary costs on such busy bodies.

The book under review most appropriately covers every conceivable aspect of writ system in Indian Context, the way it has been evolved, the way it has been practiced and the way it has been idolized. Divided into 28 chapters the book presents the most comprehensive coverage of the subject of writs and can appropriately be designated as the most comprehensive treatise on the subject.

While first chapter of the book banks on exploring the evolution of writ system under common law in England and United States of America and the way it was adopted under the Indian constitution under article 32 and 226, chapter 2 seeks to unravel the general principles of writ jurisdiction of Supreme Court of India, by discussing some of the most controversial cases brought before the Supreme Court and the way Supreme Court deftly handled them. From the point of view of a beginner in legal profession these two chapters presents some very crucial insights as to the evolution of the writ system in India and abroad.

Next 4 chapters i.e. chapter 3 to 6 deal with various aspects of writ jurisdiction of Supreme Court of India under article 32, laying down situations when the writ petitions cannot be entertained, the evolving practices and procedures as to writ jurisdiction of Supreme Court, who may file writ petitions and against whom the writs can be filed and the orders and directions of the Supreme Court in regulating and streamlining writ system in India.

Chapter 7 breaks new grounds in dealing with the writs as a public law remedy in awarding compensations. Approaching the subject from variety of perspectives, from award of compensation to victims of infringement of fundamental rights to Bhopal gas tragedy and the continuing struggle of the victims of Bhopal gas tragedy, to cases of court martial and juxtaposing the practice of writ system with legal and constitutional provisions like 376 of I.P.C. and article 142, 226 and 33 of the Constitution of India, the chapter provides a comprehensive understanding of writs as a public law remedy.

Article 226 provides a bigger and larger ambit to high courts, in the exercise of their writ jurisdiction, in as much as writ jurisdiction of high courts can be exercised not only for providing remedies for violation of fundamental rights but also in case of legal rights of individual citizens.

The book therefore devotes very large portion to the discussion on general principles of writ system in high courts, niceties of territorial jurisdiction, enlargement of the concept of standing, alternative remedies and practices and procedures in the matters of writs in the high courts. As many as 8 chapters, from chapter 8 to 15 have been devoted to elaborate the law on the point. Chapter 16 more or less continues with the same subject laying down the situations and circumstances when the Supreme Court Can and does interfere in the exercise of writ jurisdiction by high courts.

The book then turns to a comprehensive understanding of the types and kinds of writs referred to under the Constitution of India, i.e. basically five types of writs in the nature of habeas corpus, mandamus, certiorari etc. Therefore the next five chapters from chapter 17 to 21 have been devoted for discussion and elaborating the niceties of different types of writs, practices and procedure there for in India.

The basic purpose of writ system under Indian Constitution was to ensure protection and enforcement of fundamental rights provided under the constitution and it is in respect of protections and enforcement of fundamental rights that the finest dimensions of writ jurisdiction has emerged in India. A separate chapter therefore, has been devoted for unfolding the fundamental rights enshrined in part-Ill of Indian Constitution. Some of the emerging dimensions of fundamental rights for example article 15 (5), introduced by 93rd Constitutional amendment, whose constitutional validity has been upheld by the Supreme Court, has been specially dealt with. The said provision provides special provisions for admissions in educational institutions for socially and educationally backward classes. A legislation brought for the purpose of ensuring smooth implementation of this provision, i.e. Central Educational Institutions (Reservation of Admissions) Act 2006 which too has been upheld by the Supreme Court of India has been the focus of discussion in the said chapter.

Some of the basic principles of constitutional law evolved in the common law world that have been used and practiced by our courts are another major area of focus in this, treatise. Chapters 23 to 26 concentrate on principles of natural justice, malafides, legitimate expectations and promissory estoppels etc. emphasizing and highlighting-the use and importance of these principles in the exercise, practice and procedure of writ system in India.

