Vol. 5 Part 2, Vol. 6 Part 1 July 2004—June 2005

AMITY LAW REVIEW

A JOURNAL OF AMITY LAW SCHOOL

AMITY LAW REVIEW

Amity Law Review is a scholarly journal in its field in the English language. All contributions, whether Notes, Articles or Reviews, are selected as being of the highest quality, providing authoritative and innovative critical analysis of current legal issues in litigation, statute law, academic research, and commerce and industry.

Publishers
Amity University Press, E-27, Defence Colony, New Delhi–110 024

Articles, notes and correspondence should be addressed to
Manish Arora, Dy. Director, Amity Law School, Yasho Bhawan
Okhla Road, Adjacent to Fscorts Heart Institute, New Delhi-110 025

EDITORIAL

Globalisation of market economy , the fact of life has spread all over the globe in the last decade and has brought a revolution in international trade with more and more participation of different countries and access to domestic economics of different countries. The impact of globalisation also reflects in the legal services thereby expanding the internal as well as external demand for the legal services with greatest impact in the corporate legal sector. The recent forewarning of Union Law Minister to the law professionals to be prepared for the coming of foreign lawyers and law firms to practice in India has had been a cause of concern and tremendous protests in the last few years. The trepidation of lawyers rests on the grounds that permitting them for advocacy in the Indian soil will spoil the professional ethics and the noble profession which has been guarded against the evils of commercialization.

The regulations of Advocates Act has been justified on the grounds of public policy and as maintaining purity and dignity of the profession by restricting new entrants e.g., by providing for the requirement of nationality, residence etc. The principle of reciprocity i.e., only allowing citizens of those countries which allows Indian citizens to practice the profession is grounded on national honour, professional self-respect. These regulations in the legal service sector have positive adverse effects on competition in India particularly the quality of service available with respect to particular fields. Corporate legal activities such as intellectual property protection, corporate governance, environmental regulation etc. are recent phenomena which requires proficiency in these aspects of law and are felt to be comparatively better serviced by international firms. Corporate clients prefer law firms which satisfy its professional requirements both in national and foreign jurisdiction. The need is for such laws and regulations which increase the global competitiveness of the Indian firms rather to disadvantage Indian firms from competing at a global level.

Now turning our attention towards the increasing rape incidents in the Capital and the recent gang-rape of a college student reflects the moral degradation of society at large which is responsible for hostile attitude towards women. Women are raped everywhere but in India it has reached a pathetic level. India is a rape-a-moment capital of the world and Delhi is considered to be the rape capital. The need is to take women's safety seriously and deterrent steps to prevent it. Malimath Committee has rightly recommended that rapists be punished with death sentence instead of life imprisonment. Significant amendments have been made by the Parliament in Code of Criminal Procedure by making DNA test compulsory in rape cases, mandatory judicial probe for rape in custody etc. The legislators, to boost confidence in women and to create deterrent effect, have suggested various positive changes in the Indian Penal Code by advocating complete life imprisonment, the only designated sentence for rapists, doing away with discretion of courts in such cases, making police work more efficiently to prevent rapes and creating help-lines.

Let us hope the safety of women does not remain a distant dream and such stringent proposals are accepted before it is too late.

MANISH ARORA

CONTENTS

LEGAL EDUCATION IN INDIA

Justice M. Katju*

The topic of legal education can be discussed from various viewpoints, but I would like to comment on it from the point of view of the needs of society and the nation.

In modern times lawyers in various countries have given leadership to their nations. In the great American and French Revolutions many of the leading figures were lawyers. Abraham Lincoln, the great American President during the American Civil War of 1861-1865 was a lawyer, and so was Robespierre, the great French leader during the French Revolution of 1789. Lenin, the great leader of the Russian Revolution of 1917 was a student of law. During our own Independence Struggle many of the leaders, like Gandhiji, Pandit Nehru, Sardar Patel, Dr. Rajendra Prasad, Deshbandhu Chitaranjan Das, etc. were lawyers.

The reason why many great leaders in various countries were lawyers is that the legal profession is objectively in the position of producing statesmen. This is due to two reasons: (1) Lawyers belong to an independent profession, they are not subordinate to the government or to anyone else, and (2) they are directly in contact with society *in its entirety* as they have to deal with all kinds of problems of people from all sections of society, unlike say, doctors who are confined to medical problems or engineers who are confined to technical problems. Hence lawyers are the people who are most conversant with the problems of society as a whole.

Today, however, the plight of the legal profession is a sorry one. What respect lawyers command on Indian society today need hardly be commented upon. Nowadays, very few lawyers are in politics in our country, and many politicians are people who are not respected (many of them are even known to be criminals).

In my opinion the main reason for this sad state of affairs is the kind of legal education which is imparted in our Universities and Law colleges. In

* Chief Justice, Madras High Court.

the LL.B. course there are papers on Constitutional Law, Contract Act, Company Law, Tort, Hindu Law, Muslim Law, Jurisprudence, Legal History, Revenue Law, etc. The student merely wants to get his law degree, he is hardly interested in these papers, so he crams up the stereotyped answers to the stereotyped questions (often from the solved questions and answers books available in the market). The teachers are also hardly interested in the subjects they are teaching, they are simply employees earning their bread, and do not arouse a genuine interest in the subject in their pupils. The result is that law, as taught in the LL.B. course, is a drab, dull, boring subject and the student wants to quickly get out of the Law College by getting his degree.

In my opinion, this whole approach is wrong, and will not produce the kind of lawyers society and the nation needs for giving leadership to the people.

Today our country is facing gigantic problems—social, economic and political. It is intellectuals alone who can give guidance to the people for overcoming these problems: they are the eyes of the people without whom the people are blind. And the class of intellectuals most fit for fulllling this role are lawyers, but unfortunately they are not doing so, and to my mind the reason for this is that the legal education in our country is totally defective.

Take, for instance, the teaching of Constitutional Law in our Law colleges. Students are taught about the fundamental rights in the Constitution, the directive principles, Parliament, the executive, the judiciary, the federal structure, etc. But what is not taught is the historical significance of the Constitutional document.

The Indian Constitution was based on Western models. Our modern minded Founding Fathers borrowed the parliamentary system of democracy and an independent judiciary from England, the federal structure and fundamental rights from the U.S Constitution, the directive principles from the Irish Constitution, etc. Thus our Constitution is a modern Western type Constitution, it was imported and transplanted on our backward, semi-feudal society from above, and was not the product of our own indigenous social and polltical struggles. Consequently, our Constitution and our society do not correspond with each other, the former being modern while the latter being backward (unlike in Western countries where both are modern).

For example, the great rights incorporated in the part relating to fundamental rights include the rights of personal liberty, equality, freedom of speech and expression, freedom of religion etc. These rights were won by the peoples of Western Europe (particularly England and France) after tremendous, arduous struggles, turmoils and repression by the then feudal state authorities. One may recall the English Civil Wars of 1642-1660 and the

Glorious Revolution of 1688 which established the principle of Parliamentary supremacy in England, the struggle in France by Voltaire, Rousseau and other enlightened thinkers which led to the French Revolution of 1789 and the Declaration of the Rights of Man in 1791, the American Declaration of Independence of 1776 which proclaimed that all men are created equal, having the right to life and liberty and religious conscience, etc. It was only after these historical and momentous struggles during which the entire society was in turmoil in these Western countries for long periods, that the successful transition from feudalism to a modern industrial society could be accomplished.

In India, on the other hand, the fundamental rights in our Constitution were not a result of such prolonged social and political struggles in our country as happened in the Western countries. These rights were imported by our modern minded Founding Fathers from the West and then transplanted from above on our semi-feudal, backward society.

The belief that by merely importing and transplanting a modern Constitution from above will result in our society quickly becoming modern has proved wrong. What has happened in Gujarat is a proof of this. People have killed each other in the name of religion in the year 2002 (as they did at the time of Partition in 1947) although the Constitution has been in force since 1950.

At the same time, it cannot be said that the Indian Constitution is merely a paper document. By setting up modern ideals, the right to free speech, equality, secularism, etc. the Constitution is pulling society forwards towards the goal of creating a modern society. No doubt it has not done so automatically merely by its promulgation, but it has reduced the pain, agony and duration which Western societies had to go through during the period of their transition from feudalism to modernism. One may recall the thirty years war in Germany (between Catholics and Protestants) from 1618 to 1648 in which one-third of the entire German population (including women and children) were wiped out, or the massacre of the Protestants (called Huguenots) in France in 1572 or of the Catholics in Ireland.

Thus, by setting up modern ideals in our Constitution our Founding Fathers rendered great service to the nation. The ideal of secularism incorporated in Article 25, for instance, will ensure that India will remain united. Our country has tremendous diversity, so many religions, castes, lingual and ethnic groups, etc., and hence only secularism and equality for all can hold it together. These were the ideals which our great Emperors Ashok and Akbar taught us.

When India gained Independence in 1947, the subcontinent was engulfed in religious madness and people were massacring one another in the name of religion. It was easy for our leaders at that time, and there must have been tremendous pressure on them, to declare India a Hindu State

since Pakistan had declared itself an Islamic State. It is difficult to retain a cool mind when passions are inflamed, but it is the greatness of our political leaders at that time that they could do so. That is why India will survive whereas Pakistan, based on feudal communal ideals, will disintegrate.

What has happened in Gujarat was the work of some vested interests utilizing the unemployed lumpen elements in our society to commit acts of barbarism and sow seeds of discord between Hindus and Muslims. But after a momentary period when they were swayed by passions, the Indian people have seen through this game. It was heartening to see pictures in the newspapers and on T.V. of processions in Faizabad comprising of people of all communities with posters stating:

"मंदिर मस्जिद नहीं चाहिए शांति, विकास, रोजगार चाहिए"

I may also mention about caste, since it is still an important feature in our society.

It is said that caste originated from the Aryan invasion and conquest over the Dravidians. I need not go into this controversy, because subsequently caste developed into the feudal occupational division of labour in society. Every vocation became a caste, *e.g. badhai* (carpenter), *lohar* (smith), *darzi* (tailor), *kumbhar* (potter), *dhobi* (washerman), etc.

Now at one time the caste system may have played a progressive role because it introduced a rudimentary kind of division of labour in society, and as any student of economics knows, division of labour is necessary for human progress (*see* Adam Smith's 'The Wealth of Nations'). In ancient and medieval times there were no engineering colleges or technical institutes, and hence the only way to learn a trade or craft was to sit with one's father from childhood and imitate him in his work. Thus upto feudal times one had no choice in selecting his profession, he had to follow his father's profession, and so the son of a badhai became a *badhai*, the son of a lohar became a *lohar*, etc. In this way *badhai, lohar, dhobi*, etc. became castes.

The same thing happened in Europe too upto the feudal age. Even today many Englishmen have surnames like Taylor, Smith, Carpenter, etc. which indicates that their forefather belonged to these professions.

In modern times, however, the situation is totally changed. Division of labour now cannot be on the basis of one's birth but on the basis of technical skills. A factory recognizes no caste or religion but only efficient production based on technology. Hence the caste system is totally outmoded today and has to be quickly destroyed if we wish to progress. In fact it has already been destroyed *economically* because the son of a *badhai* now, does not become a *badhai*, he comes to the city and becomes an electrician or motor mechanic, or having acquired education he becomes a clerk, or a lawyer, engineer, doctor, etc. Thus today people are no longer following their father's profession, and this has largely destroyed the economic foundation of the caste system.

However, the caste system is being deliberately fostered and sustained socially by certain vested interests for vote bank politics, etc. The recent killings in Meerut of a Jat boy and Harijan girl who wanted to marry each other is an example of how backward we still are socially. We have still a long way to go before the caste system is totally eradicated, but this is a goal towards which all modern minded and patriotic people must strive.

I would also like to mention about sexual discrimination and the need to struggle for women's emancipation if we wish to make India a modern industrial nation. No doubt Article 15(1) prohibits *the State* from discriminating against women, but it does not prohibit society from doing so, and in fact such discrimination is widespread, beginning from the very birth of a child. I was told by Dr. Baweja, former Medical Superintendent of Kamla Nehru Hospital, Allahabad that whenever a male child is born in the hospital the relatives distribute sweets, their faces are full of joy, but if a female child is born their faces are downcast and crestfallen, as if a great tragedy has occurred. Crimes against women have increased lately, the courts are flooded with cases relating to dowry deaths, rapes, wife beating, etc. and all this shows that our society is still backward, even though the Constitution is modern.

It may be mentioned that I.Q. tests in modern psychology have shown that the I.Q. of an average woman is the same as that of an average man. Hence it is not due to any inherent inferiority but only due to the fact that women were not given education and other opportunities that they could not come upto the level of men.

I have dilated on all this because no doubt in our law colleges it is taught that Article 15(1) prohibits discrimination on the basis of caste, religion or sex, but the historical and social relevance of this is not explained, and without understanding such relevance, the subject becomes dull and devoid of any significance.

If we wish the lawyer community to again become respected leaders in our country then the legal education must be drastically changed, and the students should be taught about the real significance of the Indian Constitution and the laws in the manner explained above.

I may now also discuss some other topics taught in the LL. B. course in order to show the defects in our law teaching.

Everyone who has studied Company Law knows of the English decision in *Solomon* v. *Soloman & Co. Ltd.* in which the principle that a company is a distinct legal entity was laid down. What is unfortunately not taught in our law colleges is the historical significance of this principle.

In modern society business is perhaps the most important economic activity (unlike in the feudal era in which agriculture was the most important economic activity). Now in every business there is a risk, for there

is always a possibility that the business may fail (due to competition, recession, etc.). Businessmen were reluctant to take risks because if the business failed they may even lose their homes, personal assets, etc. To protect them from such an eventuality, and to encourage them to take risks, the principle that a company is a distinct legal entity separate from its shareholders or directors was created. Thus, this legal principle was of great historical importance, for, without it, modern industrial society could not have been so easily created.

Hence, when teaching *Solomon* v. *Solomon & Co. Ltd.*, the law teacher should explain to the students the historical significance of the principle in this decision. In this way it will become of fascinatingly interesting to the students, instead of being just another decision which is to be merely mugged up for examination.

Similarly, when the Contract Act is taught, the historical importance of a contract should be explained. In feudal society there could be no contracts as there was very little commodity production (a commodity is a good for sale, not for self-consumption). Feudal society was agricultural society in which the tenant farmer produced agricultural goods partly for self-consumption and partly to give to his feudal landlord. In feudal society there was very little freedom, one was bound by custom from birth till death.

As contrasted to feudal society, modern society is characterized by the immense production of commodities. Now since commodities have to be sold there has to be a voluntary transaction between the seller and buyer. This agreement is called a contract, and its distinctive feature is its *voluntary* (*i.e.* not coercive) nature. Hence freedom is a notable feature in modern society but this freedom which changes human relationships voluntarily (by contracts) was unthinkable in the previous feudal age, and hence was of revolutionary significance.

When the Contract Law is taught, it should be taught from this historical perspective, but that is perhaps never done in our Law Colleges.

As regards criminal law, which is the basic law, everyone knows that the greatest failure in the Indian legal system is in the field of criminal law. That is because the criminal law administration rests on two assumptions: (1) the police is honest and effective, and (2) witnesses have no fear in giving evidence. Since both these requirements are today missing in India, much of the criminal law remains on paper, Mafia dons are operating everywhere in society with impunity, often hand in glove with certain politicians and bureaucrats and most crimes go unpunished. Trials take years and years to conclude, and criminal appeals are begin heard in the Allahabad High Court after 22 years of their filing, which itself is a mockery of justice.

The reason for this failure is that we imported notions of criminal law mechanically from England without taking into account our own social circumstances. Hence our Universities and law colleges should become laboratories where this phenomenon is analyzed, and teachers and students of law use their creativity to prepare new ideas and solutions and new institutions to tackle the problem.

I may also mention about the subject of International Law, which is a paper in the LL. B. course. What is not taught is that it was the thirty years war in Germany (1618-1648), with its revolting cruelty, which turned the attention of a considerable number of scholars to the need of formulating rules for the protection of non-combatants in war, the treatment of the sick and wounded, the prohibition of wanton pillage and other horrors which shocked the awakening humanitarianism in Europe and motivated Grotius to publish in 1625 his famous book on International Law "The Laws of War and Peace". Similarly, the need of freedom of trade and commerce required nations to give up claims of sovereignty over the high seas and accept it as *res nullius*.

I need not go further into various other branches of law which are taught in our Law Colleges. Everyone knows that the teaching is dull, boring, mechanical and uninspiring, and many students, if given an option, would prefer to read at home rather than attend classes, and the reason for this is that the subject is not taught from a historical and social perspective. This is because our law teachers are usually ignorant of history, sociology and other subjects without the knowledge of which, the study of law becomes a dull and a formal exercise.

The student wants to quickly get his law degree and start practise to earn one's bread. There is nothing wrong in wanting to earn one's bread, but to my mind the educational system should also produce socially committed human beings who want to serve society and the nation, and not merely themselves. An education system should serve the country, and not merely produce self-seekers. Hence it should inculcate a sense of idealism, and a desire to help one's fellow citizens, but the unfortunate truth is that it is doing just the contrary. The result is, that today most of the Indian educated middle class is utterly selfish and unpatriotic, and the 'brain drain' from India is a proof of this.

Today, India is passing through a transitional phase, between feudal, agrarian society and modern, industrial society. We still have a lot of casteism, communalism, and other backward features in our society. We must help our people to cross this transitional phase with as little agony as possible, so that India becomes a modern nation like in Europe or North America. The education system, including legal education, must therefore help in this process, and for this, it needs to be radically changed in the light of what has been said above.

THE DOHA DEVELOPMENT AGENDA ON DISPUTES RESOLUTION: AN INDIAN PERSPECTIVE[1]

Julien Chaisse*

Debashis Chakraborty**

Abstract

The basic objective of establishing WTO in 1995 was to expand the volume of global trade and in order to ensure speedy and impartial resolution of disputes concerning trade-distorting policies in member countries, Dispute Settlement Mechanism (DSM) was made a central feature of the agreement. Enshrining provision of compulsory jurisdiction, and creating a system with a unified and integrated framework with much broader jurisdiction and less scope for "rule shopping" and "forum shopping", it was made a key element, a safety valve, of WTO. The compulsory enforcement of the final Dispute Settlement Body (DSB) verdict also strengthens the efficiency of multilateral trading system to a great extent. The review of the working of DSM is currently in progress. However a number of members, mostly developing countries, are dissatisfied with certain procedural, legal and enforcement-related impediments, during and after a dispute, namely—permanent panelists, remand, *amicus curiae* submissions, legal cost, cross-retaliation etc. The developing country members believe that these issues may be addressed within the framework of Paragraph 30 of the Doha Ministerial Declaration held in November 2001 and the Dispute Settlement Understanding (DSU) should be accordingly reformed in May 2004, at the end of negotiations. India, which has made two

1. The views expressed by the authors in the paper are their own, and not necessarily correspond to the same of their respective institutes.

* Doctorant a l'Universite d'Aix-Marseille III (France) - Centre d'Etudes et de Recherches Internationales et Communautaries (CERIC); Scientific Secretary of the Centre de Sciences Humaines (CSH), Embassy of France in New Delhi.

* Doctoral Scholar in International Trade and Development Division, JNU; Research Associate, Rajiv Gandhi Institute for Contemporary Studies (RGICS), New Delhi.

submissions to WTO, also believes that the DSM should be modified in order to effectively protect developing country interests.

Introduction

The result of the Uruguay Round of multilateral negotiations (1986-94) comprised of agreements covering many different sectors of international trade.[1] The whole commitments made under WTO Agreements must be implemented by the Member States of the WTO,[2] but obviously at the moment of the implementation,[3] problems arise with regard to the violations or simply to the interpretation of so many dispositions. To tackle this, Dispute Settlement Mechanism (DSM) was made a central feature of the WTO, which has had an enormous impact on the world trade system and trade diplomacy. The WTO/DSM is unique in international law essentially because it is juridical and legalistic system for disputes.[4]

Main Legal Characters of the WTO Dispute Settlement Mechanism

One of the most notable features of the panel procedures in the WTO is the provision of compulsory jurisdiction over a case brought by its members. Indeed, the WTO establishes a panel unless there is a consensus not to do so. Therefore, the consent of the Defendant State to establish a panel is no longer required. If a member requests the establishment of a panel, consensus not to establish a panel is lacking by definition, and the Dispute Settlement Body (DSB) will establish a panel. Besides, the new WTO dispute settlement system is a unified system with much broader jurisdiction and less scope for

---

1. These WTO Agreements have been published in India in: Gupta K. R., *World Trade Organisation: Text – Volume I*, New Delhi, Atlantic Publishers and Distributors 2000 (338 p.) and *World Trade Organisation: Text – Volume II*, New Delhi, Atlantic Publishers and Distributors 2000 (pp. 339-716).

2. Of course the object of any treaty is to impose binding obligations on the states who are parties to it. And States are bound to carry out, in good faith, the obligations they have assumed by treaty. This is the essence of the doctrine of *Pacta Sunt Servanda*, which means that the pledged must be followed. But in addition of this rule of general international law, the legal basis of the implementation of the WTO Agreements stays explicitly in the Article XVI.4 of Agreement Establishing the World Trade Organization: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements".

3. Which can be defined by: "putting into effect the undertakings made in trade negotiations". "Implementation", in: Goode Walter: *Dictionary of Trade Policy Terms*, Cambridge University Press 2003, p. 174.

4. In addition to the Dispute Settlement Understanding, the entire legal texts concerning the settlement of disputes have been gathered by the WTO Secretariat in: WTO Secretariat: *The WTO Dispute Settlement Procedures*, Cambridge University Press 2nd Edition 2003 (p. 146).

"rule shopping" and "forum shopping".[1] Then, the DSU is integrated because it deals with any dispute arising from WTO Agreements and there is a single set of rules for all disputes. Finally, as soon as the DSB has adopted the report, the report becomes binding on disputing parties as a matter of international law. The losing party must bring its legislation into line with the recommendations.

The Process of the Dispute Settlement

A WTO dispute settlement procedure is launched at the request of one or more member governments for a consultation regarding complaints against defending members. This process is entirely government-to-government. Of course this process is available only to WTO members in procedures against other members.

1. The first step in dispute settlement is a consultation between the complaining party (or parties) and the responding party (or parties). Before taking any other action, the countries in dispute have to talk to each other in an attempt to resolve their differences by themselves. If the parties have failed to settle the dispute by the end of 60 days, then the complaining party may ask the DSB to establish a dispute panel.[2]

2. A panel is established notably to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".[3] The panel, normally composed of three individuals,[4] then receives oral and written arguments from the parties to the dispute and from third parties. The adoption of the report is a critical step and a significant change from procedures under GATT. Since negative consensus can be broken by parties who feel that the report should be adopted, the DSB automatically adopts the report of the first-level panel unless the report is appealed or there is a consensus of the DSB against adoption.

---

1. Petersmann Ernst-Ulrich: *The GATT/WTO Dispute Settlement System International Law, International Organizations and Dispute Settlement*, Nijhoff Law Specials Volume 23 Kluwer Law International, The Hague, 1997, p. 178.
2. DSU Art. 4.7.
3. DSU Art. 11.
4. On the selection of panelists, See: Dwyer Amy and Stewart Terence: "Handbook on WTO Trade Remedy Disputes : The First Six Years 1995-2000", Transnational Pub, 2001, p. 96.

3. The parties may appeal the report to the Appellate Body, who may uphold, modify or reverse the legal findings and conclusions of the panel. An appeal has to be based on points of law such as legal interpretation; it cannot re-examine existing evidence or examine new evidence.[1] In that extent, the Appellate Body performs "a general function of guaranteeing the proper application and interpretation of the law in case of disputes within the organisation in the interest of all its members".[2] The Appellate Body then goes through a process similar to that of the first-level panel: oral and written submissions, a hearing with discussion and questioning by the division members, and then the preparation of an Appellate Body report. Once the Appellate Body has completed its report, it sends the report to the DSB, which adopts the report virtually automatically, through the "reverse consensus" process. The priority at this stage is for the losing "defendant" to bring its legislation into line with the rulings or recommendations.[3] If the Member State that is the target of the complaint loses, it must follow the recommendations of the panel report or the appeals report, which after their adoption have become those of the DSB itself. The Member State must communicate its intention to do so at a Dispute Settlement Body meeting held within 30 days of the report's adoption.[4] If complying with the recommendation immediately proves impractical, the member is normally allowed a "reasonable period of time" to do so.[5]

---

1. DSU Art. 17.6. See, Sacerdoti Giorgio: *Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review*, in: Petersmann Ernst-Ulrich: *International Trade Law and the GATT/WTO Dispute Settlement System*, Studies in Transnational Economic Law, Volume 11, Kluwer Law International 1997, pp. 245 and followings.

2. Sacerdoti Giorgio: *Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review*, in: Petersmann Ernst-Ulrich: *International Trade Law and the GATT/WTO Dispute Settlement System*, Studies in Transnational Economic Law, Volume 11, Kluwer Law International 1997, p. 274.

3. DSU Art. 19.1. However, in situations involving « non-violation » complaints, the Member is not required to withdraw the measure. See, Chua Adrian: *Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence*, Journal of World Trade Volume 32 n°2, April 1998, pp. 27-50.

4. DSU Art. 21.3.

5. On the question of what is a "reasonable period of time", See: Stoll Peter-Tobias et Steinmann Arthur: *WTO Dispute Settlement: The Implementation Stage*, Max Planck Yearbook of United Nations Law 1999, Vol. 3.

Which Structural Evolution(s) for the Dispute Settlement Understanding?

The Doha's Reviewing Process of the Dispute Settlement Understanding

At the Doha Ministerial Meeting in November 2001, the Ministers agreed to include the DSU as one of the subjects of the Doha Work Program and to negotiate these improvements.[1] But since its commencement, the negotiations have not led to the desired results. Especially as a 1994 Ministerial Decision provided, dispute settlement rules should be reviewed by 1 January, 1999. The review on its own functioning started in the Dispute Settlement Body in 1997. The deadline was extended to 31 July, 1999,[2] but there was no agreement.[3] From the Doha's Declaration, no other new agreement was found. All members, however, expressed a readiness to continue work beyond 31 May, 2003 towards an agreement. In this respect, before the Cancun Summit, at its meeting on 24 and 25 July, 2003,[4] the General Council agreed to extend negotiations from 31 May, 2003 to 31 May, 2004.

---

1. Ministerial Declaration, adopted 14 November, 2001, WTO Document WT/MIN(01)/DEC/1.

   Paragraph 30 of the Doha Ministerial Declaration has several significant elements:

   - It recognizes that the DSU is in need of improvement and clarification,
   - Paragraph 30 provides that negotiations for reform are to take place based on work done, as well as new proposals,
   - It establishes what appeared to be a deadline, May, 2003, to complete negotiations on DSU reform,
   - Fourth, it does not contain a guarantee that improvements and clarifications will enter into effect before the end of the negotiations.
   - Paragraph 30's final sentence leaves open the possibility that the "single undertaking" principle of agreeing to the results of the negotiations as a package, thereby eliminating the possibility to "pick and choose" which agreements to sign on to, may be applied to DSU reform,
   - Nevertheless, Paragraph 47 of the Ministerial Declaration leaves open the possibility that DSU reform will be outside of the single undertaking.

2. General Council - *Minutes of Meeting - Held in the Centre William Rappard on 9 11 and 18 December, 1998*, WT/GC/M/32, 09/02/1999, page 52.

3. To have a recapitulation of the arguments expressed during the debate, See: General Council - *Minutes of Meeting - Held in the Centre William Rappard on 6 October, 1999*, WT/GC/M/48, 27/10/1999, point 7.

4. General Council - *Minutes of Meeting - Held in the Centre William Rappard on 24 - 25 July, 2003*, WT/GC/M/81 28/08/2003, p. 20, paragraph 75.

Rising Problems and Potential Reforms

Despite the obvious success of the DSU, problems have emerged.[1] According to Paragraph 30 of the Doha Ministerial Declaration, the DSU negotiations are open-ended and room exists to examine a lot of issues. The question on permanent panelists, remand, *amicus curiae* submissions and cross-retaliation are among the issues that may be addressed within the framework of Paragraph 30 of the Doha Ministerial Declaration and that may reform the DSU in May 2004. India, along with several other developing countries, has submitted proposals for reform to the WTO.[2] The broad issues raised by these developing countries refer to the procedural, legal and enforcement-related impediments they often encounter while initiating or during a dispute, or even when it is over. The countries were certain about the fact that in order to ensure a level playing field to them, implementation of these measures are extremely important. Broadly, the proposals require making the provisions binding on their developed counterparts, and the governmental character of WTO should not be destabilised. In addition, the proposals reinforced the need to enhance transparency within WTO. The current analysis intends to have a look at two of the major issues: *Amicus Curiae* submissions (the refinement of the process) and Cross-retaliation (its increasing use within the WTO framework).

Amicus Curiae Submissions

An *Amicus Curiae* brief is "an opinion offered to the court by a disinterested party (called *amicus curiae* or friend of the court) in the hope that it would assist the judges in arriving at the best possible outcomes".[3] In the WTO-context, *amicus curiae* submissions are briefs from individuals or entities ("non-members" of the WTO), in particular non-governmental organisations (NGOs), which are designed to provide guidance to a panel or the Appellate Body. Although there is no mention of *amicus* submissions in either the DSU or the Working Procedures, the Appellate Body ruled that panels and the Appellate Body have the right, but not the obligation, to receive such submissions. The *amicus* question has been a source of

1. In that direction, Bourgeois Jacques: *Some reflections on the WTO dispute settlement system from a practitioner's perspective*, Journal of International Economic Law 2001, Volume 4-1, pp. 145-154 and Das Bhagirath-Lal: *The WTO Agreements: Deficiences, Imbalances and Required Changes*, TWN & Zed Books 1998, p. 9 and followings.

2. See Chaisse and Chakraborty (2003) for a detailed comparative analysis of Indian submissions to WTO and the existing provisions. The submission dated 23rd September, 2002 (TN/DS/W/18) was submitted in association with Cuba, Honduras, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe. Indonesia joined this group for the second submission dated 9 October, 2002 (TN/DS/W/19).

3. "*Amicus Curiae*", in: Goode Walter: *Dictionary of Trade Policy Terms*, Cambridge University Press 2003, p. 18.

considerable controversy. Indeed, in the *Measures Affecting Asbestos and Asbestos-Containing Products* case[1] the Appellate Body established a Working Procedure governing the submission of *amicus* briefs, applicable only to that appeal, which appeared on the WTO website and was communicated to NGOs world-wide. When the members learned that the Appellate Body had acted to facilitate the submission of *amicus* briefs, a special meeting of the General Council was convened in which the Appellate Body was sharply criticized, in particular by developing country members.[2] Perhaps as a result of this criticism the Appellate Body rejected all *amicus* briefs submitted, ruling that the briefs failed to conform to the promulgated Working Procedure.

India has formally submitted a proposal[3] and suggested the addition of the following two footnotes to Article 13: on the one hand "Seek" shall mean any information that is sought or asked for, or demanded or requested by the panels. Unsolicited information shall not be taken into consideration by the panels. On the other hand "Footnote 1" shall also apply to the Appellate Body and arbitrator under this Understanding.

Cross-Retaliation

A cross-retaliation is an "avenue open in certain circumstances to a WTO member whose rights under one agreement administered by the WTO have been infringed, to retaliate against the offending member under another agreement also administered by the WTO".[4] On this possibility it

1. Report of the Appellate Body, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12/03/2001, points 50 and followings.

2. See, Dispute Settlement Body - *Special Session - Minutes of Meeting Held in the Centre William Rappard on 14 October, 2002*, TN/DS/M/5, 27/02/2003, point I.a.1.: "With respect to *amicus* curiae briefs [...] the overwhelming majority of WTO membership were opposed to the acceptance and consideration of unsolicited *amicus curiae* briefs by panels and the Appellate Body. It was unfortunate that the Appellate Body had not been sensitive to the views of the majority of the membership on this issue; its continued acceptance of such briefs had resulted in an imbalance in the rights of third parties and those of non-parties" allowed to submit such briefs. It was the considered view of the co-sponsors that neither the Appellate Body nor panels have the authority under the DSU to accept and consider *amicus curiae* briefs. To put this issue to rest permanently, the co-sponsors had proposed the insertion of two footnotes to Article 13 of the DSU with a view to clarifying the meaning of the word «seek». This would make it clear that panels should not accept unsolicited *amicus curiae* briefs, while affirming their existing right to seek experts' opinions and views, in consultation with the parties to the dispute".

3. Dispute Settlement Body - Special Session - *Negotiations on the Dispute Settlement Understanding - Proposals on DSU*, TN/DS/W/18, 07/10/2002, point III.

4. "Cross-retaliation" in: Goode Walter: *Dictionary of Trade Policy Terms*, Cambridge University Press 2003, p.88.

has been noticed by India that, "the tremendous imbalance in the trade relations between developed and developing countries placed severe constraints on the ability of developing countries to exercise their rights under Article 22. The economic cost of withdrawal of concessions in the goods sector was likely to have a greater adverse impact on the prevailing developing-country Member than on the defaulting developed country Member".[1] As a result, proposal has been formally made to add a new article 22.3b that says: "Notwithstanding the principles and procedures contained in paragraph 3, in a dispute in which the complaining party is a developing-country Member and the other party, which has failed to bring its measures into consistence with the Covered Agreements is a developed country Member, the complainant shall have the right to seek authorization for suspension of concessions or other obligations with respect to any or all sectors under any covered agreements".[2]

The process of DSU reviewing is going on and in May 2004 DSU reform will have significant implications for developing countries. However, it is probable that negotiations concerning other agreements (*e.g.*, Intellectual Property, Textiles, Agriculture) will be more important. Yet, as the developing countries participate more actively in international trade and the dispute settlement system, the direct implications of the DSU will increase. The growing use of the DSU by India and other developing countries provides a case in point. This means that it is in the long-term interest of India and other developing countries to follow DSU reform and to participate at the same time in the negotiations concerning the other areas.

Analysis of Disputes involving India

India has so far been involved in a total of 31 cases directly, a brief summery of which is provided in **Table 1**. A couple of interesting observations could be made in the light of the cases registered at DSB. First, India's trade policy is increasingly becoming WTO-compatible, as witnessed from non-notification of any case against it for a long time (June 1999 – January 2003, the gap between DS 175 to DS 279). However, India's anti-dumping policy is increasingly coming under fire in recent times, as seen from the last two registered cases. Second, while until recently (February 2004, Bangladesh) India did not face a single case as respondent from any developing countries, as a complainant, it has to get involved in four such cases. Third, while most of the cases filed by India involves imposition of anti-dumping and other type of duties and WTO-incompatibility of import measures on textile products among other members, the same for the cases

1. See, Dispute Settlement Body - Special Session - *Minutes of Meeting Held in the Centre William Rappard on 14 October, 2002*, TN/DS/M/5, 27/02/2003, point I.a.4.

2. Dispute Settlement Body - Special Session - *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/19, 09/10/2002, Point I.

against India centers on three broad issues, namely, import restrictions, patent regime, and anti-dumping. Fourth, while India has won 7 cases out of 15 as a complainant,[1] it has not won a single case as respondent and lost 5 cases out of 16. This suggests either the legitimacy of the claims by the appellant countries, or insufficient defense on India's part. Finally, as third party, India had participated mostly in cases concerning disputes over TRIPS, textile products, primary products and dumping; *i.e.*, issues concerning its major interest.

Table 1: Cases at DSB involving India

(updated upto 13th July, 2004)

Cases involving India as Respondent

Complaint by:	Win	Loss	Amicably settled	Continuing/ Recent Request	Total
Developed countries	0	5	5	5	15
Developing countries	-	-	-	1	1

Cases involving India as Complainant

Respondents:	Win	Loss	Amicably settled	Continuing/ Recent Request	Total
Developed countries	6	1	2	2	11
Developing countries	1	0	1	2	4

Source: Compiled from WTO documents

India's Viewpoint on the need for Legal Reform

Although India believes that DSB provides a major balancing tool in the multilateral trade system, it feels that there is ample scope for betterment to help the developing countries, and raises the following points as immediate concern:

1. *Need to protect developing country interests.*—The Dispute Settlement Understanding (DSU) enshrines special and differential treatment for developing countries in various clauses, but the lack of clarity in them might often lead to interpretations actually hurting developing countries. India believes that, "There is however no way to ensure

1. It needs to be mentioned that in two cases, (DS58 - import prohibition of shrimp and shrimp products against US) and (DS206 - anti-dumping and countervailing measures on steel plate against US), although certain US procedures in force were ruled WTO-inconsistent, some of India's claims were rejected by the panel (DS206) and certain panel rulings were reversed by the Appellate Body (DS58).

that such treatment is accorded to these countries in practice. Therefore, there seems to be a need for building a screening process to check whether such requirements are adhered to."[1]

2. *High Legal Costs.*—Given the high legal cost of fighting disputes coupled with relative lack of legal expertise in developing countries, they are always at a disadvantageous position as compared to their developed counterparts. In addition, the burden of proof rests on the respondent, a policy option used several times by developed countries to harass developing countries. Hence, a developed country should not be allowed to initiate a case against a developing country unless it is able to demonstrate that the alleged violation of an agreement by the former causes economic losses to it above *de minimus* level.

3. *Implementation during Reasonable Period.*- After receiving the Panel's or Appellate Body report, the losing country has to comply within a reasonable period of time, usually negotiated among the two sides. However, as experienced by India (Turkey -- DS 34 and EU - DS 141), DSB does not have any power to force the defaulter to implement these provisions at an early date. This is a major shortcoming of the system, hurting the developing countries more than their developed counterparts.

4. *Suspension of benefits.*—The WTO allows the winner party to suspend favourable treatment, *i.e.*, retaliate, if the loser party does not comply with its obligation even at the end of the 'reasonable period of time', the extent of which depends on the level of estimated trade loss due to continuation of WTO-incompatible measures. However, it is actually an inefficient tool, as developing countries are not adequately equipped to effectively impose it on their developed counterparts. India strongly believes that this issue should not be left entirely to negotiations between unequal trade partners, and proper guidelines should be laid in this regard.

5. *Participation of NGOs.*—India strongly believes that NGOs should not be allowed to take part in dispute settlement process. There was a move by US to facilitate NGO participation in the DS process in the late nineties, and India protested against this move with several other countries on three grounds. First, the ultimate compliance obligations under WTO are to be fulfilled by the governments, not the NGOs. Therefore, involving NGOs might change the inter-governmental character of it. Secondly, government positions for a case are arrived only after discussions with all domestic stakeholders. If governments are certain that NGOs have a further

1. WTO Newsletter, Ministry of Commerce, April, 1999, pp. 6.

chance to influence the DSB, then the system loses efficiency. Thirdly, the developing countries would always be in a disadvantageous position *vis-à-vis* their developed counterparts as their NGOs are relatively unprepared to send briefs without being asked for or to respond to invitations to send briefs owing to resource constraint.[1]

6. *Structure of DSB.*—India supports the current system of selecting members by mutual agreement between the parties, and against any proposal to destabilize it. There was a draft proposal from some members several years' back to introduce a permanent seven-member panelists committee, from which three could be selected at random for a particular dispute, which was promptly rejected by India.

7. *Authoritative Interpretation by Panels and AB.*—The DSB rulings are not supposed to change the obligations of the countries under WTO. However, the Panels and Appellate Bodies often seem to overstep their respective mandate and enter the area of 'authoritative interpretation' or 'amendment', reserved only for the members as per articles IX and X of the WTO agreement. India is particularly dissatisfied the way in which certain SPS and environment related unilateral trade measures were partially upheld by the DSB.[2]

8. *Transparency in DSB Proceedings.*—There is no official negotiating history of WTO and the Secretariat notes circulated to Panels, as official references in disputes are not even shared with the parties involved. India feels this system needs to be changed immediately to bring complete transparency in the procedure.

Ensuring an impartial and efficient DSB is essential for India. The recent trends in global negotiation, in particular, the failure in Cancun Ministerial raises doubt about the removal of distorting policies in coming days, and signify hard times for developing countries like India. On one hand, India might face charges on the ground of increased usage of contingency measures (*e.g.*, EU and Bangladesh have already lodged anti-dumping cases) or market access issues.[3] On the other hand, it might need to fight various policies (*e.g.*, agricultural subsidization, anti-dumping) of other members. It has to be noted that only through DSB mechanism, the correcting mechanism within WTO, India has caused EU to change its anti-

1. For details, see WTO Newsletter, Ministry of Commerce, December, 2000, pp. 18.

2. For instance, a number of cases could be cited, *e.g.* US – Shrimps, Turtle case and the EC – Hormones case, as mentioned in WTO Newsletter, Ministry of Commerce, March 2001, pp. 2. Chimni (2002) has also raised concern in this regard.

3. The WTO Trade Policy Review on India (2002) has raised serious concern over the growing use of contingency measures by India.

dumping regulation in the aftermath of the bed-linen case (DS 141). India seems to proceed in the right track, as it is negotiating jointly with other developing countries in this regard. However, in spite of the recent pro-active approach by India, proper planning and strategic postings are still lacking.[1]

Bibliography

Amersinghe, C. F., "Dispute Settlement by International Organizations", *Indian Journal of International Law*, Volume 43 n°3, July-September, 2003.

Bourgeois, Jacques, "Some reflections on the WTO dispute settlement system from a practitioner's perspective", *Journal of International Economic Law*, 2001, Volume 4, n°1.

Broeckers, Marco and Quick, Reinhard (Ed.), "New directions in international economic law – Essays in honour of John H. Jackson", *The Hague Kluwer Law International*, 2000 (p. 593).

Chaisse, Julien and Chakraborty, Debashis, "How Developing Countries use the Dispute Settlement Understanding: Chinese and Indian Standpoints" paper presented in the 2-day International Conference on "The Doha Development Agenda: Cancun and After", jointly organized by Rajiv Gandhi Institute for Contemporary Studies and Chioa Association for International Friendly Contacts, November 6-7, 2003.

Chimni, B.S., "WTO and Environment: Legitimisation of Unilateral Trade Sanctions", *Economic and Political Weekly*, January 12, 2002.

Chua, Adrian, "Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence", *Journal of World Trade*, Volume 32, n°2, April 1998.

Commonwealth Business Council, "Developing Countries and the WTO Trade Debate: Compelling Case for Full Participation in the New Round", 2001.

Das, Bhagirath-Lal, "The WTO Agreements: Deficiencies, Imbalances and Required Changes", *TWN & Zed Books*, 1998 (p. 472).

Dwyer Amy and Stewart Terence, "Handbook on WTO Trade Remedy Disputes: The First Six Years 1995-2000", Transnational Pub, 2001 (p. 560).

Goode, Walter, "Dictionary of Trade Policy Terms", *Cambridge University Press*, 2003 (437 p.).

Government of India, "India and The WTO", Monthly Newsletter of The Ministry of Commerce and Industry, (various issues).

Gupta, K.R., "World Trade Organisation: Text – Volume I", New Delhi, *Atlantic Publishers and Distributors*, 2000 (p. 338).

Gupta, K.R., "World Trade Organisation: Text – Volume II", New Delhi, *Atlantic Publishers and Distributors*, 2000 (pp. 339-716).

Jackson, John, "The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations", *Cambridge University Press*, Cambridge, United Kingdom, 2000 (p. 497).

1. Chimni (2002) notes "It is therefore unfortunate that India has supported the election of a commerce secretary to the Appellate Body with no background in international law".

Pauwelyn, Joost, "The Use of Experts in WTO Dispute Settlement", *International and Comparative Law Quarterly*, 2002, Volume 51, Part 2, pp. 325-364.

Petersmann, Ernst-Ulrich, (Ed.), "International Trade Law and the GATT/WTO Dispute Settlement System", Studies in Transnational Economic Law, Volume 11, *Kluwer Law International*, 1997 (p. 704).

Petersmann, Ernst-Ulrich, "The GATT/WTO Dispute Settlement System International Law, International Organizations and Dispute Settlement", Nijhoff Law Specials: Volume 23, *Kluwer Law International*, The Hague, 1997 (p. 368).

Ruiz-Fabri Hélène, "Le contentieux de l'exécution dans le règlement des différends de l'organisation mondiale du commerce", *Journal du Droit International*, n°3, 2000, pp. 605-645.