Use of writs in Public Interest Litigation cases, as has been indicated above, has been a major area of controversy in evolving writ system in India. A very lengthy chapter, i.e. chapter 27 therefore concentrates on variety of dimensions of public interest litigation system in India, highlighting the utility and vulnerabilities of public interest litigation in a wide and varied system like India, where the issues from the problems of affluence to problems of starvation deaths simultaneously emerge on the scene, shocking the conscience of the nation.

Judicial review in the tradition of written constitutions has emerged as a major force in the evolving democracies all over the world. India which was comparatively a late comer in this field had the benefit of experiments of hundreds of years of other systems, especially that of United States of America. The doctrine of Judicial Review enshrined under Indian Constitution, under articles 32, 226 and 13 read together confers extensive powers of judicial review of legislation, quasi judicial proceedings and administrative action. And this power of judicial review has been profusely used by the Indian judiciary. The last chapter of the book, one of the lengthiest chapters as such, has fittingly dealt with the subject comprehensively adding special value to the book.

This being the second edition of the book, dealing with different and sensitive areas of this branch of constitutional law, has travelled all the highways and by-ways of the subject covering almost all the leading verdicts of the Supreme Court and High Courts in the realm. The book should prove to be a valuable addition on the subject of Constitutional Law and practices in India and abroad.

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Nandan Kamath-Law Relating to Computers, Internet & E-Commerce: A Guide to Cyberlaws & The Information Technology Act,2000 as amended by The Information Technology Amended) Act,2008 with Rules, Regulations and Notifications, 4 Edition(2009), Publisher-Universal Law Publishing Co. Pvt. Ltd., C-FF-1A, Dilkhush Industrial estate, G.T.Karnal Road, Delhi-110033, Pages-753,Price Rs.550/-

The growth rate of Information and Communication Technology (ICT) has been immense in the past few years and with tools like the Internet, it has penetrated deep into the system. Advent of ICT has discarded many practices and evolved innovative models from planning to implementation almost in all the spheres of life. Virtual reality has become the key concept of contemporary functioning aiming towards rapid and efficient management of various endeavors. Data, Information and Knowledge are perceived as building blocks of the backbone structure of ICT, which with the aid of technology tools create Cyberspace transcending all the boundaries.

ICT has revolutionized all preconceived notions and has posed serious challenges to current practices especially banking, communication networks, financial & commercial transaction and national security system and their regulatory domain. The systems around are going through unprecedented changes and urging for an imperative need of reviewing all the existing norms, policies and laws.

This book is a systematic and significant attempt in this context presenting a deep root analysis of problems emerged from ICTs and their regulatory paradigm. This book serves as a comprehensive guide to Cyberlaws & The Information Technology Act, 2000. The fourth edition of this book is a substantial revision over previous edition in view of the amendment by the Information Technology (Amended) Act,2008 with Rules, Regulation and Notifications.

This book is a systematic and sequential collection of articles structured in an analytical manner on impact of ICT on law as authored by various senior students of the National Law School of India University. The book consists of 24 chapters with the contents arranged in a sequential manner

to first develop an understanding of basics of technology and then the regulatory tools in detail.

The first chapter introduces the readers to the concept of web and nature of Internet frauds, Phishing scams etc. which develops an understanding of the flavor of the subject. Cyber Crimes being global in nature do not fit in the model of conventional Jurisdiction and thus require different modalities on jurisdictional issues. This book addresses such issues including Internet jurisdiction and contractual obligation in Cyberspace quoting significant cases on Cyberspace Jurisdiction such as *Pres-Kap.Inc.* v. *System One, Direct Access, Inc., Panavision* v. *Toeppen* etc.

It also touches upon relevant issues like electronic mail transactions and mechanical process to examine witness. In the Indian context, it summarizes the jurisdiction as specified under the IT Act, 2000. Electronic evidence is another challenging area wherein issues of admissibility and reliability of electronic records requires a serious deliberation. This book presents a comparative standing of Indian laws, UNICITRAL Model laws and Information technology Act, 2000 on the issues of admissibility of evidentiary documents, writing of documents and nature of threshold requirements. It provides a detailed comparison of practices in USA, UK, Canada and India for the rule against Hearsay.