Stoll Peter-Tobias et Steinmann Arthur, "WTO Dispute Settlement: The Implementation Stage", *Max Planck Yearbook of United Nations Law*, 1999, Volume 3.

WTO Secretariat, "The WTO Dispute Settlement Procedures", *Cambridge University Press*, 2nd Edition 2003 (p. 146).

JUDICIAL LEGISLATION ON THE STATUS OF CANTEEN EMPLOYEES

Suresh C. Srivastava*

Introduction

It has now been well increasingly recognized all over the world that canteens for the workers are essential part of the industrial establishment, providing undeniable benefits from the point of view of health, efficiency and well being.[1] In India, the need for setting up canteen(s) inside the work place was emphasized by the Royal Commission on Labour, the Labour Investigation Committee, the National Commission on Labour and the Committee on Labour Welfare. However, there is no uniformity about the minimum number of workers required for providing and maintaining canteen(s) by the occupier under the Factories Act, 1948 the Mines Act, 1952, the Beedi and Cigar Workers (Conditions of Employment) Act, 1966, the Dock Workers (Safely, Health and Welfare) Scheme, 1961, the Motor Transport Workers Act, 1961, and the Plantations Labour Act, 1951. While the Factories Act, 1948 the Mines Act, 1952 and the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 make it obligatory on the part of the employer to run a canteen where 250 workers are ordinarily employed, the Plantations Labour Act, 1951 lays down that in every plantation where 150 workers are ordinarily employed there should be a canteen in the work place. The Contract Labour (Regulation and Abolition) Act, 1970 empowers the appropriate Government to frame rules requiring the contractor to provide and maintain one or more canteens for the use of contract labour in every establishment. However, where (in a factory employing less than 250 employees) the management agrees to provide a canteen to its workers in

* Research Professor, Indian Law Institute, Formerly Professor, Chairman & Dean, Faculty of Law, Kurukshetra University & University of Calabar (Nigeria).

1. Government of India, Report of the Committee on Labour Welfare, p.6 (1969). Cited in Government of India, Report of the National Commission on Labour, p. 112 (1969).

terms of the provisions of the Factories Act, it is obligatory under the settlement to maintain that canteen.[1]

Experience shows that the employer who is required to maintain a canteen and employ workers therefor instead of employing workers directly employs workers through contractor and thereby evade the provisions of the Act. A question, therefore, arises, whether the workers employed by the contractor in canteen may be treated as employees of the principal employer? In the absence of any legislative provisions regulating the security of tenure of canteen employees employed by contractor, the Supreme Court has not only made a distinct contribution to labour law in general and the Contract Labour (Regulation and Abolition) Act, 1970 in particular but also has displayed creative attitude of judges to protect the interest of canteen employees. It has evolved various norms as to when the canteen employees employed by the contractor may become the employee of the principal employer.

A survey of decided cases reveals that conflicting opinions have been expressed even by the Supreme Court which has brought uncertainty.

This paper seeks to examine the approaches of Indian Judiciary which led to the conflicting opinion.

Judicial Response

We shall now examine the response of the Indian judiciary regarding the status of contract labour and the problems involved therein. In a series of decided cases the Supreme Court has discouraged the employment of contract labour in statutory canteen to ensure fair conditions of service and security of tenure to them. However, in some cases court have given restricted meaning and thereby denied security of tenure to contract labour.

Saraspur Mills Co. Ltd. v. *Ramanlal Chimanlal*,[2] is one of the earliest case on status of canteen employees wherein the Supreme Court held that workers employed in a canteen, even if run by a Co-operative Society, were 'workers' as the occupier of the factory is under a mandatory obligation to maintain and run a canteen under section 46 of the Factories Act, 1948.

The aforesaid issue was more elaborately dealt with in *M.M.R. Khan* v. *Union of India*.[3] In this case, the Supreme Court was concerned with canteen run by Railway Establishments falling into three different categories: Firstly, statutory canteens which are provided compulsorily in the establishments employing 250 or more workers under section 46 of the Factories Act, 1948. Secondly, Non-statutory recognized canteens, which are run in an establishment which may or may not be governed by the Act but which

1. *Cantes India Pvt. Ltd.* v. *Industrial Tribunal*, 1980 Lab. IC 1126 (HC Cal).

2. (1973) 3 SCR 967.

3. 1990 (SUPP) SCC 191.

admittedly employ 250 or less than 250 employees and hence, it is not obligatory on the employer to maintain. However, they are set up as a staff welfare measure where the employees exceeds 100 in number. These Canteens are established with the prior approval and recognition of the employer as per the procedure contemplated under the Rules and Regulations of the Establishment; and thirdly, non-statutory and non-recognized canteens. These canteens are run at establishments under the second category but employ 100 or less than 100 employees and are established without the prior approval of or recognition of the employer.

Again in *All India Railway Institute Employees Association* v. *Union of India*,[1] the Supreme Court while dealing with this question held that the employees in the Railway Institutes or clubs were not employees of the Railway establishment. *Parimal Chandra Raha* v. *Life Insurance Corporation of India*,[2] is a leading case on the subject. Here the Supreme Court ruled:

(a) Where there is a statutory obligation (*e.g.* under the Factories Act, 1948) to provide and maintain a canteen for the use of his employees, the canteen becomes the part of the establishment and the workers employed in such canteen are the employees of the management.

(b) Where there is no statutory obligation but there is otherwise obligation on employer to provide a canteen such as part of service condition, the canteen becomes the part of the establishment and the workers employed in such canteen are the employees of the management.

(c) Where there is a no obligation to provide a canteen but there is an obligation to provide facilities to run canteen, the canteen does not become a part of the establishment.

(d) Nature of the obligation:

(i) The obligation to provide canteen may either be explicit or implicit.

(ii) Where the obligation is not explicitly accepted by or cast upon the employer either by an agreement or an award, etc., it may be inferred from the circumstances, and the provision of the canteen may be held to have become a part of the service conditions of the employees.

(iii) Whether the provision for canteen services has become a part of the service condition or not, is a question of fact to be determined on the facts and the circumstances in each case.

1. (1991) 2 Lab LJ 265.

2. 1995 Supp (2) SCC 611.

(iv) Whether a particular facility or service has become implicitly a part of the service conditions of the employees or not, will depend, among others, on the nature of service or facility.

(v) The service or facility of canteen increases the efficiency of the employees and the establishment, whether the same is available as a matter of right to all employees in their capacity as employees or not. The advantage of such facility may be measured in terms of the number of employees employed in the establishment and the number of employees who avail the service, the length of time for which the service has been continuously available, the hours during which it is available, the nature and character of management, the interest taken by the employer in providing, maintaining, supervising and controlling the service, the contribution made by the management in the form of infrastructure and funds for making the service available, etc.

However, in *Indian Petrochemicals Corp. Ltd.* v. *Shramic Sena*[1], a new gloss was given to this decision by stating that the presumption arising under the Factories Act in relation to such workers is available for the purpose of the Act and no further. The Supreme Court held that the Factories Act does not govern the rights of employees with respect to (i) recruitment (ii) seniority (iii) promotion (iv) retirement benefits, etc. These are governed by other statutes, rules, contracts or policies. Therefore, employees of the statutory canteen cannot *ipso facto* become the employees of the establishment for all-purpose. The court added that (i) It should be borne in mind that the initial appointments of these workmen are not in accordance with the rules governing appointments; (ii) Rules governing establishments; (iii) Rules governing policy of recruitment of the management; (iv) The aforesaid recruitments could also be in contravention of the various statutory orders including reservation policy; (v) Further the reservation policy is an instrumentality of the State and as such State has an obligation to conform to the requirements of Articles 14 and 16 of the Constitution. Be that as it may, the Court ordered that the services of the workmen should be regularized not as a matter of right of workmen but with a view to eradicate unfair labour practices and bring equity and social justice.

Again, the Supreme Court in *Indian Overseas Bank* v. *I.O.B Staff Canteen Workers' Union and another*,[2] while considering the effect of *Parimal Chandra Raha* v. *L.I.C. of India* and *Indian Petrochemicals Corp. Ltd.* v. *Shramic Sena* gave a narrow meaning to the scope of section 46 of the Factories Act, 1948 when

1. 1999(6) SCC 439.
2. 2000(4) SCC 245.

it ruled that: "the workers of a particular canteen statutorily obliged to be run render no more than to deem them to be workers for limited purpose of the Factories Act and not for all purposes and in cases where it is a non-statutory recognized canteen the court should find out whether the obligation to run was implicit or explicit on the facts proved in that case and the ordinary test of control, supervision and the nature of facilities provided were taken note of to find out whether the employees therein are those of the main establishment.

From the above it is evident that by giving the interpretation the Court in the above case has not only denied security of tenure to contract labour but even deprived them from the benefits available to workers employed in factories from other labour legislation.

A year later, the Supreme Court disapproved the line of thinking adopted in *Indian Overseas Bank* case. Thus in *Barat Fritz Werner Limited* v. *State of Karnataka*,[1] the Supreme Court ruled that the workers working in canteens even if employed through the contractor have to be treated as "workers" and no restricted meaning can be given. Even where the Factories Act, 1948, is not applicable to an establishment but canteen facility is provided as a condition of service, an employee of such a canteen may be treated as worker.

The aforesaid view was reiterated in *V.S.T. Industries Ltd* v. *V.S.T. Industries Workers Union*.[2] While dealing with the claim of workers of a canteen run through a private contractor in pursuance of the obligation of the industrial establishment under section 46 of the Factories Act, 1948 the Supreme Court upheld the claim of workers for being treated as workers of the company itself.

A year later in *Harishanker Sharma* v. *Artificial Limbs Manufacturing*[3] the Supreme Court deviated from the decision in *V.S.T. Industries Ltd. and Barnck Fritz Werna Ltd.* case and reinstated the decision taken in *Indian Petrochemicals and Indian Overseas Bank* case. In this case, some 700 workers of the canteen run for the benefit of the employees of the Artificial Limbs Manufacturing Corporation argued that they were working in the canteen for many years, under several contractors, and therefore they were entitled to the wage benefits of the Corporation itself. The Supreme Court rejected their demand and observed as follows:

> "It cannot be said as an absolute provision of law that whenever in discharge of a statutory mandate, a canteen is set up or other facilities provided by an establishment, the employees of the canteen or such other facility become the employees of the establishment".

1. 2001 Lt.R 285.
2. JT 2001 (1) SC 36: 2002 LLR 101.
3. (2002) 1 LLJ 237 (SC).

The Court held that contractors are not entitled for absorption by the principal employer. This is also true for statutory canteens in industries and factories.

It is submitted that the Court not only departed from its earlier decision but failed to appreciate that this is a case of sham contract where employee continues but the contractor changes.

In *Steel Authority of India* v. *National Union Waterfront Workers*[1] the Constitution Bench of the Supreme Court appears to have retained the position well-settled in decided cases, namely, when the principal employer is to comply with statutory duty to maintain canteen in a factory/ establishment, on abolition of such contract, the contract workers are to be absorbed as regular employees. Thus, the court while adverting to the position of law in force observed as follows:

> We have gone through the decisions of this Court in *V.S.T. Industries* case, *G.B. Pant University* case and *M. Aslam* case. All of them relate to statutory liability to maintain the canteen by the principal employer in the factory/establishment. That is why in those cases, as in *Saraspur Mills* case the contract labour working in the canteen were treated as workers of the principal employer. These cases stand on a different footing and it is not possible to deduce from them the board principle of law that on the contract labour system being abolished under section (1) of section 10 of the CL (R&A) Act, the contract labour working in the establishment of the principal employer have to be absorbed as regular employees of the establishment.

The Supreme Court has, however, not expressly settled the controversy arising out of the conflicting judgment made in the *Parimal Chandra Raha* case and the *Indian Petro Chemicals Corporation Ltd.* case.

In *National Thermal Power Corporation* v. *Karri Pothuraju*,[2] the National Thermal Power Corporation Ltd. (NTPC) started a canteen in the year 1983 for the benefit of the employees of their unit, through a contractor and from that time onwards it was being run through contractors engaged from time-to-time. The said corporation being a "factory" under the Factories Act, 1948 was under an obligation to provide and maintain a canteen for the benefit of employees of the unit. However, instead of employing workers directly the corporation, as said earlier, engaged workers through contractors and many of the workers were working from the year 1983. The working of the canteen in respect of preparation, service and maintenance to ensure quality was supervised by the Deputy Manager (Administration) and his subordinates.

---

1. 2001 LLR 961: JT 2000 (7) SC 268.
2. 2003 LLR 1006.

The said authority (as claimed) issued identity cards to the workers for entering the factory premises.

The respondent workers filed a writ petition in the High Court under Article 226 of the Constitution of India seeking for a direction to the appellant to regularize their services with attendant benefits.

The Single Judge of the Andhra Pradesh High Court dismissed the petition. Thereupon the respondent workmen filed an appeal before the Division Bench of the Andhra Pradesh High Court. The Division Bench set aside the order of the Single Judge and allowed the claims subject to conditions specified in the order. Aggrieved by this decision, the National Thermal Power Corporation filed an appeal by special leave before the Supreme Court. The appellant placed reliance upon the decisions reported in *Indian Petrochemicals Corporation Ltd.* v. *Shramik Sena,*[1] and other related decisions to contend that the Division Bench went wrong in reversing the decision of the learned Single Judge and that the respondent-workers who were workers in the canteen engaged by the contractor, cannot claim to be part of the appellants' establishment and claim for regularization in the services of the appellant undertaking and consequently the order under challenge was liable to be set aside. On the contrary the respondent workers placed reliance upon the decisions in *Indian Overseas Bank* v. *I.O.B. Staff Canteen Workers Union,*[2] as well as *Steel Authority of India Ltd.* v. *National Union Waterfront Workers,*[3] and in *V.S.T. Industries Ltd.* v. *V.S.T. Industries Workers' Union.*[4] to contend that the decision of the Division Bench does not require any interference in this appeal. Reliance was also placed on an earlier decision of the Supreme Court in the *Saraspur Mills Co. Ltd.* v. *Ramanlal Chimanlal*[5] for sustaining the decision of the High Court.

The Supreme Court after examining the rival contentions referred to the its earlier decision in *Saraspur Mills Co. Ltd.* v. *Ramanlal Chimanlal,*[5] *V.S.T. Industries Ltd.* v. *V.S.T. Industries Workers' Union*[4] and *Steel Authority of India Ltd.* v. *National Union Waterfront Workers,*[3] and observed:

> An analysis of the cases discussed above, shows that they fall in three classes: (i) where contract labour is engaged in or in connection with the work of an establishment and employment of contract labour is prohibited either because the industrial adjudicator/court ordered abolition of contract labour or because the appropriate government issued notification under section 10(1) of the CL (R&A) Act, no automatic absorption of the contract labour working in the

1. JT 1999 (4) SC 454: 1999 LLR 961 (SC).
2. JT 2000 (4) SC 503: 2000 LLR 647 (SC).
3. JT 2001 (7) SC 268: 2001 LLR 961 (SC).
4. JT 2001 (1) SC 36: 2001 LLR 101 (SC).
5. 1974(3) SCC 66.

establishment was ordered; (ii) where the contract was found to be a sham and nominal, rather a camouflage in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances wherein the Court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited; (iii) where in discharge of a statutory obligation of maintaining a canteen in an establishment, the principal employer availed the services of a contractor, the courts have held that the contract labour would indeed be the employees of the principal employer.

The Court accordingly held that it is too late in the day for the employer, which had an obligation under the Factories Act, 1948 to run the canteen to the contrary.

A perusal of the aforesaid judgment reveals that neither the appellant nor the respondent referred to the judgments of the Supreme Court in *Parimal Chandra Raha* v. *Life Insurance Corporation of India*[1] and *Barat Fritz Werner Limited* v. *State of Karnataka*,[2] which support the line of thinking adopted in this case. The Court has also not referred to its earlier decision in *Harishanker Sharma* v. *Artificial Limbs Manufacturing*,[3] which supports the view point of the appellant. This has really deprived the Court to take full view of the situation.

Conclusion

The Indian judiciary, in its journey from *Saraspur Mills Co. Ltd.* (1973) to *National Thermal Power Corporation (2003)*, has shown innovative zeal. But in this process it has given misgivings as well. The judges, at times, interpreted the obligation of employer in a narrow sense. In this process there emerged conflicting views. It is not difficult to find the same judge taking different approach even in the cases decided by him earlier. Thus Justice Rajendra Babu who was a member of the Bench of the Supreme Court in *Harishankar Sharma* v. *Artificial Limbs Manufacturing Ltd.*,[4] took a different view than those expressed in *National Thermal Power Corporation Ltd.* case.

---

1. 1995 Supp (2) SCC 611.
2. 2001 LLR 285.
3. (2002) 1 LLJ 237 (SC).
4. *Supra.*

THE GROWING MENACE OF CYBER TERRORISM: CHALLENGES BEFORE THE CRIMINAL JUSTICE SYSTEM*

Gurjeet Singh**

"Just as a modern thief can steal more with a computer than with a bag, tomorrow's terrorist may be able to cause more damage with a computer mouse than with a bullet or a bomb."

Introduction

The emergence and growth of Information Technology (IT) has revolutionised the entire globe. It has changed the way we think and the way we act in our day-to-day life. Such has been the impact of technological advancements and innovations today that we cannot simply imagine our lives without them. The modern day technology has shrunk distances around the world and made the inflow and outflow of information across the borders much easier than ever before.

The invention of computer and the Internet are the cornerstones of the Information Technology Revolution. Computers have been dominating the technological scenario, and of late, the legal scenario world over since the early 1970s.[1] Internet and the World Wide Web that blossomed in 1980s,

* This is the revised and enlarged version of the paper presented at the XXXVth All India Police Science Congress Organised by the Punjab Police and the Bureau of Police Research and Development (BPRD), New Delhi and held at Jalandhar (Punjab) on 24-26 May, 2004.

** B.A. (Hons.), M.A. (Eco., Pol. Sce. & Pub. Admn), LL.M. (GNDU), Ph.D. (GNDU), Ph.D. (SOAS, London), Professor and Formerly Head, Department of Laws, Guru Nanak Dev University, Amritsar - 143 005 (Punjab). I am heartily thankful to my friend Padmashri Mr. J.P. Birdi, IPS, Inspector General of Police (Border), Amritsar for his valuable comments on an earlier draft of this paper.

1. For a detailed discussion on the topic of 'Role of Computers in the Field of Law', see: Gurjeet Singh (2001): "Role of Computers in the Fields of Legal Education and Research." In: S.K. Verma and M. Afzal Wani (eds.): Legal Research and Methodology, New Delhi: Indian Law Institute, pp. 715-29.

have made it possible to have a world of information and connectivity at the click of a mouse. Notwithstanding the fact that these small electronic machines have brought enormous speed, accuracy and ease in our day to day working, they have also opened up a variety of new ways of committing and perpetrating crimes thereby doing greatest harm to the mankind.

As a matter of fact, when computers and Internet were developed, their inventors could not probably have imagined that these could also be misused for the commission and furtherance of criminal activities. However, today many disturbing things are happening in cyberspace,[1] especially the cyber crimes.[2] It will not, therefore, be out of place to mention here that the commission of cyber crime has acquired international dimensions and that "today the cyber criminals can move at the speed of light on a highway on which there are traffic signals, no constables, and no custom or immigration authorities to check them from doing anything wrong."[3]

The purpose of the present paper is to discuss the problem of 'Cyber Terrorism' as one of the gravest forms of cyber crime and to highlight some of the prominent tools and techniques of this particular form of crime. Besides discussing some of the issues relating to the problem, an attempt has

1. The expression 'Cyber Space' owes its origin to a scientific fiction novel, *Necromancer* written by William Gibson in the year 1984. According to Gibson, 'Cyber Space' refers to that imaginary space that is created by computers when they communicate. Cyber Space is thus an abstract concept that represents an area where a kind of activity takes place in which the computers connected through a network are engaged. It is that invisible realm in which one particular computer is linked to other computers in the world, and retrieving or sending almost any information anywhere in more than 150 countries cheaply, quickly, and reliably. It is often referred to as the 'Information Highway' of which one of the major components is Internet. However, Cyber Space has no physical boundaries. For further details, see: K. Aswathappa (2001): *Essentials of Business Environment*, Mumbai: Himalaya Publishing House.

2. As a matter of fact, there is no clear-cut definition of the term 'Cyber Crime'. This term is interchangeably used with the term 'Computer Crime'. The Organisation of Economic Co-operation and Development (OECD) instead uses the term 'Computer Abuse' and defines it as follows: "Computer abuse is considered as any illegal, unethical, or unauthorised behaviour relating to automatic processing and the transmission of data". Broadly speaking, therefore, 'Cyber Crime' refers to all activities done with the criminal intent in cyber space. According to the criminal law experts, computer related crime is almost a silent and discrete crime committed without anyone noticing it, with the criminal sitting at his home or office, without making any sound or visible activity. It has virtually no boundaries and does or may affect every country in this world. For more details, see: Parthasarthy A.S. Pati (2003): "Cyber Crime." In: *Infosym: The IT & Law Initiative*, Vol. IV (December), pp. 101-16. Also see: "Cyber Crime: Are You Safe?" In: *LawZ.*, Vol. 4, No. 1 (January 2004), pp. 11-15.

3. Gurjeet Singh and Vicky Sandhu (2001): "Emergence of Cyber Crime: A Challenge for the New Millennium." In: *Delhi Law Review*, Vol. XXII, pp. 25-57, at p. 26.

also been made to offer some workable suggestions to deal with the growing menace of cyber terrorism. A number of references have been given at the end of the paper in order to facilitate further research on the topic. These references may be found immensely useful by the academics, criminal lawyers, researchers and policy planners who are involved in the crusade of prevention and detection of 'cyber crimes' in general and 'cyber terrorism' in particular.

Menace of Cyber Terrorism in the Contemporary Society

Just as terrorism is a stigma in the real world, it is also a bane in the cyber space. The growth of Internet has shown that the medium of cyber space is being used by individuals and groups alike to threaten the governments worldwide as also to terrorise the citizens of a country. As a matter of fact, till now, there is not a single acceptable definition of the term 'Cyber Terrorism'. However, there is broad agreement on one point that 'Cyber Terrorism' refers to two elements: (i) Cyber Space and (ii) Terrorism. That obviously means that the term necessarily refers to any dangerous, damaging, and destructive activity that takes place in Cyber Space. Nevertheless, some workable definitions have been suggested by the experts. For instance, some of the Cyber Law Experts define it "as the premeditated use of disruptive activities, or the threat thereof, in cyber space, with the intention to further social, ideological, religious, political, or similar objectives or to intimidate any person in furtherance of such objectives."[1] The underlying premise in this definition is that cyber crime and cyber terrorism differ only on the basis of the motive and intention of the perpetrator.