This book presents the issue of digital signature in an authentic way including all the functional aspects of signatures, assimilating technology, UNICTRAL draft rules on electronic signature, public key and private key concepts, certifying authority and more importantly, evidentiary, liability and risk allocation aspects of digital signature.

Computer software is another area which requires serious attention as far as protective tools in the existing regime are concerned. It discusses Copyright as a tool of software protection and also local & proxy catching matters for software in the matrix of enforceability and liability. Cases highlighted in the discussion are relevant and works as a background for developing an understanding on this issue. Internet and related practices are primarily concerned with domain name which acts as an identification for service provider.

Registration of domain nanTe and it's interlink with legal system is a sensitive issue. Domain name dispute is an emerging area for Indian Courts and is expected to penetrate more in the coming years. This book presents a critical review of domain name dispute resolution policies in a rational manner. For readers acquainting themselves with the issues of

Cyberspace for the first time, this book is an asset to understand the complexities of hyper linking, framing and meta-tagging with practical perspective.

Cyber crime has emerged is a new class of crime and addressing these crimes requires an integrated approach of analyzing relevant provisions of IPC and the Information Technology Act, 2008. This book identifies various types of cybercrimes with proper examples and addresses these crimes in the legislative framework. This book is probably the first efficient attempt to study Cyberporn and Cyberstalking in Indian context.

Cryptography and National Security concerns are presented here with the perspective of policy makers and executers. Data Piracy and protection of database is a sensitive issue for financial and commercial networks which are directly linked with credit card frauds, identity theft etc. This book may be useful to those who are linked with these networks and those who deal with disputes of this kind.

The Microsoft Antitrust Trial is a landmark case for developing an understanding of Economics of Antitrust Laws and monopoly powers. This book presents the relevant issue in this context in a reasonable manner. The power line of this book is inclusion of a large number of relevant cases which are embedded with the text such that it exposes the reader to real practices in the context of Cyberspace and Cyberlaws. This book is a significant attempt to compile the fundamental issues emerged as by products of ICT and regulatory paradigm.

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Textbook on Economics for Law Students by Kalpana Satija, 2009 Edition, Universal Law Publishing Co. Pvt. Ltd, C-FF-1A, Dilkhush Industrial Estate, GT Karanal Road, Delhi - 110033.Pages- 710, Price Rs. 325/-

Economics is a very vast subject. Knowledge of fundamentals of economics is essential for students of law. Legal experts need to have basic understanding of the optimizing behaviour of individuals as consumers, employees, employers, producers and businessmen. For example to understand competition law one should know the basic structure of the market and various degrees of competition prevailing in the market which is provided by microeconomics.

The current global economic crisis once again triggered the interest of every citizen in the working of the present economic system, the role of state policy in regulating the economy and the intricacies of the international economic relations

The book under review has been divided into 25 chapters and attempts to provide a comprehensive coverage of the basic concepts, principles and policies in place. In fact, it covers nearly all branches of economics to be taught for the full six semester course under one cover. It deals with definition, scope, types and methods (p 3-48), Microeconomics (p 50-251), Macroeconomics (p 287-495), International trade and Exchange Rate (p. 496-520 and p 546-598), Economic Growth (p 533-544) and Government Policy and failure (599-623). Though economics is a subsidiary subject for law students, all these should be taught to them with clarity and precision. The book, however, does not serve this purpose.