Another workable definition of 'Cyber Terrorism' is that "it is the premeditated, politically motivated attack against information, computer systems, computer programmes, and the data which result in violence against non-combatant targets by sub-national groups or clandestine agents."[2] Even this definition is also a narrower one. For the term to have any meaning, we must be able to differentiate it from other kinds of computer abuse. As a matter of fact, therefore, a workable as well as universally accepted definition of the term 'Cyber Terrorism' needs to be worked out.

Tools and techniques used by Cyber Terrorists

Although there is difference of opinion among the cyber law experts about the tools and techniques used by the cyber terrorists for terrorising and hitting their targets, following are some of the prominent tools of terror that are being used quite frequently and with impunity:

1. Rohas Nagpal (2002): "Defining Cyber Terrorism." In: *The ICFAI Journal of Cyber Law*, Vol. 1, No. 1 (November), pp. 75-78, at p. 77.

2. Yogesh Barua and Denzyl P. Dayal (2001): *Cyber Crimes*, New Delhi: Dominant Publishers and Distributors, p. 3.

a. Hacking

Hacking is a generic expression for all forms of unauthorised access to a computer or computer network. Hackers are basically skilled computer users who penetrate computer systems to gain knowledge about them and about how these work.[1] Obviously, therefore, the gravity of hacking is weighed against what is actually done upon illegally entering the computer system. Data may be stolen or integrity of the information may be affected which is at par with sabotage and in both cases, great damage is done. As mentioned above, hackers can break the security of computer network by using their skill in a way that is illegal. Hacking can manifest itself in many ugly forms including 'Cyber Murders'. For instance, a British hacker hacked in to a Liverpool Hospital in 1994 and changed the medical prescriptions for the patients. A nine year old patient who was prescribed a highly toxic mixture survived only because a nurse decided to re-check his prescription. The only motive of hacker was to know as to 'what kind of chaos could be caused by penetrating the hospital computer. Others have not been so lucky. An underworld don who was only injured in a shoot out was killed by an overdose of penicillin after a hacker broke into the hospital computers and altered the prescription of the diseased. Hacking is facilitated by many technologies, the major ones being packet sniffing, tempest attack, password cracking, and buffer overflow.[2]

b. Cracking

Cracking is another form of hacking. It involves breaking the security on software applications. A cracker is a hacker with criminal intent. According to the Jargon Dictionary, the term 'Cracker' began to appear in 1985 as a way to distinguish 'benign' hackers from the hackers who maliciously cause damage to the targeted computers. Crackers maliciously sabotage computers, steel information located on secure computers, and cause disruption to the networks for personal or political motives. Crackers develop their own software that can circumnavigate or falsify the security measures that keep the application from being replicated on a PC. For example, if a registry access is permitted to everyone, passwords could be cracked. An employee could he able to dump password registry contents, if he is allowed access, and crack them at leisure. Password dumping and cracking is not difficult. A plethora of tools for that purpose are available on the Internet. Password having been cracked, it perinits the cracker to log on to the server with cracked user name and password. He then gains a legitimate access to the restricted system resources.[3]

1. Yogesh Barua and Denzyl P. Dayal (2001): *Cyber Crimes*, New Delhi: Dominant Publishers and Distributors, p. 3. p. 7.

2. Rohas Nagpal (2003): "Cyber Terrorism in the Context of Globalisation." In: *Infosym The IT & Law Initiative: A Symbiosis Society's Law College Publication*, Vol. 4 (1December 2003), pp. 74-97, at p. 75.

3. *Ibid.*

Thus, protection is needed against theft of equipment, loss of software or data, virus incidents, Internal system attacks and hacking. Loss of software or data and virus incidents have been the main cause for loss of computerised information.

It may be appropriate to mention here that Section 66 of the Information Technology Act, 2000 has defined hacking and has proceeded to prescribe punishment for the same. It states as follows:

> **Hacking with Computer System**
>
> 66. (1) Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hacking.
>
> (2) Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

Simultaneously, Section 43 of the Act states as under:

> **Penalty for damage to computer, computer system, etc.**
>
> 43. If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network:
>
> (a) accesses or secures access to such computer, computer system or computer network;
>
> (b) downloads, copies or extracts any data, computer database or information from such computer, computer system or computer network including information or data held or stored in any removable medium;
>
> (c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;
>
> (d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;
>
> (e) disrupts or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;
>
> (f) denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;

(g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;

(h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network,

he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.[1]

It is unanimously agreed that any and every system in the world can be hacked. Using one's own programming abilities as also various programmes with malicious intent to gain unauthorised access to a computer or network are very serious crimes. In order to prevent hacking, it would be necessary for the system owner to install a suitable hardware or software 'firewall' that is configured to allow only authorised persons to the computer.

c. Trojan Horses

This term has its origin in the word 'Trojan Horse'.[2] A 'Trojan Horse Programme' or 'Trojan Programme' is an innocent looking programme that contains hidden functions. They are loaded onto the computer's hard drive and executed along with the regular programme. However, hidden in the belly of the 'innocent' programme is a sub-programme that will perform a function mostly unknown to the user. Trojan Programmes can take the form of a popular programme where the original source code has been altered to hide the Trojan payload.[3] It may be appropriate to mention here that a Trojan Horse Virus is the most destructive type of virus and has been used by the cyber terrorists and hackers quite frequently.

d. Computer Viruses

Computer viruses have become a serious financial and security threat from the cyber terrorists to computer networks across the world. According

1. See: The Information Technology Act, 2000.

2. In the 12th Century B.C., Greece declared war on the city of Troy because the Prince of Troy abducted the queen of Sparta with a wish to make her his wife. The Greeks besieged Troy for 10 years but met with no success as Troy was very well fortified. In their last effort, the Greeks pretended to be retreating, leaving behind a huge wooden horse. The people of Troy saw the horse, and, thinking it was a present from the Greeks pulled the horse into their city, unaware that the hollow wooden horse had the best Greek soldiers inside. Under the cover of night, the Greek soldiers snuck out, opened the gates of the city, and later, together with the rest of their army, killed the entire army of Troy. Similar to the wooden horse, a Trojan horse programme pretends to do one thing while actually doing something completely different. For more details, see: Rohas Nagpal (2003), pp. 74-97.

3. Yogesh Barua and Denzil P. Dayal (2001), p. 34.

to rough estimates, there are at present 35,000 types of computer viruses in existence today and there are approximately 300 types of new viruses that are created each month.

A computer virus is a programme that infects a computer by inserting a copy of itself into the computer and harms the computer in some manner, generally without the computer user's awareness. A virus typically spreads from one computer to another by e-mail or an infected disk. Once a virus is activated, it does not have to cause damage immediately. There are countless creative ways by which a virus can be triggered. Most viruses contain a 'pay lord' that contains the damaging code. The 'pay lord' is the damage a virus creates. In the past, virus 'pay lords' have been triggered on a certain date, when the computer re-starts, or after a certain amount of times the virus is loaded into the system. Viruses can hide in several places in a computer's memory. Other viruses hide in computer programmes so that the virus is activated every time the programme is loaded. One the virus is activated, it can duplicate and spread itself without any further input by the user.[1]

e. Computer Worms

Computer worms are similar to computer viruses. However, one major distinction between the two is that computer worms multiply without any human interaction. A worm can wind its way through a network system without the need to be attached to a file, unlike viruses. Worms are commonly spread over the Internet via e-mail message attachments and Internet Relay Chat.[2] Worms may also invade a computer and steal computer's processing resources to replicate themselves. 'Love Bug' is an example. It was spread by making copies of itself and sending them out to listing in victim's e-mail address book. It did shut down many government and corporate networks.[3] The Haiku Worm is another good example of a robust worm with many features. The Haiku Worm spreads itself through e-mail with an attachment called 'haiku.exe. When the worm is executed, it modifies the system to load every time the computer is re-booted. After the computer is re-booted, a small haiku poem will appear in a window box. The worm generates its own haikus from a list of words. The worm will also

1. It may be appropriate to mention here that not all viruses cause damage to its host. Viruses that are 'benign' or non-harmful, are still considered viruses. For example, a virus could display an innocuous message on a certain date. Although it might be annoying and create a sense of anxiousness, the virus does not cause any measurable harm. However, the current anti-virus and anti-hacking statutes do not distinguish between the 'harmful' and benign viruses.

2. Peter Norton (2001): *Introduction to Computers*, Fourth Edition, New Delhi: Tata McGrawhill Publishing Co. p. 539.

3. *Ibid.*

search the hard drive for e-mail addressee and the worm will send haiku.exe with a message to the e-mail addressee it located on the hard drive.[1]

The amount of damage that computer worms can cause may be amply clear from the following instance: Robert Morris was a first year student in the Computer Science Program at the Cornell University in the United States. He released a computer worm with the intent to demonstrate the vulnerability of computers to malicious programmes. He programmed the worm to multiply only once on a computer, thereby helping the worm evade detection. However, to defeat the system administrators who might trick the worm into thinking the computer already had the worm, Morris designed the worm to automatically reproduce every seventh time, regardless of whether the machine already had the worm or not. However, Morris underestimated the number of iterations the worm would make. The worm multiplied across the Internet much more quickly than anticipated and he made attempts to limit the damage by releasing a solution over the Internet. However, due to network congestion caused by the worm, the solution was not able to get through until serious damage had already been done to many protected computers across the country. The estimated cost to repair each infected installation ranged from $ 200 to more than $ 53,000. Morris was charged with violating the law and was accordingly punished.[2]

f. Electronic Mail Related Crimes

Electronic Mail (e-mail) has emerged as the world's most preferred form of communication. Like any other form of communication, e-mail is also misused by the cyber criminals and terrorists. E-mails have become effective instruments of harassment, be it mental, physical, racial, religious, sexual or other. Persons perpetuating such type of harassment are also guilty of cyber crimes. There are a large number of instances where the medium of e-mails has been used not simply to harass an individual or a group of individuals, it has been used to terrorise them. This has happened in case of adherence or alignment of an individual or the group to a particular ideology or an organisation.

g. Denial of Service Attacks

Denial of Service (DOS) Attacks are aimed at denying authorised persons an access to a computer or computer network. These attacks may be launched using a single computer or millions of computers across the world. In the latter scenario, the attack is known as a Distributed Denial of Service (DDOS) attack. The main reason for the vulnerability of computer systems to DOS attacks is the limited nature of computer and network resources, be it bandwidth, processing power, storage capacities or other resources. Further,

1. Yogesh Barua and Denzil P. Dayal (2001), pp. 32-34.
2. *Ibid.*, p. 33.

DOS attacks pose another challenge, namely, timely detection and source identification. These attacks are usually launched from innocent systems that have been compromised by the attackers. All that the attacker has to do to launch a DDOS attack is to install a Trojan in many computers, gain control over them and then employ them in sending a lot of requests to the target computer. DOS attacks are a very perturbing problem for the law enforcement agencies mainly because they are very difficult to trace. In addition, usually these attacks target sensitive systems or networks—sometimes even those that are vital to national security. Sometimes even when the perpetrators can be traced, international extradition laws may prove a hitch in bringing them under the authority of the law.[1]

h. Cryptography

Finally, a disturbing trend that is emerging now a days is the increasing use of encryption, high frequency encrypted voice/data links, stegnography etc. by the terrorists and members of the organised crime cartels. Strong encryption is the criminal's best friend and the policeman's worst enemy. If a criminal were to use 512-bit symmetric encryption, how long would it take to decrypt the information using brute force techniques?

i. Web Jacking

This term is derived from the term 'Hijacking'. In these kinds of offences the hacker gains access and control over the website of another. He may even mutilate or change the information on the site. This may be done for fulfilling political objectives or for money. For example, recently the site of Ministry of Information Technology was hacked by the Pakistani hackers and some obscene matter was placed therein. Further, the site of Bombay Crime Branch was also web jacked. Another case of web jacking is that of the 'Gold Fish' case. In this case, the site was hacked and the information pertaining to gold fish was changed. Further a sum of US $ 1 million was demanded as ransom. Thus web jacking is a process where by control over the site of another is made backed by some consideration for it.[2]

j. *Salami* Attacks

This kind of crime is normally prevalent in the financial institutions or for the purpose of committing financial crimes. An important feature of this type of offence is that the alteration is so small that it would normally go unnoticed, *e.g.*, the Zigler case wherein a logic bomb was introduced in the bank's system, which deducted 10 cents from every account and deposited it in a particular account.[3]

---

1. Rohas Nagpal (2003), p. 77.
2. Parthasarthy A.S. Pati (2003), pp. 101-16, at p. 106.
3. *Ibid.*, p. 104.

Cyber Terrorism: Emerging issues and challenges before the Criminal Justice System

Following are some of the contemporary issues and challenges that are being faced by the Criminal Justice System across the globe in the wake of increasing commission of cyber crimes and cyber terrorism.

a. Jurisdictional Issues

One of the prominent issues relating to Cyber Terrorism is that of 'Jurisdiction'. Like pollution control legislation, one country cannot, by itself, effectively enact laws that comprehensively address the problem of Internet related crimes without cooperation from other nations. While the major international organisations like the OECD and the G-8, are seriously discussing cooperative schemes, many countries do not generally share the urgency to combat computer crimes for many reasons, including different values concerning piracy and espionage or the need to address more pressing, social problems. Obviously, therefore, these countries directly or indirectly present the cyber-criminals a safe heaven to operate. Thus, never before has it been so easy to commit a crime in one jurisdiction while hiding behind the jurisdiction of another.

As a matter of fact, a court must have jurisdiction to hear a case and render an effective judgement. Jurisdiction is the power of a court to hear and determine a case. Such jurisdiction is essentially of two types, namely subject matter jurisdiction and personal jurisdiction. And for a judgement to take place, the two must be satisfied conjointly.

There is a very peculiar problem while applying the issue of jurisdiction in case of cyber crimes. In all the cases, several parties are present in various parts of the world that have only a virtual connection with each other. Then, if one party wants to sue the other, where can he sue? Traditional requirements generally encompass two areas - firstly, the place where the defendant resides, or secondly, where the cause of action arises. However, in the context of the cyber crime, both these are difficult to establish with any certainty.

We take a simple example of a person ordering certain goods on the web. After the money was deducted from his credit card, suppose a person does not get the goods he was promised. Now if the buyer is residing in India, the owner of the site is actually residing in New Zealand, the website is located on a server in California, then it is difficult to decide if the transaction was done in India or in New Zealand or in California.

Thus, the first and the foremost issue is that of jurisdiction and a lot of brain storming exercises are required to decide about it so that the future generations who are going to be primarily the On-Line customers, could be saved from being cheated and defrauded.

b. Other Issues

According to some of the Cyber Law experts, following are the challenges that are being faced by the Criminal Justice System:

(i) Technical challenges that hinder law enforcement's ability to find and prosecute the criminals operating online;

(ii) Legal challenges resulting from laws and legal tools needed to investigate cyber crimes; and

(iii) Operational challenges to ensure that a network of well trained, well equipped investigators and prosecutors who work together even across the national borders.

Although the detailed discussion of all the above mentioned points may not be possible due to space constraint, it is sufficient to mention here that the problem of cyber crime is a problem that sans borders and boundaries and in turn needs to be tackled on the technical, legal and operational fronts. The world community has to work in co-operation and co-ordination in order to take on the problem of such a magnitude and ramifications.

Strategies for Tackling Cyber Crime

There is no denying the fact that the existence of cyber crime and growing instances of cyber terrorism have certainly given sleepless nights to the law enforcement agencies. Although the magnitude of cyber crime in India is not comparable to the one prevailing in the advanced countries like the United Kingdom and the United States, this fact should not, in any way, come in the way of the investigative agencies. They should get themselves acquainted with the problem of emergence of cyber crime and should train their officers and men to invariably tackle such crimes. It may be appropriate to mention here that a comprehensive strategy to tackle the emerging problem of cyber crime should have the following components:

(i) Emphasis on Adequate In-Built Security Features in the Computer System;

(ii) Establishing Legal Framework and Evolving Investigative Techniques to Gather Evidence;

(iii) Information Cooperation.[1]

Significant advances have been made in computer security, both in hardware and software. Policy-makers and Information Technology Managers have to ensure that proper threat perception is made and an adequate level of security features are introduced in the computer networks of sensitive departments. There is, therefore, an urgent need to sensitise the

1. Balwinder Singh (2000): "Cyber Crime A New Challenge for the Police." In: *CBI Bulletin* (February), pp. 35-37, at p. 35.

computer users in financial sector as well as departments dealing with the security of the State about the security features and right perspectives.

As regards the legal framework, most of the advanced countries have already framed adequate laws for functioning in the computerised environment.[1] However, till recent past, in India one could find our obsolete and primitive civil and criminal statutes of the Common Law vintage having been made to subserve the ends of the society "primarily through judicial innovation and ingenuity."[2] According to the experts, and rightly so, such statutes are overdue for a total review and replacement. The nature of cyber crimes and the skills involved are such that existing legal framework cannot do much to control and contain the same. The Cyber Space Technology, has undermined to major extent the traditional legal concepts like property and has impacted the rules of evidence like the burden of proof, *locus standi*, and the concept of *mens rea*.[3]

It may be appropriate to mention here that India has recently passed the Information Technology Act, 2000. Due to space constraints, it may not be possible to give detailed section-wise commentary on the Act. Nevertheless, it may be mentioned here that the IT Act has brought home the message that Indian law makers and law enforcement agencies are adequately prepared to take on cyber criminals and terrorists and to bring them to book to save the interests of the people in the country.[4]

Concluding Observations

In the light of the above discussion, one can easily conclude that cyber crime has hit the mankind with unbelievable severity. It has progressed from being mere malicious pranks by disenchanted teenagers to a serious threat that is likely to tax the resources of law enforcement agencies and to potentially destabilise the society. Computer Viruses and Worms, Trojan Horses, Denial of Service Attacks, Spoffing Attacks, Web Jacking, and E-Frauds etc. etc. have taken the contemporary world by storm. However, all these pale into insignificance in the face of the most dreaded threat of 'Cyber Terrorism'. Cyber criminals and cyber terrorists, unlike their traditional criminal counterparts, seek opportunity and are attracted to the vacuums in the law enforcement. And with the growing dependence on computers and the Internet, cyber crimes are likely to acquire more prominent place in the

1. For details on the cyber crime legislation enacted world wide, see: Gurjeet Singh and Vicky Sandhu (2001), pp. 51-54.

2. Veer Singh and Bharat Bhushan Parsoon (2002): "Cyber Crimes and the Need for National and International Legal Control Regimes." In: *Punjab University Law Review*, Vol. 44, pp. 36-51.

3. *Ibid.*, p. 41.

4. For a critical evaluation of the Information Technology Act, 2000, see: Pavan Duggal (2001): *Cyber Law in India: An Analysis*, New Delhi: Saakshar Publications.

world of crime in the days to come. However, notwithstanding their rapid increase and frequency, the commission of cyber crimes is not made public due to private industry's reluctance to publicize its vulnerability and the government's concern. Obviously, therefore, it requires technically oriented as well as adequately trained investigative staff for prevention and detection of cyber crimes. Assistance from the reputed national and international institutes and organisations having expertise in the field of computers and allied matters shall always be required to tackle the menace of cyber crime in general and cyber terrorism in particular. We need well-informed and adequately trained investigators to investigate and detect such crimes and help preventing them in future. There is also a great need for Cyber Crime Courts in the country. However, initiative has to come from Law Enforcement Agencies to make systematic effort in imparting training to prosecutors and judges. As a matter of fact, the legal community as a whole must also familiarise itself with the various tools and techniques being used by the cyber criminals and terrorists so as to ensure that the perpetrators of such hi-tech crimes are tried and convicted in accordance with the law of the land.

ANNEXURE

CASES RELATING TO CYBER TERRORISM WORLD WIDE

Case One.—In 1997, 35 computer specialists used hacking tools freely available on 1900 web sites to shut down large segments of the US power grid. They also silenced the command and control system of the Pacific Command in Honolulu.

Case Two.—In 1998, Spanish protestors bombarded the Institute for Global Communications (IGC) with thousands of bogus e-mail messages. E-mail was tied up and undelivered to the ISP's users, and support lines were tied up with people who couldn't get their mail. The protestors also spammed the IGC staff and member accounts, clogged their web page with bogus credit card orders, and threatened to employ the same tactics against organisations using the IGC services. They demanded that the IGC stop hosting the web site for the Euskal Herria Journal, a New York based publication supporting Basque independence. Protestors said IGC supported terrorism because a section on the Web pages contained materials on the terrorist group ETA, which claimed responsibility for assassinations of Spanish political and security officials, and attacks on military installations. IGC finally relented and pulled the site because of the mail bombings.

Case Three.—In 1998, ethnic Tamil guerrillas swamped Sri Lankan Embassies with 800 e-mails a day over a two-week period. The message read: "We are the Internet Black Tigers and we are doing this to disrupt your communications." The Intelligence authorities characterised it as the first known attack by cyber terrorists against a country's computer system.

Case Four.—In 1998, a major bank fraud involving theft of US $10 million was committed by a Russian named Vladymir Levin. While sitting in Russia, he hacked into the computer system of City Bank Branch in the USA through an internet connection and succeeded in breaking the security features of the bank. Through the internet banking, he could move the cash from the US to Argentina, Indonesia and

Switzerland. Routine computerised audit system gave a lead and the hacking was detected. The hacker was arrested when he visited Switzerland to collect cash from one of the Swiss banks.

Case Five.—During the Kosovo conflict in 1999, NATO computers were blasted with e-mail bombs and hit with denial of service attacks by hackers protesting the NATO bombings. In addition, business, public organisations, and academic institutes received highly politicised virus-laden e-mails from a range of Eastern European countries. Web defacements were also very common.

Case Six. In the recent past, the website of the Bhabha Atomic Research Centre (BARC) at Trombay was hacked. The hackers gained access to the BARC's computer system and pulled out virtual data. It was like a bolt from the blue. Scientists at the BARC got the shock of their lives when they found rude anti-nuclear messages splashed across their computer screens. The hackers were later traced to be based in New Zealand.

Case Seven.—In 2001, in the backdrop of the downturn in the US-China relationships, the Chinese hackers released the Code Red virus into the wild. The virus infected millions of computers around the world and then used these computers to launch denial of service attacks on the US websites, prominently the website of the White House.[1]

Case Eight.—In 2002, numerous prominent Indian websites, notably that of the Cyber Crime Investigation Cell of Mumbai were defaced. Messages relating to the Kashmir issue were pasted on the home pages of these websites. The Pakistani Hackerz Club, led by 'Doctor Neukar' was believed to be behind the attack.

Case Nine.—In 2002, Cloud Nine, a U.K. based Internet Service Provider (ISP) was forced to shut business after a week long Denial of Service Attack that resulted in the complete stoppage of its service.

Case Ten.—A hacker broke into a pornographic site on the Internet and introduced the name and phone number of bureaucrat's daughter based at Delhi. The bureaucrat's home was flooded with the telephone calls. The matter was first reported to the Crime Branch of Delhi Police and later on the enquiry was handed over the CBI and it was successful in tracing out the hacker.

SELECT REFERENCES AND SOURCE MATERIALS

Azmi, S. Shamimul Hasnat (2003): "Information Technology, Cyber Crimes and Solutions." In: *Souvenir and Conference Papers of the International Conference on International Law in the New Millennium: Problems and Challenges Ahead* (4-7 October), Vol. 3, New Delhi: Indian Society of International Law, pp. 437-57.

Bajaj, K.K. (2003): "Cyber Crimes: A New Challenge." In: *Souvenir and Conference Papers of the International Conference on International Law in the New Millennium: Problems and Challenges Ahead* (4-7 October), Vol. 3, New Delhi: Indian Society of International Law, pp. 423-30.

Barua, Yogesh and Denzyl P. Dayal (2001): *Cyber Crimes: Notorious Aspects of the Humans and the Net*, Vols. 1-4, First Edition, New Delhi: Dominant Publishers and Distributors.

1. Rohas Nagpal (2003), pp. 74-97.

Bruce, Sterling (1993): *The Hacker Crackdown: Law and Disorder on the Electronic Frontier*, New York: Bantman Books Inc.

Brunnstein, Klaus and Simone Fischer-Huebner (1995): "How far can the Criminal Law help to Control IT Misuse?" In: *International Yearbook of Law, Computers and Technology*, vol. 9, pp. 111.

"CBI Gears up to Combat Cyber-Terrorism." In: *The Asian Age* (25 March 1999).

Chander, Muktesh (2004): "Cyber Terrorism: A Myth or Possibility." In: *Agenda Papers of the 35 All India Police Science Congress* (24-26 May), Jalandhar: Punjab Police and Bureau of Police Research and Development, pp. 114-24.

Chopra, Deepti and Keith Merril (2000): *Cyber Cops, Cyber Criminals and Internet*, New Delhi: Pioneer Publications.

Clough, Bryan and Paul Mungo (1993): *Approaching Zero: Data Crime and the Computer Underworld*, Faber and Faber, New York.

Computer Related Crime - Report of the European Committee on Crime Problems (1990), Strasbour: Council of Europe.

Culen, Paul (1997): "Computer Crime." In: Lillian Edwards and Charlotte Waelde (Eds.): *Law and the Internet: Regulating Cyberspace*, Oxford: Hart Publishing Co., pp. 210-20.

"Cyber Crimes, Nascent Crimes - New Victims - Need for New Laws." In: *The PRP Journal of Human Rights*, Vol. 4, No. 4 (October-December), pp. 37-41.

Denning, Peter J. (ed.)(1990): *Computers Under Attack: Intruders, Worms, and Viruses*, New Jersey: Addison Wesley Longman Inc.

Donna, Parker (1998): *Fighting Computer Crime: A New Framework for Protecting Information*, New York: John Wiley & Sons.

Dubey, Aarti (2001): "Cyber Law and Terrorism." In: *Souvenir of the National Conference on Cyber Laws and Legal Education* (22-24 December), Hyderabad: NALSAR University of Law and All India Law Teachers Congress, pp. 38-42.

Dudiya, V.D. (2001): *Information Technology and Cyber Laws*, New Delhi: Bharat Publication House.

Duggal, Pavan (2000): *Cyber Law in India: An Analysis*, New Delhi: Saakshar Publications.

Eoghan, Casey (2000) *Digital Evidence and Computer Crime: Forensic Science, Computers and the Internet with CD-Rom*, New Jersey: Academic Press Incorporated.

Franklin, Clark and Vernon J. Geberth (eds.) (1996), *Investigating Computer Crime*. New York: CRC Press, 1996.

Gibbons, Thomas (1995): "Computer Generated Pornography." In: *International Yearbook of Law, Computers and Technology*, Vol. 9, pp. 83-90.

Gupta, Nikhil Jaiprakash (2004): Quelling the Cyber Crime Challenge: With Special Reference to Investigation and Prevention of Cyber Pornography and Cyber Stalking." In: *Agenda Papers of the 35 All India Police Science Congress* (24-26 May), Jalandhar: Punjab Police and Bureau of Police Research and Development, pp. 23-40.

Gupta, Suryajyoti (2002): "Civil and Criminal Jurisdiction in the Internet", *Indian Bar Review*, Vol. 29, Numbers 3-4 (July-December), pp. 45-72.

Hawkin, C.J. (1966): "The Problem of Pornography." In: *Sydney Law Review*, Vol. 5, pp. 220-25.

Hishiyama, Takeshi (2003): "Efforts Against Cybersquatting." In: *Infosym: IT & Law Initiative - A Symbiosis Law College Publication*, Vol. 3, pp. 117-23.

Jain, Mukesh (1999): "Crime in Cyberspace." In: *CBI Bulletin* (September), pp. 21-24.

Jones, T. (1996): "Computer Terrorist or Mad Boffin?" In: *New York Law Journal*, Vol. 146, pp. 46-50.

Kamath, Nandan (2000): *Law Relating to Computers, Internet, and E Commerce: A Guide to Cyber Laws and the Information Technology Act, 2000 With Rules and Notifications*, Second Edition, New Delhi: Universal Law Publishing Co.

Karkara, Gurbax Singh and S.K. Sharma (1998-99): "Law of Cyber Crime in India." In: *Journal of the Legal Studies*, Vol. 19, pp. 13-25.

Kelleher, Dennis (1997): "International Computer Crime." In: *New York Law Journal*, Vol. 147, pp. 445-50.

Khaitan, Suman J. (2003): "Information Technology, Media and Communications; On-Line Security, Cyber Crime and Terrorism." In: *Souvenir of the 5th LAWASIA Business Law Conference* (17-20 January), New Delhi: Bar Association of India and LAWASIA India Chapter, pp. 172-79.

Kumaramanglam, Kitty (2000): "Role of Law Enforcement Agencies in the Light of Growing Threat of Cyber Crimes." In: *CBI Bulletin* (July 2000), pp. 12-15.

Mehta, Dewang (2000): "Cyber Crime and Police." In: *CBI Bulletin* (July), pp. 7-8.

Mercer, John D. (2000): "Cyber Squatting—Blackmail on the Information Superhighway." In: *Boston University Journal of Science and Technology Law*, Vol. 6, pp. 11-30.

Mishra, R.C. (2002): *Cyber Crime: Impacts in the New Millennium*, Delhi: Author's Press.

Mustafa, Faizan (1997): "Challenge of Internet, Cybersex and Muslim Youth: Need for an Islamic Solution." In: *Aligarh Law Journal*, Vol. 12, pp. 95-108.

Nagaraja, M.K. (2000): "Cyberporn Crimes: An Analytical Approach to Investigation." In: *CBI Bulletin* (July), pp. 25-27.

Nagpal, Rohas (2002): "Defining Cyber Terrorism." In: *The ICFAI Journal of Cyber Law*, Vol. 1, No. 1 (November), pp. 75-78.

Nagpal, Rohas (2003): "Cyber Terrorism in the Context of Globalisation." In: *Infosym: The IT and Law Initiative*, Vol. 4 (December), pp. 71-97.

Parthasastry, Pati (2003): "Cyber Crime." In: *Infosym: The IT and Law Initiative*, Vol. 4 (December), pp. 101-16.

Ponnaian, M. (2000): "Cyber Crimes, Modern Crimes and Human Rights." In: *The PRP Journal of Human Rights*, Vol. 4, No. 3 (July-September), pp. 13-20.

Prosise, Chris and Kevin Mandia (2001): *Incident Response: Investigating Computer Crime*, New York: McGrawhill Professional Book Group.

Purohit, Tapan (2001): "Cyber Crime and the Law with Specific Reference to Information Technology Act, 2000 - An Analysis." In: *Souvenir of the National Conference on Cyber Laws and Legal Education* (22-24 December), Hyderabad: NALSAR University of Law and All India Law Teachers Congress, pp. 64-66.

Rao, D.S. Prakasa (2001): "Cyber Crimes Including Cybersquatting Vis-a-vis Cybermark Legal Protection." In: *Souvenir of the National Conference on Cyber Laws and Legal Education* (22-24 December), Hyderabad: NALSAR University of Law and All India Law Teachers Congress, pp. 60-63.

Rao, Ragini (2001): "Pornography on the Internet." In: *The Lawyers Collective*, Vol. 16, No. 3 (March), pp. 11-12.

Rathor, Subash P. and Bharat B. Das (2001): "Cyber Crimes: The Emerging Trends and Challenges." In: *Souvenir of the National Conference on Cyber Laws and Legal Education* (22-24 December), Hyderabad: NALSAR University of Law and All India Law Teachers Congress, pp. 56-59.

Reed, Chris (1996): *Computer Law*, New Delhi: Universal Law Publications.

Richards, James R. (1998): Transnational Criminal Organisations: Cyber Crime and Money Laundering: *A Handbook for Law Enforcement Officers, Auditors, and Financial Investigators*, CRC Press.

Rimm, Martin (1999): "Marketing Pornography on the Information Superhighway." In: *George Washington Law Journal*, Vol. 83, pp. 1849-72.

Sharma, Rahul (2004): "Cyber Crime Investigation and Prevention." In: *Agenda Papers of the 35 All India Police Science Congress* (24-26 May), Jalandhar: Punjab Police and Bureau of Police Research and Development, pp. 42-52.

Singh, Balwinder (2000): "Cyber Crime A New Challenge for the Police." In: *CBI Bulletin* (February), pp. 35-37.

Singh, Gurjeet and Vicky Sandhu (2001) "Emergence of Cyber Crime: A Challenge for the New Millenium." In: *Delhi Law Review*, Vol. 23, pp. 25-57.

Singh, Veer and Bharat Bhushan Parsoon (2002): "Cyber Crimes and the Need for National and International Legal Control Regimes." In: *Punjab University Law Review*, Vol. 44, pp. 36-51.

Sinha, S.B. (2001): Cyber Crime in the Information Age." In: *Souvenir of the National Conference on Cyber Laws and Legal Education* (22-24 December), Hyderabad: NALSAR University of Law and All India Law Teachers Congress, pp. 7-11.

Souvenir of the National Conference on Cyber Laws and Legal Education (22-24 December 2001), Hyderabad: NALSAR University of Law and All India Law Teachers Congress.

Subramanian, S. (1995): "Combating Computer Crime." In: *The Hindustan Times* (18 April), p. 12.

Taxmann's Information Technology Act, 2000, New Delhi: Taxmann Allied Services Pvt. Ltd.

"Tight Cyber Laws Needed to Check Computer Crime." In: *The Asian Age* (25 March 1999).

Usmoni, Mohamad (2004): Cyber Law and Terrorism." In: *Souvenir of the National Conference on Cyber Laws and Legal Education* (22-24 December), Hyderabad: NALSAR University of Law and All India Law Teachers Congress, pp. 43-48.

Vikram, T. (2004): "Cyber Crimes: Initial Response Guidelines for the Police." In: *Agenda Papers of the 35 All India Police Science Congress* (24-26 May), Jalandhar: Punjab Police and Bureau of Police Research and Development, pp. 53-76.

Viswanathan, T.K. (2003): "Overview of Jurisdictional Conflicts in Cyberspace." In: *Souvenir and Conference Papers of the Millenium: Problems and Challenges Ahead* (4-7 October), Vol. 3, New Delhi: Indian Society of International Law, pp. 399-410.

Wasan, N.R. (1999): "Note on National Seminar on Computer-Related Crime and Recommendations / Suggestions / Strategies." In: *CBI Bulletin*, pp. 58-59.

Wasik, Martin (1991): "Misuse of Information Technology: What Should be the Role of the Criminal Law?" In: *The Yearbook of Law, Computers and Technology*, Vol. 5, pp. 158-66.

INTERNATIONAL LAW ON WATER RESOURCES

Dr. B.L. Chavan*

Water is one of the abundant resources on the earth. It plays very crucial role in biosphere and in all living organisms. Water is a common substance with several uncommon properties. It has several properties of reactive nature. It makes up the bulk of most living organisms in the form of complex organic compounds found in different organisms including human being. Compared with other resources, it is used in tremendous quantities. The use of water accelerates industrial production of goods and agricultural food production. There are many important issues and problems associated with its use, distribution and management. Mainly, the availability of water in a right place at the right time in the right form is a major problem for human society. This article highlights the availability and importance of water resources at global level and takes a brief review of the status of international law relating to water resources.

Global Perspective

The total amount of water held on the planet Earth is relatively constant on geologic time scale. Three quarters of the earth is covered by water. It amounts in total to more than 1,400 million km^3. About 95% of this water is in the oceanic water. Out of the remaining 5% of the total water, 4% lies in frozen state in polar regions and only about 1% is available as fresh water in all the lakes, rivers, the total atmospheric moisture, soil moisture, water content in vegetation and underground water.[1] Almost 98% of the 1% free flowing and rapidly circulating fresh water is in the form of groundwater. About half of this total ground water lies more than 1 km below the ground surface and only 0.1% of the total 5% fresh water is in the rivers. The average water use per capita in the world in 1975 was about 700

* Department of Environmental Science, Shivaji University, Kolhapur, Maharashtra.

1. Zaman M., Biswas A.K., Khan A.H. and Nishat A. 1983. River Basin Development. Proceedings of the National Symposium on River Basin Development. (held between 4-10 Dec. 1981), Dacca, Bangladesh.

m^3/year and today it has exceeded 1350 m^3/year. The total human use of water was about 3850 km^3/year and today it has increased to about 6100 km^3/year. The total annual water yield in the form of river water is about 48,000 km^3. The total quantity of water used is approximately 1000 times the world's total production of all minerals. This water is unevenly distributed in different continents in the form of precipitation. The South America has highest average precipitation of about 163 cm/year as against 469 cm/year of the estimated total and Australia has lowest of about 47 cm/year.[1]

The water is continuously circulating in the form of hydrological cycle. But the varying distribution of water in terms of time, quality and quantity makes problems of its control and use. These problems are not confined within the boundaries of one country. Many rivers flow through several states or nations, all of which would like the right to use all of its water. Today, the human society has realized that fresh water is a finite resource, especially, river waters are precious natural resources for the augmentation of fishing, food and water supplies, energy and development of industries.[2] If everyone takes his water share as he wants, many rivers would be dry. It would evoke the problem of water shortage. This problem may be tackled only with the effective legal provisions.

Water resources in river basin

There are 214 continental flowing rivers with river basins shared by more than one nation. Out of these 214 shared rivers, 148 rivers flow through 2 countries, 31 through 3 countries and rest through 4 countries or more than 4 countries. Five or more countries share twelve of the major rivers of the world. The river Danube flows through 12 countries, the Niger through 10, the Nile and Congo through 9 each, the Zambezi and Rhine through 8 each, the Amazon through 7, Chand, Volt and Mekong through 6 each and La Plata and Elbe through 5 each.

There is a great variability in river water resources in all the five continents. This variability is not only among the five continents but also among the different rivers of these continents. In South America roughly ten times more river water is available per capita than in Asia or Europe. In North America it is one and half times more than in Africa. The per capita flow of river water is 1,620,000 m^3/year in Amazon, 750 m^3/year in Rio Grande, 1,920 m^3/year in Ganga and 11,200 m^3/year in Brahmaputra. With the increasing water consumption and growth in population, the per capita flow of river water is decreasing considerably.

1. Botkin D. and Keller E. 1995. Environmental Science. John Wiley & Sons., New York. Pp. 372-396.

2. ILA. 1966. The Proceeding of International Law. International Law Association, Helsinki.

Need of International Law on Water Resources

The river water is expected to provide the optimum benefit to the people settled in and around its basin. It should not matter whether the settlement lies within a single jurisdiction or not. The political interference and pressures turn it to be difficult. Most of the countries have enacted laws and regulations to resolve the conflicts on water resources of their river basin. If the river basin in question is under the control of single country, the concerned government can deal with and solve the all social, administrative[1] and economical[2] problems related to it. Even then, the claims and counter-claims of competing states many times make the solution very difficult. The Narmada, Krishna and Kauveri water disputes in India are the examples of this kind. If the river basin in question falls within the territories of two or more countries, it is difficult to make a solution. This is because of political differences, problems of integrated planning and ultimate interests of political parties within each of these countries. Hundreds of lawsuits over water occupy the domestic courts now days. The battle lines are being drawn for an ever bigger conflict. Therefore, it becomes necessary to balance and reconcile the issues, claims and the counter-claims of these countries before the emergence of any international river basin development plan. Most of these issues, problems or claims and counter-claims may be of an international nature.[3] These issues, claims and counter-claims need to be recognized and covered by international law. Therefore, there should be a set of legally formulated and systemized principles applicable to the water users of international rivers.

Sources of International Law on Water Resources

Since time immemorial, international law has permitted all the countries to exercise complete control over their territorial waters. The existing international law concerning water resources is an outcome of centuries of endeavour towards formulating the procedural instruments to balance and harmonize divergent interests of the participating nations. International water law can be interpreted in terms of its sources and contents of interests.

The international law has originated in the history of international social, economic and political relations. The international law was concerned with the matters of boundary demarcation on rivers in its initial period. It got concerned with transboundary waters in rivers and lakes, aiming at assurance of the principle of freedom for navigation through international waterways thereafter. Later, regulation of hydroelectric power production

1. Anon. 1960. Indian Journal of International Law. Vol. I, p. 49.
2. Smith, H. 1931. The Economic Uses of International Rivers. King, London.
3. ILA, 1972. Post-1996 articles of the International Law Association approved by the 55th Conference, New York.

and transmission along with drinking supply, irrigation and other concerned uses and conflicts between sharing countries modified the set of substantive principles. These principles need to recognize and confirm legal rights and obligations of each of the participating countries. These principles in the form of law can be employed as a tool or instrument to rule out the conflicts and smoothen the relations with sound understanding of mutual interests of countries sharing these water resources. In a nut-shell, the international law on water resources can provide a machinery for the peaceful resolution of disputes, offer for the accommodation of correlative rights of each country and release national energies to use in development and productive process.

Many conferences, meetings, discussions held at international level on the matters of rivers, lakes and water resources resulted into various treaties. These treaties are binding upon the participating countries, they have got the legal sanction of international law to which we now refer as international water law. The treaties concluded on various aspects of water resources like water management, sharing of water and water resources, utilization of river water and lake water etc in last century. There was growing interest of world community with growing awareness on the different issues of water and water resources including the water poliution. This has reflected through the signing of agreements and the interest has been increased for all the purposes besides the navigation.

International water law has also origin of the statutes of the International Court of Justice as it may be learned from its Article 38. These sources are in the form of general or particular international Conventions, international tradition or custom, principles of law, arbitral awards and decisions of international tribunals, bilateral or multilateral agreements referring to water resources, as well as legal, scientific and social writings of quallfied experts, law making activities of international bodies, resolutions passed and recommendations made by different international organizations.

The agreement sources of international law on water resources cover both the substantive issues[1] like allocation of the water or regulation of uses and procedural issues[2] like definition and identification of systems of control of uses, rights of inspection and the procedures of applying suitable solution to overcome the differences that arrive from the interpretation of treaties or conventions.

1. ILC, 1980. International Law Commission. Report of the International Law Commission on the work of its 32nd Session, 5th May, to 25th July, 1980 and United Nations General Assembly, official Records: 35th Session, supplement No. 10 (A/35/10).

2. AII, 1961. Use of International Non-maritime waters. Annuaire de l'Instituet de droit International. Vol. 49. Part II, Salzburg Session, Basle. Pp. 381-384.

The set of norms in the form of international custom provides certain rules that are useful in resolving the conflicts on the river waters and water resources. These emphasize on the duty to co-operate and negotiate, prohibition of management practices, equitable distribution of common water resources, mutual understanding and smooth consultation. The set of general principles of law relating to water have also been developed by the international courts and arbitral tribunals in their decisions beyond the limits of specific disputes.

Legal Theories and practices

The international law on water has the base on theoretical concepts of two doctrines, the doctrine, of Unlimited Terrestrial Sovereignty and Unlimited Territorial Integrity. The concept of sovereignty in the form of concept of Unlimited Territorial Sovereignty was totally unrestricted in the customary international law. This was an outcome of the efforts of political theorists for their justification of independent existence of national states. It has played a constructive role in building in the modern nations.

The concept was extrapolated to the field water considering the field water as a subject of sovereignty of respective country. The doctrine asserts that no alien interference could be accepted or admitted in their water conservation, utilization and management practices. But, this doctrine protects the rights of upper basin countries and mostly neglects or ignores the downstream countries. The theorists of downstream or lower basin countries propounded the doctrine of Unlimited Territorial Integrity. This doctrine implies that the water is part of the territory of a country. The other countries sharing the water resources cannot hamper its use. If it happens, the sovereign right will get compromised over the territorial integrity right. Therefore, these theories of Unlimited Territorial Sovereignty and Unlimited Terrestrial Integrity appear two extreme theories. Whenever these are applied, the application of doctrine need to be justified for perceiving the interest of each country. Otherwise, the application of these doctrines can breed a permanent conflict. Both these theories cannot stand the test of logical analysis in modern realities. This calls for the development of a new set of principles based on equity, fairness, modernity, sound understanding and peaceful relations. It needs to be based on scientific, technical and ethical base and social, cultural and economical realities of modern period.[1] Considering it, the Permanent Court of International Justice stated that the sharing of common water or river water is not just a right of passage but also a common legal right of sharing the resources as it is in the interest of communities belonging to all parties.[2] Substantial fines are needed to deter the violators of this legal right.