The book starts with "solid introduction" (p.xlix), which is really strange terminology to be used. From page 1 to lviii "Portraits of the Great Economists who made the Economic Laws" are given. So far so good. But the sequencing is chronologically not proper. David Ricardo (1748-1832) and Malthus should have been presented before Karl Marx (1818-1883). I don't think mentioning the name of Narendra Jadhav and Manmohan Singh with great economists like Adam Smith, Ricardo,

Marx and Solow is right because nobody knows about their contributions to economic theory

Right from the beginning the book presents unheard of concepts like under types of economics (p 25) two types, internal and external are given. Moreover on page 36, the author explains three types: Free market, planned and Mixed. These are, however, also classified under Economic Systems. The difference between types of economics and economic systems is also not clear (p 35-41). Some very basic and useful concepts like ordinal approach of utility analysis is mentioned only once (p 74). No further details are given. Entire indifference curve analysis is missing though isoquants are discussed. The difference between kinds of demand and types of demand is not clear (p 52-53). On page 55 under assumptions of the law of demand the first assumption that there should be perfect competition in the market raises the question that will there be no demand in imperfect competition? Just after completing the discussion of demand without deriving supply curve she jumps to equilibrium analysis. She is not able to explain income effect adequately. She wrongly states (p 58) that income effect is negative for superior goods and positive for inferior goods.

The author includes some unnecessary sections which are not required at all and excludes some very useful concepts. The arrangement of topics and chapter is also not rational. For example, 'aggregate demand and supply' are discussed in the last chapter (25) whereas it should be an integral part of macroeconomics. In fact, these are presented in Chapter 9 section 9.7. Many topics like micro-macro economics, monetary policy, foreign exchange rate and inflation are repetitively discussed in different chapters and in different ways in the book. This is all very confusing for the students who have no previous knowledge of the subject.

The Book as it stands today cannot be recommended for use by law students. The treatment of concepts and principles is confusing, contradictory and repetitive. The book is in need of heavy editing.

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Cyber Crime in India - A Comparative Study, by Dr M. Dasgupta, (Eastern Law House, 54, Ganesh Chandra Avenue, Kolkata, 2009) pp. X+ 419. Rs.390/-

The core theme of the book is centered on the concept of 'cyber crimes in India' notably with a comparative analysis of EU, UK and US, laws and legislations and a reflection on international instruments including the >VTO and the UNCITRAL model laws. The basic layout of the book consists of six chapters, annexed with eight legal instruments at the end. The chapters observe an appreciation of the latest technology, the issues and the threat this technology poses, the legal void the technology points at within the existing legislation and the possible solutions, which are substantiated with leading cases.

The modern era of e-commerce, e-governance, globalization and liberalization demands connectivity through cyber technology. It is this world *sans* boundaries that ensures rapid economic development. However this also encourages unwarranted elements to be a part of cyber world in the form of 'cyber criminals', who with their ability to hack, destroy, alter, access, not only contaminate cyber space but also lead to immense amount of economical and social losses. The book is spaced with six different chapters elaborately dealt with, chapters 3, 4, 5 and 6 has the author's own conclusion and suggestions. The author expresses his ideas in a simple and lucid manner, however more proof- reading ought to have been done for occasional grammar mistakes. The arguments are elaborately supported by different leading cases. The book travels the path of definition of cyber crime, its history, hacking, fraud, pornography and terrorism in cyber world. As the book proceeds it compares cyber legislations from EU, UN, UK and USA. The first chapter entitled "Cyber Crime A General Perspective" speaks on different theories, such as 'Differential Association Theory', 'Social Learning Theory' and the discussion on the Information Technology Act, 2000. The second chapter deals with the "History of Cyber Crimes" with different phases of cyber crimes, few leading cases like R v Gold, and Claude R Carpenter etc have been subjected to thorough discussion. The third chapter is on "Cyber Hacking". It discusses hackers, hacker's behavior and the hacker culture. Next it deals with different international

initiatives to deal with hacking. Here the author compares the UK, EU and the US legislations. The fourth chapter deals with "Cyber Fraud", wherein different schemes of frauds have been discussed rather comprehensively. A successful bid to compare EU, UN, UK and US legislation has been attempted. The fifth chapter deals with "Cyber Pornography". The chapter elaborates on different legislations with cases and compares legislations of different jurisdictions such as US, UK and also the constitution of India and the response after the passing of the Information Technology Act, 2000. The last chapter deals with "Cyber Terrorism". It deals with the concept of security, confidentiality and the trend towards utilization of cyber space for warfare. The chapter deals with different incidents and comparison of different legislations such as UK, US and Indian laws.