---

1. PCIJ, 1929. Permanent Court of International Justice, order case.
2. PCIJ, 1937. The diversion of water from the Meuse. Judgment of 28th June, 1937.

The new theory of Limited Territorial Sovereignty is emerging out. This theory recognizes and focuses on the limited rights of territorial people with their sovereignty in respect of sharing of available water resources. This doctrine already has been practiced in the domestic Courts of many countries like USA (*Kansas* v. *Colorado*, 1930; *New Jersey* v. *New York*, 1931; *Nebraska* v. *Wyoming*, 1945), India (*Sind* v. *Punjab*, 1941), Germany (*Wurttemberg* v. *Baden*, 1926) and Italy (*Connecticut* v. *Massachussetts*, 1931; *Electricite' de France* v. *Compagnia Impress Electichedi Liguria*, 1968). These Courts have evoked or evolved and applied a variety of concepts and set of principles relating to the sharing of water resources.[1] The list of these principles include Equallty of lights, Equitable Apportionment, Equitable Utilization, Community Ownership, Equalization of water, Reasonahle and Equitable Utilization etc. Moreover, the International Law Association has introduced the concept of the International Drainage Basin, as the aggregate of both surface water and ground water of a common geographic area. The text of international declaration of Helsinki rules[2] has incorporated the doctrine of Reasonable and Equitable Utilization.

The practical implementation of these principles requires spirit of fairness, mutual understanding and a close co-operation. This is possible by setting up of a international governing body that may be a part of UNESCO or an independent institution. Now a days, the rules, agreements and regulatory orders on governing the distribution and utilization of water resources have advanced towards equity and fairness and empirical considerations in respect of fair and equitable sharing of water resources. International plans for the future, together with regulations that are enforced at various levels in different parts of World are probably essential to a peaceful and sustainable future. Without these, free enterprise will continue to destroy the precious water resource.

---

1. AALCC, 1973. Draft Propositions on the Law of International Rivers, A report of Asian-African Legal Consultative Committee submitted by a sub-committee at New Delhi. Pp. 7-14.

2. ILA, 1966. The Helsinki Rules approved by the 52nd Conference of the International Law Association, Helsinki.

MANDATORY IMPORT OF JUDICIAL DISCRETION: ENFORCEMENT OF SUBSTANTIVE RIGHTS THROUGH PROCEDURAL RULES[1]

Rita Khanna*

There are certain provisions of law which are quite ancient, but the new social justice orientation imparted to them by the Constitution of India makes them a remedial weapon of versatile use. Social justice is due to the people under Article 47 of the Constitution. Article 47 directs the state to raise the level of nutrition, the standard of living and to improve public health of the people.[2] So, this article enjoins upon the state to consider the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. And if any Statutory Act imposes the duty upon the State authorities to maintain or protect public health, then the discretionary power of the officer of the State takes the form of mandatory power. This becomes more important after the Supreme Court's declaration of the right to health as an integral part of the right to life, the government has a constitutional obligation to provide health facilities.[3] People must trigger-off the jurisdiction vested for their benefit in any public functionary like a Magistrate under section 133, Cr PC. Public power of the Magistrate under section 133, Cr PC is a public duty to the

1. Advocate, Delhi High Court.

2. Article 47 of the Constitution: *Duty of the State to raise the level of nutrition and the standard of living and to improve public health*: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

3. *State of Punjab* v. *Mohinder Singh Chawla*, (1997) 2 SCC 83; *Mr. 'X'* v. *Hospital 'Z'*, AIR 1999 SC 495; *Chameli Singh* v. *State of U.P.*, AIR 1996 SC 1051.

members of the public who are victims of the nuisance, and so he shall exercise it when the jurisdictional facts are present.[1]

A Magistrate can pass conditional as well as absolute order under section 133 Cr PC for removal of nuisance. A District magistrate, a Sub-Divisional Magistrate or any other executive Magistrate especially empowered in this behalf by the State Government can pass such an order. He passes such an order on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit.[2]

---

1. "All power is a trust—that we are accountable for its exercise—that from the people, and for the people, all springs, and all must exist."

   Vivian Grey, B.K. VI Ch. 7, Benjamin Disraeli. As cited in *Ratlam Municipality* v. *Vardhichand & Others*, AIR 1980 SC 1622.

2. *Conditional Order for removal of nuisance*: Whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers—

   (a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public, or

   (b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated, or

   (c) that the construction of any building, or the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

   (d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing-by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

   (e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

   (f) that any dangerous animal should be destroyed, confined or otherwise disposed of,

   Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, owning or possessing such animal or tree, within a time to be fixed in the order—

   (i) to remove such obstruction or nuisance; or

   (ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

Contd. on next page

Section 133 Cr. PC gives power to the Magistrate to order for the removal of public nuisance affecting public health. And if the order of the court is defied or ignored, section 188 IPC comes into penal play.[1]

Where directive principles find statutory expression in do's and don'ts, the court should not allow the municipal government to become a statutory mockery. Affirmative action is required to make the right effective which otherwise becomes sterile. The law must be enforced when people in misery cry for justice. The plea of poor finance is a poor alibi. The people responsible for enforcement will have to face the penalty of the law, if what the constitution and follow up legislation direct them to do are defied or denied wrongfully. The following questions may be asked regarding the enforcement of the rights of the people:

(i) can the environmental pollution adversely affecting the public health and danger to public life and property be ordered to be stopped;

(ii) can the statutory authority be compelled to *carry out its duty* to the community by affirmative action;

(iii) can the plea of poor finance be a good alibi?

(iv) if not, how to pass a workable order?

Contd. from previous page

(iii) to prevent or stop the construction of such building or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner, provided in the said order;

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute;

(2) No order duly made by a Magistrate under this section shall be called in question in any civil court.

Explanation.—A "public place" includes also property belonging to the state, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

1. Section 188 IPC: Whoever, knowing that by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

(v) can the private people be called to contribute?

(vi) whether the order should be a time-bound order or not?

How the Magistrate or the court will make the rights of the people to be realized can be exemplified by taking into consideration the following cases:

(I) Environmental pollution adversely affecting the public health and posing danger to public life and property—

In *Govind Singh* v. *Shanti Sarup*,[1] an application was filed in the court of the Sub-Divisional Magistrate, Samrola, under section 133 Cr PC, 1898 complaining that the appellant had constructed an oven and a chimney which constituted a nuisance under section 133 of the Code. The appellant had constructed an oven and a chimney in the premises let out to him by the Punjab Oil Mills for carrying on the occupation of baker.

Conditional Order

Sub-Divisional Magistrate served a conditional order on the appellant under section 133(1) of the Code calling upon him to demolish the oven and the chimney within a period of 10 days from the date of the order and to show cause as to why the order should not be confirmed.

Absolute Order

The evidence disclosed that the smoke emitted by the chimney constructed by the appellant was "injurious to health and physical comfort of the people living or working in the proximity" of the appellant's bakery and that there was no justification on the part of the appellant for discharging the smoke from the chimney on the G.T. Road. The learned Magistrate had made a local inspection on the basis of which he prepared abovestated report. The chimney was not only an encroachment upon a public place but its construction let to a grave consequence. Allowing the use of the oven and chimney was, according to the Magistrate, "virtually playing with the health of the people." A strong wind could carry the flames over a distance and cause a conflagration, according to the Magistrate. And further, after hearing the parties and the evidence led by them, the learned Magistrate made the conditional order absolute directing the appellant to cease carrying on the trade of a baker at the particular site and not to lit the oven again.

According to the highest court in this case, not merely the right of a private individual was involved but the health, safety and convenience of the public at large was involved. The highest court modified the conditional order of the Magistrate by requiring the appellant to demolish the oven and the chimney constructed by him within a period of one month from the date of the order.

1. AIR 1979 SC 143.

(II) Can the statutory authority be compelled to carry out its duty to the community by affirmative action—

In *Ratlam Municipality* v. *Vardhichand*,[1] the key question was, whether by affirmative action a court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis. At issue was the coming of age of that branch of public law bearing on community actions and the court's power to force public bodies under public duties to implement specific plans in response to public grievances. Section 123 of the M.P. Municipalities Act, 1961 casts a mandate.[2] And yet the municipality was oblivious to this obligation towards human well-being and was directly guilty of breach of duty and public nuisance and active neglect. The people of the locality had the following complaints regarding environmental pollution and the resultant risk to their health:

(i) In a *nala* that was behind the houses situated on new Ratlam Road, dirty and filthy water of alcohol plant, having chemical and obnoxious smell, flowed. It also provides the ground for breeding of the mosquitoes.

(ii) Municipality had started constructing drain but left the construction in between and in some of the parts the drain had not at all been construted. Water accumulated in pits created dirt and bad smell and produced mosquitoes in large quantities. This water used to go to nearby houses causing harm to them. Sometimes snakes and scorpions used to come out obstructing the people to pass through this road.

(iii) lack of lavatories caused heavy dirt and mosquitoes;

(iv) the road constructed by Nagar-Palika was on a high level and due to this, more water started entering the houses of the locality causing more harm and loss to the houses.

This way all the works done by the non-applicants, *i.e.*, construction of drain, canal and road came within the purview of public nuisance. The local

1. AIR 1980 SC 1622.

2. *Duties of Council.*—(a) In addition to the duties imposed upon it by or under this Act or any other enactment for the time being in force, it shall be the duty of a Council to undertake and make reasonable and adequate provision for the following matters within the limits of the Municipality, namely:

   xxx xxx xxx

   (b) cleansing public streets, places and sewers, and all places, not being private property, which are open to the enjoyment of the public whether such places are vested in the council or not; removing noxious vegetation, and abating all public nuisances;

   (c) disposing of night soil and rubbish and preparation of compost manure from night-soil and rubbish.

people first asked for municipal remedies failing which they moved for Magisterial remedies. The applicants requested to remove all the nuisances stated in their main application and they also requested that under-mentioned works must be done by the non-applicants and for which suitable orders were requested to be issued:

1. the drains to be properly managed and completed so that the water may pass through the drain without obstruction;
2. the big pit and earthern drains where dirty water usually accumulates, should be closed and the filth should be removed therefrom;
3. *Nala* should be managed and covered in a way not to create over-flow in the rainy season;
4. the Malaria Department to sprinkle D.D.T. and use other means to eradicate mosquitoes completely from the said locality;

The proceedings showed the justness of the grievances and the indifference of the local body.

The learned Magistrate has made an order to remove all the nuisance for the health and convenience of the people residing in that particular area. For the purpose:

(i) the Town Improvement Trust with the help of Municipal Council was ordered to prepare a permanent plan within six months to make the proper flow in the said *nallah* and take proper action to give it a concrete form;

(ii) both the authorities were ordered to construct the proper drainage system within six months' time;

(iii) the places where the pits were in existence were ordered to be covered with mud so that water may not accumulate in those pits and it may not breed mosquitoes. The Municipal Council was ordered to complete this work in two months.

(III) Plea of poor finance

The Municipality took the plea of insufficiency of the funds. The statutory setting is shown through the reading of section 133 Cr PC, section 188 IPC and section 123 Municipality Council Act of Madhya Pradesh and the Municipality cannot extricate itself from its responsibility. The highest court had observed that the Cr PC operates against statutory bodies and others regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the state regardless of budgetary provision. Likewise, section 123 of the Act has no saving clause when the Municipal Council is penniless. Otherwise, a statutory body or government agency may legally defy duties under the law by urging self-defence, a self-created bankruptcy or perverted expenditure budget.

Facilities sufficient to meet the people's needs must be provided

A responsible Municipal Council constituted for the precise purpose of preserving public health and providing better facilities cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facts of human bodies. Similarly, providing drainage systems—not pompous and attractive, but in working condition and sufficient to meet the needs of the people—cannot be evaded if the Municipality is to justify its existence. A bare study of the statutory provisions makes this provision clear

The neglect of the Malaria Department of the State of Madhya Pradesh to eliminate mosquitoes, especially with open drains, heaps of dirt, public excretion by human beings for want of lavatories and slums nearby, had created an intolerable situation for habitation. An order to abate the nuisance by taking affirmative action on a time-bound basis was found to be justified in the circumstances by the highest court.

In *Niyamakendram's*[1] case also the situation was similar. Kochin in Kerala has backwaters and lagoons, nasty gutters and stagnant ponds which breeds mosquitoes in plenty. Much could be done by a responsible local authority (Corporation) by taking affirmative action on a time-bound basis to mitigate the hardship of the people. The official reaction was one of lethargy and inaction and false assumption that they have only powers and no duties. Added to this is the saddening fact that the corporation had financial crunch. But a responsible local body cannot run away from its duty by pleading financial inability.

The Kerala High Court had stepped in to find out the ways and means to bale out the corporation out of its precarious position in order to protect the health of the citizens which had been declared by the Apex Court as a part of fundamental right to life and liberty of every person. The Court considered it essential to remind the public authorities about giving permanent consideration to the health and well-being of the people as imperatively implicit in the right to life guaranteed under Article 21 of the constitution.

Raising funds for Mosquito Eradication Programme

The Kerala High Court had called upon the various institutions, establishments and organizations, who were impleaded as respondents in the original petition to come forward and make generous, practical and humanist contributions to the "Mosquito Control Programme" of the High Court of Kerala by crossed cheque, demand draft, the proceeds of which was to be utilized for spraying chemicals, purchase of pesticides, machines, etc., in co-operation with the Corporation.

---

1. *Niyamakendram, Kochi* v. *Secy., Corporation of Kochi*, AIR 1997 Ker 152.

Co-ordination of operation by the Special Officer

An advocate was appointed as the special officer to co-ordinate the operation by keeping liason with the various authorities and institutions.

Scrutinisation of the Accounts

In order to ensure complete transparency in the conduct of operation, a C.A. was appointed to scrutinise the accounts.

Co-operation from the Media

The medial was to give adequate coverage to this programme so that individuals and institutions would get an opportunity to make their contribution to this venture. M/s. Tata Tea Ltd. came forward to make the public cause, a great success by promising a contribution of a sum of Rs. 4 lakhs. The Court expected others to follow suit because public health is the basic condition in which right to life and developmental activities can flourish.

Time-bound Order

The highest court had observed in the *Ratlam Municipalities* case that the Magistrate's responsibility under section 133 Cr PC is to order removal of such nuisance within a time to be fixed in the order. The learned Magistrate had fixed a time of six months to evolve a plan and to start planning. The learned Magistrate had not fixed the completion time of the plan. But it was the observation of the highest court that these matters directly affect the health and safety of the people, therefore they must be completed in a short span of time. Seven years had elapsed and if they were not sufficient to do the needful, granting some more time could not have completed the job.

Enforcement of Civil Rights

The order of the Magistrate was revised by the Supreme Court to convert it into a workable formula, the implementation of which had to be observed by the court.

Estimated cost-proposals

The learned Magistrate had not adverted to the estimated cost of the scheme nor the reasonable time that would have been required to execute it. It was considered necessary by the Supreme Court to ascertain how far the scheme was feasible and how heavy the cost was likely to be. The court must go further to frame a scheme and then fix time-limits and even oversee the actual execution of the scheme in compliance with the court's order. Three proposals were put forward before the Supreme Court with regard to the estimated cost of the scheme, as directed by the Magistrate.

Scheme 'A' was stated to cost an estimated amount of Rs. 1,016 crore. The State Government had revised this proposal and brought down the cost. The Supreme Court had modified the directions according to the dictum

"first things come first." The worst aspects of the insanitary conditions were to be eliminated first. For that not the showy scheme beyond the means of the Municipality must be undertaken and half done. The Supreme Court had approved scheme 'C' which had to cost only around 6 lakhs.

Specified time for completion of work

The time-limit of one year for completing execution of the work, according to that scheme, was fixed by the Supreme Court.

Inspection of the work

The work was directed to begin within two months from the date of the order and the Magistrate was directed to inspect the progress of the work every three months broadly to be satisfied for the *bonafide* implementation of the order.

Breach of the Order

Breach of the order was directed to be visited with the penalty under section 188 IPC. The Municipal Commissioner or other executive authority bound by the order under section 133, Cr PC shall obey the direction because disobedience, if it causes obstruction or annoyance or injury to any persons lawfully pursuing their employment, shall be punished with simple imprisonment or fine as prescribed in the section. The offence is aggravated if the disobedience tends to cause danger to human health or safety. The imperative tone of section 133, Cr PC read with, the punitive temper of section 188 IPC makes the prohibitory act a mandatory duty.

In the end, one can conclude by stating that section 133, Cr PC is categoric, although it reads discretionary. Judicial discretion, when facts for its exercise are present, has a mandatory import. Therefore, when the Sub-Divisional Magistrate, Ratlam had before him, information and evidence, which disclosed the existence of a public nuisance and, on the materials placed, he considered that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act. But the order of the Magistrate must be a workable order and the time should be specified for the completion of the work. If it is not time-bound, it will lose its meaning.

THE HISTORICAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW: AN OVERVIEW

Harloveleen Kaur*

Introductory

War, armed conflicts and hostilities have been a part of human life and, save the transformation in forms and manifestations, they would remain so. The Law of War, though in its present form is of recent origin, it has its roots in the ancient history. Even in the distant past, military leaders were known to order their troops not to execute the captured enemies, to treat them well and to spare the civilian population. Often, upon termination of hostilities, the warring parties agreed to exchange the prisoners they held. Over time, these and similar practices gradually developed into a body of customary rules governing the conduct of war. Around the middle of the 19th century, the customary practice sparing the enemy's field hospitals and respecting both medical personnel and the wounded had all but vanished. Appalling conditions also awaited captured combatants, who were often subjected to inhumane treatment. It was in these conditions that the Red Cross ideal was born. Since then, the law of war has been developed continuously.[1]

War is by definition an evil, as the Nuremberg Tribunal set forth in its judgment of the major war criminals of the Second World War. Yet, States continue to wage wars and groups still take up weapons when they have lost hope of just treatment at the hands of the government. However, it is hardly impossible to find documentary evidence of when and where the first

* Lecturer in Laws at Department of Laws, Guru Nanak Dev University, Regional Campus, Gurdaspur.

1. *Law of War: Prepared for Action: A Guide for Professional Soldiers*, Geneva: ICRC, p. 9.

legal rules of a humanitarian nature emerged and it would be very difficult to name the creator of international humanitarian law.[1]

It was during one of the bloodiest wars, that is, the Battle of Solferino that the idea of humanitarian assistance was probably crystallised. It was in these conditions that the Red Cross came into existence. Since then, the law of war has been developing continuously. An effort has been made to enlarge the scope of protection for civilians caught up in the fighting as new types of conflict make this increasingly necessary. Civilians and military personnel alike have joined the International Red Cross and Red Crescent Movement in its efforts to improve conditions for the victims of war. The tangible results of this can be found in the rules to protect the wounded, the sick and shipwrecked, prisoners of war and civilians, set out in the Four Geneva Conventions of 1949 and their Additional Protocols of 1977. Especially relevant to military commanders are the rules governing means and methods of combat, laid down in the Hague Convention IV and 1977 Protocol I, which set a framework of limitations and prohibitions on certain weapons and tactics used, so as to avoid unnecessary suffering and damage to the environment.[1]

First there were unwritten rules based on customs that regulated armed conflicts. Then bilateral treaties (cartels) drafted in varying degrees of detail came gradually into force. The belligerents sometimes ratified them after the fighting was over. There were also regulations, which States issued to their troops, for example, the Lieber Code. The law then applicable in armed conflicts was thus limited in both time and space in that it was valid for only one battle or specific conflict. The rules also varied depending on the period, place, morals and civilisation.[2]

The purpose of this paper is to discuss the historical background of the development of International Humanitarian Law. Contrary to the general belief and impression that the humanitarian law came into existence and developed after the adoption of the Geneva Conventions of 1949 and got consolidated after the passing of the Additional Protocols, humanitarian law has been in existence since the dawn of civilization and the fighting of wars. In the following paragraphs, I have endeavoured to list down the various events in the history in the chronological order, which led to the origin, growth and consolidation of the International Humanitarian Law.

As a matter of fact, the term 'International Humanitarian Law' is understood as referring to both customary and treaty law rules. The development of treaty rules commenced in earnest in 1864 with the adoption

1. Emmanuel Bello (1980): *African Customary Humanitarian Law*, Geneva: ICRC, p. 326.

2. *ICRC: International Humanitarian Law: Answers to Your Questions*, (2000), p. 8.

of the First Geneva Convention. It is very important to recall that the tradition of regulating the behaviour of combatants goes back thousands of years. The first codification in international treaty law may have occurred in 1864, but most cultures, most religions and most traditions have a set of rules governing how conflicts should be conducted, protecting civilians and limiting the way in which fighters may fight.[1]

International Humanitarian Law in Historical Perspective

As mentioned above, efforts to limit the use of force and to mitigate its destructive consequences are probably as old as the history of armed conflict. However, the profound occupation with the prevention of warfare and with the reduction of suffering resulting from it was not for many centuries reflected in a legal recognition of humanitarian principles. The rights of belligerents to adopt any degree or kind of force to defeat the opponent and of conquerors to treat prisoners and occupied territories as were deemed fit were widely accepted. Indeed, in some cases, ancient practice justified the total destruction of the enemy. The history of civilization nevertheless includes the development of customs of a humanitarian nature applicable to armed conflict situations. Ancient civilizations possessed codes regulating warfare, and surviving texts include provisions with humanitarian effects. There are records of early examples of impartial relief to the wounded in battle, in both Europe and Asia.[2]

For many millennia, there was no such thing as humanity in land warfare. From the Caveman to Biblical times, and for centuries thereafter, the winner in battle took from the loser not only his life, but also all of his available belongings, including women, children, domestic animals and personal property. Similar statements will be found throughout the Bible. Unless circumstances permitted otherwise, all of the enemy who lived were killed and all their real property was seized or razed. An exception is to found in the *Koran, Surah* xlvii, paragraph 4, which includes the following statement:

> When you meet in battle those who have disbelieved, smite their necks, and after the slaughter tighten fast the bonds, until the war lays aside its burden. Then either release them as a favour, or in return for ransom.[3]

This dates from the sixth century A.D. *Sun Tsu*, writing 'The Art of War' in the fourth century BC, and *Manu Smriti*, an anonymous Sanskrit

1. *ICRC-UNESCO Regional Seminar for SADC States and Madagascar on Implementation of International Humanitarian Law and Cultural Heritage Law* (19-21 June 2001), Pretoria: ICRC and UNESCO, p. 23.
2. "Historical Perspectives on Humanitarian Assistance." In: *The American Journal of International Law*, Vol. 56 (1956), pp. 8-21 at p. 8.
3. Howard S. Levie (2000): "History of the Law of War on Land." In: *International Review of the Red Cross*, Vol. 82, No. 838, pp. 339-50 (340).

treatise (probably dating around 200 BC), both forbade the slaying of prisoners of war, giving as alternatives absorption into one's own army, enslavement, or ransom. It is obvious that at this period in the evolution of mankind, humanity played no part, or a very small and almost accidental part, in land warfare.[1]

As mentioned above, the international humanitarian law is usually traced to the Law of Geneva and the Law of The Hague. But history records the spiritual beginnings of these legal principles even to ancient revulsions and moral compulsions. Together, they constitute the heritage of humanist jurisprudence in its national and international dimensions.[2] The ideal of humanitarian service in peacetime has been expressed since antiquity in the form of Samaritan work, usually organised in response to local needs. Bilateral assistance between states in disasters was not unknown in the past.