I have certain ideological reservations over the author's suggestion in Chapter 6 of the book, "Websites like Orkut, MySpace and the like need to be completely banned and blocked immediately as these are identified as objectionable and illegal."[1] "The Information Technology (Amendment) Bill 2006 proposed to reduce liability of intermediaries; this must not be implemented if we need to combat cyber terrorism and other cyber crimes."[2] Websites like - Orkut, Face book, MySpace, Twitter and their ilk are useful and important sources of expression and information. The banning would lead to complete blocking of these expressions and it would make it a strenuous task for ethical hackers to plan their strategy to combat cyber crimes. It is suggested that a total ban would rather defeat the cause than aid it.

Hence with certain reservations, I recommend the books for academics, law students, researchers and cyber scholars.

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[1] Dr M. Dasgupta, *Cyber Crime in India - A comparative study,* (Eastern Law House, 2009) at 226.
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"Copyright Law Desk Book : Knowledge, Access and Development" by Akhil Prasad & Aditi Agarwala, (Universal Law Publishing Co. Pvt. Ltd, Delhi, First Edition 2009), p.396, Price: Rs.325.

The work under review is a study on intellectual property law. The book could be in the genre of a semi-academic work, which revisits the institutionalisation of the global intellectual property regime and describes its various aspects. Instead of being a focused study, it is an attempt to approach the concept of copyright in a comprehensive and broad manner. It is a manual for understanding the mechanics of intellectual property rights and the conceptual foundation of the field.

The book has four parts, divided into chapters and descriptions relating to each part. Part I has four chapters. An introduction to intellectual property rights has been provided in this chapter. Part II analyses the idea and concepts of property rights, internationalisation of intellectual property rights and its various manifestations, a number of doctrines governing copyright laws are covered in this part. The narration provided there tends to be a bit too descriptive and often loses focus.

Part II deals with the history and evolution of intellectual property rights. The concepts of "public interest", "originality", "colourable imitation", and "proto-history" are all analysed in a British background. Of all these, chapter 3 appears to be more pragmatic with its recommendations and suggestions for a new international copyright law. Various International Conventions relating to intellectual property rights, e.g., the 1886 Berne Convention for the Protection of Literary and Artistic Works, are revisited by the authors of the book. This part ends with an analysis of the legal and economic rights of copyright Laws.

Part III is devoted to Indian copyright legislations. In this part, one finds a rather balanced understanding of the copyrights and a reasonable presentation of the law on the subject. However, generality seen in the previous parts is also apparent here.

Part IV is rather broad and has ten chapters. It provides a theoretical treatment of copyright. It appears that the authors have stressed more on software technology, than on any other areas in copyright. The importance of media, entertainment and technology also is taken

seriously. There are details of the digital rights, rights of access to internet, law under Braliie Scanner, international copyright law and the jurisprudence of the World Trade Organization in these chapters.

The chapters, with a passing seriousness, deal with the rights of the disabled, human rights, and e-Iibraries in order that the work has a broader coverage. A comparative perspective which has studies on copyright law in the United Kingdom, Japan, Korea and Spain provided in chapter nine would broaden the learning experience of the reader. A little detailed analysis of the provisions of the People with Disability Act would have been more appropriate.

Overall the Authors have done a serious work on copyright law in national and international perspectives. However, the broad descriptive framework the authors have chosen is, at the cost of lack of details on many aspects of copyright. Yet, criticising the Authors orr this ground is easier said than done. I therefore, congratulate the Authors for providing a good reader, one meant for a general audience than specialists.

Finally, the foreword by Sylvia Kierkegaard, President of the International Association of IT Lawyers, Copenhagen is impressive. The bookJias a good layout and design. Highly recommended for reading.

DR. V. L.MONY*

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