The first laws of war were proclaimed by major civilisations several millennia before our era. Among the Sumerians, war was already an organised institution, characterized by declarations of war, probably possibilities for arbitration, immunity for messengers from the enemy and finally by peace treaties. The United Kingdom has had a long history of association with treaties. Treaties after all, in the history of international law, are very old institutions. We have a recorded treaty of 3000 B.C. between the *Sumerian* States: boundary stones marking the end of a war, settling the boundaries, and therefore the stone is preserved.[3] Hammurabi, King of Babylon, proclaimed the famous code that bears his name, beginning with the words, "I establish these laws to prevent the strong from oppressing the weak." It was customary to release hostages against the payment of ransom. The ancient Egyptian culture was marked by considerations for one's fellow beings. The 'Seven Works of True Mercy' instruct its readers to 'feed the hungry, give water to the thirsty, clothe the naked, shelter the traveller, free the prisoners, treat the sick, and bury the dead.' A commandment dating from the second millennium declares, 'You should also give food to your enemy.' A guest, even an enemy, must not be harmed.[4]

The civilisation of the *Hittites*, rediscovered by archaeologists little more than a century ago, was found to have had a remarkably humane

1. Howard S. Levie (2000): "History of the Law of War on Land." In: *International Review of the Red Cross*, Vol. 82, No. 838, pp. 339-50 (340).
2. V.R. Krishna Iyer (1999): "Humanitarian Jurisprudence within the Parameters of a Global Democratic Order." In: M.K. Balachandran and Rose Varghese (1999)(eds.): *Introduction to International Humanitarian Law*, New Delhi: ICRC Regional Delegation, pp. 97-111 at p. 103.
3. G.I.A.D. Draper (1988): "The Geneva Conventions Acts in Commonwealth States." In: Michael Bothe (ed.): *National Implementation of International Humanitarian Law: Proceedings of an International Colloquium* held at Bad Homburg, London: Martinus Nijhoff, (17-19 June), pp. 12-28 (13).
4. Hans-Peter Gasser, (1993) p. 8.

manner of conducting warfare. The Hittites also had a code of laws, based on justice and integrity. They too signed declarations of war and treaties of peace.[1] The war between the Egyptian and *Hittite* Empires was ended by a peace treaty in 1269 B.C., notably for its moderation, and respect for justice, which opened an epoch of harmony and friendship between the two powers.[1]

Many ancient texts such as the *Mahabharata*, the Bible and the *Koran* contain rules advocating respect for the adversary. For instance, the *Viqayet* - a text written towards the end of the 13th century, at the height of the period in which the Arabs ruled Spain - contains a veritable code of warfare.

For convenience, the history of international humanitarian law has been divided into three phases and has been discussed in the following paragraphs:

The First Phase: (Uptil 1859)

The concept of humanity is as old as the origin of human species on this earth. The roots of humanitarian law are very much deeper than some European authors with a narrow view had long believed. In reality, the laws of war are as old as war itself, and war is as old as life on earth. From time immemorial, religious teachers, philosophers, saints and sages have unequivocally denounced wars. There is a quite a substantial amount of literature and studies which maintain that the essential principles of international humanitarian law are as old in Asia as in Europe, if not much older, and that the principles which led to the establishment of these laws emanate from a perception of warfare which has been common to mankind through the ages. The development of rules of conduct in war is of course different from country to country, and merits specific examination in each case.

For instance, the ancient Chinese customary rules relating to the conduct of war are same as those contained in the Geneva Conventions. Even the humanitarian ideas and values, which shaped the ancient Chinese laws of war, are enshrined in today's body of international humanitarian law. There is also an evidence of this law in China of 40,000 years ago.[2]

As far as India is concerned, there are lot many examples from history— ancient, medieval and modern—abjuring violence. In fact, India professed and gave the message of peace and non-violence to the world as its ideal. And yet, we have had to face many wars of international character and strifes within the nation, which affected large numbers, both combatants

1. Hans-Peter Gasser, (1993) p. 8.

2. Alfred M. Boll (2001): "The Asian Values Debates and Its Relevance to International Humanitarian Law." In: *International Review of the Red Cross*, Vol. 83, No. 841 (March) pp. 45-57 (56).

and civilians. An attempt has been made here to highlight the various developments in ancient India in the field of humanitarian law. An endeavour has also been made to compare the ancient or early humanitarian law with the present day humanitarian law.

Abjuring violence has in fact been part of India's cultural and religious heritage since time immemorial. Notwithstanding the ideals of non-violence propounded by Lord Buddha and Mahatama Gandhi, war remains a reality of life, despite the fact that it has been 'outlawed' by the United Nations Charter. People have by no means stopped fighting each other; one conflict after another has broken out over the past fifty years. Over 170 conflicts that have ravaged the world peace since 1949 have claimed over 255 million victims, most of them civilians.[1] According to A.L. Basham:

> ... in no other part of the ancient world were the relations of man and man, and of man and the state, so fair and humane ... No other ancient law-givers proclaimed such noble ideals of fair play in battle as did Manu. In all her history of warfare, Hindu India has few tales to tell of cities put to the sword or of the massacre of non-combatants. The ghastly sadism of the Kings of Assyria, who flayed their captives alive, is completely without parallel in ancient India. There was sporadic cruelty and oppression no doubt, but in comparison with conditions in other cultures, it was mild. To us the most striking feature of ancient Indian civilisation is its humanity.[2]

The land of *Bharata* gave birth to Gautama Buddha, Mahavira and Ashoka who preached non-violence to attain salvation. *Dharampada* of Buddha says "victory breeds hatred, for the conquered is unhappy. He who has given up both victory and defeat is contended and happy." Violence in general has been rejected in India and efforts have always been made to spread compassion in the society. Mahatma Gandhi: "My patriotism is not an exclusive thing. It is all embracing and I should reject that patriotism which sought to mount upon the distress or exploitation of other nationalities."[3]

Hindu epics like *Mahabharata, Ramayana,* other writings and positivistic manuals like *Manusmriti* and *Arthashastra* provide for the pro-humanitarian laws, or the laws of armed conflict in ancient India.[3] Besides these, the *Agnipurana, Shantiparva* of *Mahabharata* and *Gita* Episodes, among others are

1. N. Sanajaoba (1999): *Human Rights in the New Millennium,* New Delhi: Deep and Deep Publications, p. 115.
2. A.L. Basham (1981): *The Wonder That Was India,* p. 8 Quoted by L.R. Penna (1989): "Written and Customary Provisions Relating to the Conduct of Hostilities and Treatment of Victims of Armed Conflicts in Ancient India." In: *International Review of the Red Cross,* No. 271 (July-August), pp. 333-48 (333).
3. *N. Sanajaoba,* (1999) pp. 116-17.

also the major sources of Indian Humanitarian Law.[1] The sources of early humanitarian laws of India are found in *Shrutis* (Four Vedas - *Rigveda, Yajurveda, Samaveda, Atharveda*), the *Smritis* viz *Dharmasutras* left by *Gautama, Badudhayana, Apastamba, Harita, Vishnu* and *Dharmashastras, Manusmriti* containing 2694 verses, the synthized *Yajnavalkyasmriti, Puranas,* 112 mystical *Upanishada* and the commentaries. Besides the *Charvak* School and materialistic Indian tradition, early India had evolved Buddhist and Jain traditions. Essentially, these two strong early Indian traditions opposed Brahmanical Vedic-orthodoxy, as they by and large espoused the upgradation of the downtrodden, the warrior—*Kshatiryas, Vaishyas* and *Sudras*. These two non-vedic traditions not only espoused the absolutist forms of humanitarian laws of that time, but also went upto the extent of outlawing any loss of life under one pretext or the other.[2]

As mentioned above, the various sources of Hindu Humanitarian Law *inter alia* include *srutis*[3], *smritis*[4], digests, commentaries, customs, epics, *Arthashastra* and other political texts. The Hindus gave no special name to humanitarian law. In Sanskrit, there is no term equivalent to *strictissimi juris* for dissociating positive law from ethical and religious ideals. Ancient Indian law was founded on the social and sociological concepts of a pastoral people, and was necessarily influenced by the theological tenets and philosophical theories of the Vedic Aryans. Ancient India is therefore an admixture of religion and ethics with legal percepts. The Hindus preferred to base the rules relating to interstate relationship on *Dharma,* as the sheet anchor of common humanity. *Dharma* pervades Hindu philosophy, thought and social structure. It is an expression of wide import and refers to the aggregate of religious, moral, social, and legal duties and obligations. Thus, law is a branch of *dharma,* called *dharmashastra*.[5]

The Hindus gave no special name to the science of international law. They preferred to base the rules relating to interstatal relationship on *Dharma* or religion as the sheet anchor of common philosophy. *Dharma* pervades throughout the Hindu philosophy, thought, and social structure. *Dharma* is created for the well being of all creations. All that is free from doing any harm to any created being is *dharma*. It is the principle that is capable of presenting the universe. In the *Purushartha*, individual's striving

1. *N. Sanajaoba,* (1999) pp. 116-17, 120.
2. *Ibid.*, p. 119.
3. *Sruti* includes four *Vedas*: *Rig, Yajur, Sama* and *Atharva* and their respective appendices, the *Brahmanas.*
4. Smritis include Dharmasutras, Dharmashastras, Manusmriti, Yajnavalkyasmriti, Naradasmriti, Puranas, Upanishads.
5. L.R. Penna (1989): "Written and Customary Provisions Relating to the Conduct of Hostilities and Treatment of Victims of Armed Conflicts in Ancient India." In: *International Review of the Red Cross,* No. 271 (July-August), pp. 333-59 (334).

to attain the ultimate that is *moksha* or salvation, *dharma* is the foremost. It is an expression of wide import and refers to the aggregate of duties and obligations that *inter alia* include religious, moral, social and legal. *Dharma* according to Manu is that "which is followed by learned and good, by those ever free from spite and passions, and which is acknowledged by the mind and consists pleasing to one's self."[1]

In ancient India armed conflicts were classified as either *Dharma Yuddh* or *Kutila Yuddha*. Even those taking part in the former type of action were required to strictly follow the rules of war. The most important of the rules of war was the mandate against killing or injuring an opponent who sought *Sharan* (protection). As these rules were part of our scriptures, they were followed as one's own *dharma* (supreme authority) without reference to the conduct of the other party.[2] The *dharma*, as a moral-jural concept, had its own dimensions for the regulation of war.

No conspectus of the source of Hindu Law, however brief, can omit the *Arthashastra* (400 B.C-300 B.C.) of *Kautilya*, also known as *Chanakya* or *Vishnugupta*. The work is not a *Dharamashastra* but a masterly treatise on ancient Indian Policy and a veritable reservoir of rules relating to the duties of a king and his administration, including the administration of justice, laws, courts, legal procedures, taxation, rights, matrimonial causes, and of paramount importance for the present purpose, the law relating to war, and other matters of philosophy, sociology, economics and hygiene. It gives detailed instructions on the control of the State, the organization of national economy, and the conduct of war and it is a most precious source book for many aspects of ancient Indian life.[3]

Kautilya's *Arthashastra* dwells upon deeply into the foreign policy, international law, neutrality, diplomacy and war. The armed conflict, that is, war is entrenched in his foreign policy. Kautilya's six approaches to foreign policy are: peace, war, neutrality, marching, shelter and dual policy. Immunity was extended to the envoys. The soldiers of the enemy camp who had fallen or surrendered, or turned back were given protection. This major treatise on ancient Indian Polity deals *inter alia* with rules relating to the conduct of war. Kautilya recommends treacherous war at that time, when open becomes inappropriate. Even the conqueror of the war has the responsibility to honour the customs and rights of the subject people he has occupied in the war.[4]

---

1. L.R. Penna, (1985): "Traditional Asian Approach to the Protection of Victims of Armed Conflict and their Relation to Modern International Humanitarian Law: An Indian View." In: D.W. Greeg (ed.): *Australian Year Book of International Law*, Fsyhwick: Canberra Publishing Co., pp. 94-113.
2. N. Sanajaoba, (1999) p. 131.
3. L.R. Penna, (1985) p. 118. For Further Details See: N. Sanajaoba (1999).
4. N. Sanajaoba (1999), p. 123.

The epic literature of *Mahabharata* and *Ramayana* on references to the precepts of war, the means of warfare, and the treatment of combatants and non-combatants bear a staring resemblance to the modern concept enunciated in the Geneva Conventions and their Additional Protocols. The *Ramayana* (300 B.C.) by the sage Valmiki also contains passages on statecraft and warfare. In *Ramayana*, one notices that the laws of war were humanized. War was a game to be fought fairly. The rule of the game was chivalry and not chicanery—soldiers fought with arms and not by resorting to stratagems. The idea that men are the work of one creator and that they are all his children was propounded in the Upanishads and gradually led to better treatment of the conquered by the conqueror. Magasthenes, in his *Magnum Opus* 'Indica' draws a beautiful sketch of an armed conflict situation in India.[1]

The noblest example of a victorious battle and the bleeding consequences sensitizing the victor emperor into abandonment of war itself much earlier, during 260 B.C., the ferocious Kalinga War in which about half a million people were killed or wounded, turned the great emperor Ashoka into a Buddhist and made him take a view to renounce violence altogether.[2] Ashoka proclaimed his belief in ahimsa or non-violence. Buddhism was made the state religion even though other religious faiths were tolerated. Buddhist missionaries were sent throughout India and adjacent lands as far as Syria, Egypt, and Greece. Under the aegis of Ashoka, Buddhism has escalated from a simple Indian sect to a major religion of the world.[3] Therefore, he declared in inscription that still exists that he would abjure war. To him H.G. Wells pays the highest tribute thus:

> Amidst the tens of thousands of names of monarchs that crowd the columns of history their majesties and graciousness and serenities and Royal Highness and the like, the names of Asoka shines and shines almost alone, a star. From the Volga to Japan his name is still honoured. China, Tibet and even India though it has left his doctrine, preserve the tradition of his greatness. More living men cherish his memory today than have ever heard the names of Constantine of Charleneague.[4]

Indian sub-continent always had scholars and religious preachers who were opposed to bloodshed and propagated non-violence. One could wage

---

1. N. Sanajaoba (1999), p. 116.
2. M.G. Kadam (1996): "International Humanitarian Laws and Armed Forces." In: *Report of the Seminar on International Humanitarian Law: Its Significance and Importance in the Modern World* (28-29 August), pp. 130-36 at p. 131.
3. L.R. Penna, (1985) p. 170.
4. H.G. Wells (1978): *The Outline of History*, p. 402 as quoted by V.R. Krishna Iyer (1999), p. 104.

war only when all other options to settle a dispute failed and during the battle warring parties had to scrupulously follow a Code of Conduct. The *Manusmriti* has been all along considered to be the supreme authority in the entire country. The *Dharamshastras* from one Rig Vedic Age copiously refers to the opinions of Manu, Manu Svasyabhauva, Prachet as Manu, and Vriddha Manu; the identity of the real author of the extant *Manusmriti* is not established. It is divided into twelve chapters and contains 2694 verses. The approximate date of compilation is placed at 200 B.C. It is a landmark in the history of Hindu Law and a reservoir to which references are necessary for the proper appreciation of any fundamental concept or any question involving first principles. As such the rules of law laid down in it and its most characteristic doctrines have today, their practical importance. Manu stresses the importance of *danda* connoting the concept of sanctions in restraining transgressions of law. For him, *danda* "rules all men," punishment alone protects them; punishment is watchful while they asleep: the wise knows punishment (to be justice).[1]

It is important to mention here that Manu, the ancient Indian scholar, was probably the first to lay down principles for warriors. A battle was gigantic warfare but with many rules. Homage and not annexation was the right fruit of victory. Combatants were forbidden to kill enemies who were disabled, and those who surrendered.[2] The Code of *Manu* (*Manava-dharma-shastra*), the basis for the laws, morals and customs of the people of India developed around 200 B.C., also referred to protection of war victims. Chapter Seven of the Code of *Manu* dwelt upon the laws of war and conduct of war in that age. In this Chapter on the duty of a king, there are many detailed regulations which in part read as follows: a king must protect his people when an enemy declares war on them on the battlefield, a soldier must not kill an enemy by using a hidden weapon, hook-shaped weapon, poisonous weapon or fire weapon; a soldier must not attack an enemy who has surrendered; a soldier must not attack an enemy who is not ready for combat, who is severely wounded, is giving up the fighting or is fleeing.[3]

Manu explained the Law of War as "While fighting in a battle, he should not kill his enemies with weapons that are concealed, barbed or smeared with poison or whose points blaze with fire."[4] In those times, the king could not kill one, who has climbed mound or is impotent or folds hands in supplication or one asleep or without armour or one who is

1. L.R. Penna (1985), p. 177.
2. N. Sanajaoba (1999), p. 116.
3. Adacht, Sumo (1988): "The Asian Concept: Nature of International Humanitarian Law and Its Place in International Law." In: *International Dimensions of Humanitarian Law: UN Educational, Scientific and Cultural Organisation*, London: Martinus Nijhof Publishers, pp. 13-20 (13).
4. N. Sanajoaba (1999), p. 120.

engaged with some one else. The basic six tactics to be observed by the king that is alliance, war, marching, camping, dichotomy, and seeking refuge were written by Manu. Manu in his time had evolved the elementary forms of contemporary concept of horse de combat. Chapter seven of *Manusmriti* dwelt upon laws of war and conduct of war in that age.[1] Arthur Nussbaum points out:

As has long been known, the Hindu Code of Manu - compiled about 100 B.C. form older materials - displays an astounding degree of humaneness, if not softness, in matters of warfare. An honourable warrior is supposed, for instance, not to strike an enemy who is sleeping, or has lost his coat of arms, or is naked, or is overcome with grief, or has turned to flight.[2]

The *Mahabharata* (200 B.C.) written by the ancient sage Vyasa is the account of a dynastic struggle between two cousins, the *Pandavas* and *Kauravas*, which culminated in the Battle of *Kurukshetra* (900 B.C.). On the battlefield, Arjuna, the third of the five *Pandavas* brothers, is overcome with anguish when he sees in the opposing army men of his kinsmen, teachers, and friends. Krishna, the charioteer, reveals himself as the incarnation of God Vishnu, and in the exalted *Bhagvad Gita* persuades Arjuna to fight by instructing him in spiritual wisdom and the means of attaining union with God.[3]

The twelfth book of the *Mahabharata*, known as *Shanti Parva* is a collection of many disparate passages on statecraft and human conduct.[4] The concept of just war had degenerated to unjust forms and led to violations could be understood from several examples. A particular scene has been significant and spectacular - the Lord Krishna stood for unjustifiable violations of the law in a situation, where in his ally, the *Pandavas* were nearly doomed. One important event of *Karnabadha* (murder of Karna) from the *Mahabharata*—stuck up in the mud, Karna should not have been even touched by Krishna's friend Arjuna,. but they struck Karna dead just to win the war. Karna should not be touched at the time when he was not ready to shoot arrows at Krishna and Arjuna. The righteous of that time save the cowards was not ready to violate the law at that moment.[5]

It is pertinent to note here that there is a variety of instances, events and rules and regulations and laws relating to treatment of victims of armed

1. N. Sanajoaba (1999), p. 120.
2. Arthur Nussbaum (1980): *A Concise History of the Law of Nations*, pp. 3-4 cited by L.R. Penna (1985), p. 168.
3. L.R. Penna (1989), p. 336.
4. Manoj Mathur (1996): "Activities of the Indian Red Cross Society in Situations of Armed Conflict." In: *Report of the Seminar on International Humanitarian Law: Its Significance and Importance in the Modern World* (28-29 August), pp. 115-21 at p. 116.
5. N. Sanajoaba (1999), p. 122.

conflicts that are also present in the modern today's international humanitarian law. These rules and regulations are as follows:

- Law as a last resort
- Basis of protection
- Jus ad Bellum
- Jus ad bello
- Military objects
- Combatants and non-combatants
- Prohibited instruments of warfare
- Treatment of protected persons and sick and wounded persons
- Prisoners of War
- Enemy occupation
- Dissemination[1]

After discussing the ancient Indian perspective, we shift directly to the twelfth century. An important development relating to humanitarian assistance, within the framework of Christianity, involved the establishment of charitable orders, several of which were organised on an international non-governmental basis. The Order of the Knight of St. John of Jerusalem was concerned from the 12th century onwards with the impartial care of the wounded and sick. During the crusades Muslim leaders also supported the principle of impartial relief. Early practice thus provides example of the work carried out in modern times by Red Cross and Red Crescent Societies.[2]

The advance of humanitarian sentiments was generally slow, and cannot be broadly attributed to the religious or secular spheres alone. Restraints on brutal practices of warfare were also derived from enlightened military strategy. The realization that violence does not contribute to the defeat of the enemy and that the purpose of conflict is not necessarily frustrated by showing consideration to the wounded, to prisoners and to civilians provided one basis for the growth of principles of respect for the human person in armed conflict.[2]

Towards the end of the Fourteenth Century, there was a swing of marking a turning-point in military history: the appearance of firearms made the dwarf a match for the giant. The new invention revolutionized the art of war and at the same time it caused a radical change in the social order. The release of prisoners on payment of a ransom became common practice; the wounded were taken care of and medical services worthy of the name

1. For further details see: L.R. Penna (1985).

2. "Historical Perspectives on Humanitarian Assistance." (1956), p. 9.

were set up. The founders of natural law Vitoria, Suarez and later Grotius met with attention and their influence was deeply felt.[1] One of the first of its kind was arrived at even earlier in the Covenant of *Semach* in 1393 between the Cantons of Switzerland, with clauses requiring respect for the wounded and for women, for which reason it is commonly known as the 'Frauenbrief'. It specifies that women shall be kept apart from war and that the wounded shall be 'left intact, with respect to their persons and possessions'.[2] According to the Spanish theologians, founders of the school of the law of nations, this law of war was first laid down around 1474, the Year of Las Casas' birth—though the exact date has not been scientifically established— was the subject of a laborious attempt at reaffirmation by a Diplomatic Conference in 1974.[3] Las Casas' special merit lay more particularly in his efforts to obtain the effective application of the established norms. The threats uttered by the chaplains of the conquerors, his fierce expostulations were supplemented by a policy of negotiated agreements, which foreshadowed the safety zones and non-defended localities of the 1949 Geneva Convention and of the Additional Protocols which have been under discussion in 1974, 1975 and 1976. The claim of Las Casas, based on the doctrine of *padres*, presented the two elements of a law of war:

- The liberation of the Indian peoples and the restitution of their property came under international human rights; these included the right to war which had to be drawn up and accepted on both Indian and Spanish sides.
- The barbarous cruelties witnessed by Las Casas as a clerigo and colonist, were the deciding factor which led him to protest and to state his policy of a humanitarian law to the central authority, whose support he gained, and to the local colonial authorities, with whom he had to negotiate.[3]

A new sentiment emerged on the battlefields: a sense of concern for the wounded, genuine medical services was gradually set up. The most illustrious of surgery pioneers of that time Ambroise Pare[4] after the Battle of Saint Quentin of 1577 wrote: "The wounds of the injured stank to high

1. J. Pictet (1975): "The Swing of the Pendulum: A Hundred Years in the Development of Humanitarian Law: 1874-1973." In: *International Review of the Red Cross*, No. 168 (March), pp. 11-22 at p. 112.
2. Hans Peter Gazer (1993), p. 19.
3. Paul de Geouffre de La Pradelle (1974): "Human Rights and Armed Conflict: On the 5ooth Anniversary of the Birth of Las Casas." In: *International Review of the Red Cross*, No. 165 (December), pp. 402-06 (403).
4. Ambroise Pare achieved a major breakthrough when in 1552; he practiced for the first time a ligature of arteries after amputating a limb, a great advance over cauterization with boiling oil.

heaven, worm-eater, gangrened, and rotten as they were .... Yet no medicines at all were available at La Fere ....."[1] He was dismayed at the inadequacies around the battle. It was realized by that time that however numerous and skillful, surgery alone could not cope with the situation. Pare called for a much comprehensive organisation, equipped with substantial services.[1]

The 17th Century opened the age of Enlightenment which among other things witnessed the birth of humanitarianism, and advanced a rational form of charity and justice. The philosophers refused to consider suffering as a fatality and no longer accepted the doctrine that every man was responsible for the misery in the world. They held that all men had equal and inalienable rights, which it was the responsibility of the states to guarantee. The first item on the agenda was to gain the greatest possible happiness for the greatest possible number of people.[2] Natural Law theorists of this century recognize a distinction between combatants and non-combatants and emphasized some moderation in war and the advisability of human behaviour. In the year 1675, the Treaty of Strasbourg that was signed by Germany and France seems to be the earliest in the field of the prohibition of the chemical and bacteriological weapons. Article 57 of the Treaty stipulated that "the use of poison in any manner be it to poison wells, or food, or arms, is wholly excluded from modern warfare."[3]

New ideas were not put about until the 18th century and the time of E.de.Vattel and J.J. Rousseau, to which period the rise of the secular humanitarianism of the 19th century can be traced. That movement in turn provided the new impetus towards the codification and development of humanitarian principles witnessed during the later part of the same century.[4] In the 18th Century, war became a struggle between professional armies with smaller numbers of soldiers. Civilians were no longer directly involved because the armies had their own supply services and pillage was forbidden. War had become an art with its own rules, and although these were sometimes violated, the breaches were exceptional. Perfidious and cruel methods were banned, since they would dangerously exasperate the enemy. In short, war was under human control.[5]

As early as in 1704 A.D., in the Battle of *Anandpur Sahib* in the State of Punjab in India, the contribution made by a person named Bhai Kanhaiya is

1. Pierre Boissier (1985): *History of the International Committee of the Red Cross*, Geneva: Henry Dunant Institute p. 126.
2. Hans-Peter Gasser (1993), p. 21.
3. Rahmatullah Khan (1969): "Chemical and Bacteriological Weapons and International Law." In: *Indian Journal of International Law*, Vol. 9, No. 1, pp. 497-511 (505).
4. "Historical Perspectives on Humanitarian Assistance." (1956), p. 9.
5. Hans-Peter Gasser (1993), p. 21.

worth mentioning. This battle was fought around fifty years before the Battle of Solferino. Bhai Kanhaiya served the victims of war not only of his religion and nation but also of the enemy's army. When asked by the authorities concerned, that is, Guru Gobind Singh, who led the battle, Bhai Kanhaiya replied that in each victim of conflict, he saw the face of God. That's why he provided them with services like water. The Guru replied that now he had the responsibility for providing other necessities like first aid to the sick and wounded people. The above incident shows the concern for the humanity that was visible in India far before than the Battle of Solferino.

On the eve of the Battle of Fontenoy in 1747 A.D., Louis XV was asked how the wounded enemy should be treated. He replied, "Exactly like our own men, because when they are wounded they are no longer our enemies. In fact, 4,000 beds were already prepared to receive the wounded. When the battle ended, 1,200 wagons were sent forward to evacuate the victims and take them to hospitals where well-trained personnel and adequate supplies of dressing materials were awaiting them.[1]

The Treaty of Friendship and Peace in 1785 was a treaty reached by Fredrick the Great and Benjamin Franklin which stipulated that "in case of conflict the parties would abstain from blockades and that enemy civilians would be allowed to leave each country after a certain time. Prisoners of war would be fed and lodged in the same manner as the soldiers of the detaining power and a man of confidence would be allowed to visit them and provide them with relief."[2] The most remarkable document of this kind was the 'Treaty of Friendship and Peace' arrived at by Frederick the Great and Benjamin Franklin in 1785, containing provisions which rose to the level of principles, in which we find for the first time the ideas that the parties 'commit themselves mutually, and before the Universe' and that the purpose of a convention between states is to protect the individual. It was stipulated in this document that in case of conflict the parties would abstain from blockades and that enemy civilians would be allowed to leave each country after a certain time. Prisoners of war would be fed and lodged in the same manner as the soldiers of the detaining power and a man of confidence would be allowed to visit them and provide them with relief.[3] It will not be out of place to mention the 'immortal principles' of the 1789 Revolution, which, in the view of its leaders, should have universal peace as their corollary.

In 1834, the Fifteenth International Conference of the Red Cross met in Tokyo and approved the text of an International Convention on the condition and protection of civilians of enemy nationality who are on

1. Hans-Peter Gasser (1993), p. 22.
2. V.K. Krisna Iyer (1999), p. 104.
3. Hans-Peter Gasser (1993), p. 21.

territory belonging to or occupied by a belligerents, drafted by the ICRC. No action was taken on that text either, the governments refusing to convene a diplomatic conference to decide on its adoption. As a result, the Tokyo Draft was not applied during the Second World War, with the consequences we all know.[1] When the Crimean War broke out in 1854, the medical services of the Franco-British expeditionary corps were virtually non-existent. In the course of the conflict, all the customary principles of humanitarian law had fallen by the wayside.[2] Similarly in the year 1856, The Declaration of Paris prohibited privateering and made a number of other provisions regarding the laws of naval warfare.[3] The origins of the Red Cross and the Geneva Conventions are found in the period, in the efforts of Henry Dunant, a Swiss citizen and civilian witness to the effects of the Battle of Solferino in the year in 1859 in Italy, to bring relief and assistance to the wounded. Henry Dunant subsequently advocated rules for the protection of victims of international war as well as the establishment of voluntary relief.[3]

The Second Phase (1859-1949)

The Battle of Solferino in the year 1859 was a turning point in the arena of international humanitarian law which led to the further development and consolidation of the humanitarian law especially in the codified form.

After the Battle of 1859, the major event that took place was the American Civil War. During the American Civil War that was continued for four years (1861-65), a refugee Professor Francis Lieber, an international lawyer of German origin, who had migrated to America in 1863 and, after revision by a board of officers, promulgated as General Orders No. 100 of the Union Army, prepared a set of instructions popularly known as the Lieber Code, to be followed by the American Army during the war. It is important to mention that it was the first attempt to lay down specific humanitarian rules to be applicable in time of war. The Code provided for the "protection of persons and especially of women, of religion, the arts and sciences and punishment of crimes against the inhabitants of hostile countries." There were also provisions requiring the humane treatment of prisoners of war. This Code was, of course, a national action, not applicable to other countries, but it served as one of the sources of the international actions, which were to follow.[4] Apart from the above, the Code provides detailed rules of the entire range of warfare, from the conduct of war proper

1. Hans-Peter Gasser (1993), p. 21.
2. *Ibid.*, p. 25.
3. Christopher Greenwood (1998): International Humanitarian Law and the Laws of War: Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference (June), pp. 1-84 (5).
4. Howard S. Levie (2000), p. 341.

and the treatment of the civilian population to the treatment of specified categories of persons such as the prisoners of war, the wounded, doctors, nurses and chaplains. Although technically a purely internal document and written to be applied to American Civil War as mentioned above, the Code has also served as a model and a source of inspiration for the codification of laws and customs of war.[1]

In the same year in which the Lieber Code was prepared, that is in 1863, an International Conference meeting in Geneva drafted resolutions that called for each country to establish a committee to assist the medical services, and to provide for the neutrality of ambulances and medical personnel. This was the precursor for the Geneva Conferences, which drafted the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field and the 1868 Additional Articles relating to the Condition of the Wounded in War.[2] The Geneva Convention of 1864 laid down the foundations for contemporary humanitarian law. It was chiefly characterized by:

- Standing written rules of universal scope to protect the victims of conflicts;
- Its multilateral nature, open to all States; and
- The obligation to extend care without discrimination to wounded and sick military personnel;
- Respect for and marking of medical personnel, transports and equipment using an emblem.[3]

The 1864 Convention, in the form of a multilateral treaty, therefore codified and strengthened ancient, fragmentary and scattered laws and customs of war protecting the wounded and those caring for them.[4] It is worth mentioning the fact that the 1864 Geneva Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field was the first multilateral convention with the purpose of affirming an international humanitarian law of armed conflict. The Convention was signed by sixteen states. It was open to accession by non-signatories and quickly gained worldwide acceptance.[5]

The 1864 Convention is notable for incorporating moral humanitarian ideas into the sphere of inter-state relations. Article VI of the Convention aimed to extend the protection of international law to humanitarian activity

1. Gurdip Singh (1999): "Development of International Humanitarian Law." In: *M.K. Balachandran and Rose Varghese* (eds.), pp. 112-19 (116).
2. Howard S. Levie (2000), p. 341.
3. Christopher Greenwood (1998), p. 8.
4. *Ibid.*, p. 9.
5. "Historical Perspectives on Humanitarian Assistance." (1956), p. 10.

on the battlefield by providing that "wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for." The Convention accorded neutrality to ambulances and their personnel, and protected the humanitarian actions of civilian inhabitants assisting the wounded. Article VII recognized the distinctive emblem of the Red Cross on a white ground. The Convention was revised in 1906 and 1929 and formed the basis of the First Geneva Convention of 1949.[1]

The lack of clauses relating to naval operations became tragically apparent at the Battle of Lissa in 1866 that could be likened to a "maritime Solferino." The horrors of the battle of 1866 inspired ICRC to prepare a draft containing additional articles to the 1864 Convention, concerning more particularly the navy, and these were submitted to a Diplomatic Conference convened in Geneva in 1868. In 1868, an attempt was made to adopt additional articles extending the 1864 Convention to naval warfare but these articles never entered into force. The St. Petersburg Declaration, 1868, outlawing projectiles of under 400 grammes in weight (that is, ammunition but not artillery shells) which were explosive or charged with fulminating to inflammable substances, became the first agreement of modern times to prohibit the use of a specific category of weapons.[2] The modern legal concept underlying the Convention on Certain Conventional Weapons (CCW), including Protocol on Blinding Laser Weapons, was first formulated in the St. Petersburg Declaration of 1868 with the goal of fixing "the technical limits at which the necessities of war ought to yield to the requirements of humanity." The declaration prohibited the use in war of explosive or incendiary bullets small enough to be fired from an infantryman's rifle. A soldier hit anywhere with an 1860s rifle ball would ordinarily be placed out of action. An explosives bullet would therefore 'uselessly aggravate' his suffering by making his wound more serious than military necessary.[3] Next year that is in 1869 the First Conference for Neutralisation of Military Medical Services in the Field was held.

During the seven weeks' war between Prussia and Austria in the year 1870, there had been considerable progress in the history of relief work for the wounded. The Geneva Convention and the societies had become realities, although only for one side of the war. In Prussia, great efforts had been made since the war of 1866 to improve still further the way in which the army's medical services were organised. A remarkable innovation was

---

1. "Historical Perspectives on Humanitarian Assistance." (1956), p. 10.
2. Christopher Greenwood (1998), p. 5.
3. "The Protocol on "Blinding Laser Weapons": A New Direction for International Humanitarian Law." In: *The American Journal of International Law*, Vol. 90 (1996), pp. 484-512 (484).

the setting up of regimental companies of stretch-bearers.[1] The activities of the medical services and those of the voluntary relief workers were carefully coordinated. In 1866, the King of Prussia named a 'Royal Commissioner and Military Inspector of Voluntary Treatment of the Sick'. The Ordinance of 29 April 1869 concerning the medical service of the army in the field conferred on him 'supreme authority over voluntary treatment of the wounded and sick'. The position of the Prussia was opposite to that of the French people. They were not aware of the humanitarian principles especially the Geneva Convention and they constantly violate the humanitarian norms and principles. There has been in existence the international Committee for the protection of the prisoners, the Committee created an agency named the International Relief Committee for Prisoners of War. Another institution founded by the Committee was the "Central Relief Agency for members of the armed forces interned in Switzerland."[2] In the same year (1870), the ICRC was set up. Two men played an essential role in its creation: Henry Dunant and Guillaume-Henri Dufour. Dunant formulated the idea in his monumental work *A Memory of Solferino* published in 1862. On the strength of his own experience of war, General Dufour lost no time in lending his active moral support, notably by chairing the 1864 Diplomatic Conference. It is important to mention here that the whole credit of the establishment of the ICRC goes to Dunant for his untiring efforts and struggle for a humane cause of the victims of war.

In 1874, a Diplomatic Conference, convened in Brussels at the initiative of Tsar Alexander II of Russia, adopted an International Declaration on the laws and customs of war. The text was not ratified, however, because some governments present were reluctant to be bound by a treaty. Even so, the Brussels draft marked an important stage in the codification of the laws of war.[3] At the Brussels Conference, representatives of fifteen states adopted the Project of an International Declaration concerning the Laws and Customs of War on Land, although this instrument never became binding.[4] In 1874, an International Conference called by the Russian Government met in Brussels and adopted the International Declaration concerning the Laws and Customs of War, a document which contained many provisions intended to make land warfare more humane. Unfortunately, it never became effective for lack of ratifications. However, it served as one of the sources for the Regulations attached to the 1899 Convention (II) with Respect to the Laws and Customs of War on Land, drafted by the First International Peace Conference in The Hague. At the same time three Declarations were adopted, one prohibiting the launching of projectiles and explosives from

1. Pierre Boissier (1985), p. 242.
2. *Ibid.*, p. 266.
3. *Ibid.*, p. 267.
4. Christopher Greenwood (1998), p. 5.

balloons,[1] one prohibiting the use of asphyxiating gases, and one prohibiting the use of expanding bullets.[2] It was in the Preamble to this Convention that the famous de Martens Clause[3] made its appearance. The Clause stated:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.[4]

The first conflict during which the Convention of 1864 was fully applied was the Serbo-Bulgarian War in 1885, which consisted nevertheless in a number of fierce engagements. In the early stages, the Serbian Army penetrated into Bulgaria, but then was forced to retreat as a result of a military movement that has since become famous. In the retreat, numerous wounded were left on the field, but the medical detachments remained behind with them, the victims were cared for without distinction, and medical personnel allowed to cross the lines. The death rate of the wounded fell to two per cent. It should perhaps be added that the Red Cross and the Convention were not alone responsible for this low figure, for thanks to Pasteur's discoveries, aseptic treatment had just been introduced. However, the States had come to understand that humanitarian law was to the advantage of all, and henceforth this was no longer disputed by anyone.[5]

The text of the Diplomatic Conference that was convened in the 1868 was not ratified, and the new provisions, embodied in one of the Hague Conventions, did not enter into force until 1899, the year after another disaster, a naval engagement off the Cuban coast during the Spanish-American War of 1898. The articles on naval warfare then took their rightful place in international law.

---

1. This Declaration was to be in force for only five years. However, at the 1907 Second International Peace Conference its effectiveness was extended to "the close of the Third Peace Conference." As that Conference has never taken place, it has been argued that the Declaration is still in force; moreover, since it prohibited the discharge of projectiles and explosives from balloons "or by other new methods of a similar nature". It is sometimes argued that bombing by aircraft violates this Declaration. Needless to say, no nation has accepted this argument.
2. Howard S. Levie (2000), p. 342. This Declaration was the prohibition of dumdum bullets.
3. For further details see: Rupert Ticehurst (1997): "The Martens Clause and the Laws of Armed Conflict." In: *International Review of the Red Cross*, No. 317 (March-April), pp. 125-34.
4. Howard S. Levie (2000), p. 342.
5. J. Pictet (1975), p. 115.

The First Peace Conference of Hague (1899) Conference began a great era of law making in relation to the conduct of warfare. The fact that the high hopes of a century of peace, which were entertained at the Conference, have been so cruelly and extensively disappointed by the realities of the twentieth century should not be allowed to blind us to the achievements of that law-making process. As a result of the 1899 and subsequent conferences, the laws of war at the end of the twentieth century are far more advanced than they were at its outset.[1]

At the Hague Peace Conferences of 1899 and 1907, the premises of St. Petersburg were further generalized to prohibit use of weapons, materials or methods of warfare that would cause 'superfluous injury' or 'unnecessary suffering' to enemy military personnel.[2] It is widely recognized, however, that by itself 'the unnecessary suffering doctrine as it applies to military personnel gives no clear, decisive, or instantaneous guide to the legality or illegality' of particular weapons.[3] Hague Regulations of 1899 and 1907 cover most of the aspects of hostilities on land. These Regulations were greatly influenced by the Lieber Instructions 1863, the Brussels Declaration 1874, and the Oxford Manual of 1880. It is important to mention here that at the 1899 Peace Convention, four Conventions were established.[4]

In the beginning of the twentieth century, in the Russo-Japanese War of 1904-05, full consideration was given to carrying out the provisions of the Geneva Convention and the Hague Convention respecting the Laws and Customs of War on Land. Moreover, the Government and the Army paid close attention to the fact that the campaign was carried out in the territory of a neutral state. Above all, arrangements were made for the treatment of war victims, for that war was the first opportunity of applying The Hague Convention and the Russian Czar Alexander II had sponsored the Convention. For these reasons, Japan enacted a number of laws and regulations for the treatment of prisoners of war. At that time, the Convention afforded prisoners of war favourable treatment. However, Japan considered such treatment inadequate because the customs and social

1. J. Pictet (1975), p. 115, 116.
2. A variety of factors have been traditionally regarded as pertinent to deciding whether a weapon will cause unnecessary suffering or superfluous injury. These include the painful or severity of wounds from the questioned weapon, the duration of suffering or incapacitation, the mortality rates, the incidence of permanent damage or disfigurement, the feasibility of treatment in the field, the military utility of the weapon, the availability of alternate systems, the humanitarian and military effects of those alternate systems, and logistics.
3. "The Protocol on "Blinding Laser Weapons": A New Direction for International Humanitarian Law." In: *The American Journal of International Law*, Vol. 90 (1996), pp. 484-512 (485).
4. Gurdip Singh (1999), p. 116.

standards of western people were so different from those of the Japanese. Japan, therefore, adopted more favourable treatment according to traditional philosophies and past experiences. The Imperial Expeditionary Armies established Prisoners-of-War Committees within their headquarters and drew up field regulations in order to ensure fair treatment. There being no international law for victims of maritime warfare, the Imperial Navy applied *mutatis mutandis* the Geneva Convention on Land Warfare. Japan spontaneously adopted regulations for disposal of the dead, including collection, burial, and identification of possessions left behind and prohibition of looting. This all goes to show that Japan tried to assimilate fully the western methods and practices prescribed in the Conventions, while maintaining her fundamental spirit and philosophy which usefully supplemented the Conventions concerned and remedied some of their shortcomings.[1]

One year later after the Russo-Japanese War, in 1906, an International Peace Conference met in Geneva and updated the 1864 Convention and the 1868 Additional Articles. It was this 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field that was in force during the First World War. It was superseded by the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field which was, in turn, superseded by the 1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[1]

The Second International Peace Conference, held in The Hague in 1907, adopted a slightly redrafted set of the Regulations attached to the 1907 Convention (IV) respecting the Laws and Customs of War on Land. The only Declaration that it readopted was that relating to the dropping of projectiles and explosives from balloons.[2] The 1907 Peace Conference built upon the achievements of the 1899 Conference. Both of the Conventions on the Laws of War adopted by the 1899 Conference were revised. In addition, the Second Conference adopted seven new conventions on the Laws of Naval Warfare, a Convention on the Rights and Duties of Neutral Powers in Land Warfare and a Convention Relative to the Commencement of Hostilities.[3] Thus, in the Second Peace Conference in 1907, thirteen Conventions were established. De Martens Clause is expressive of humanitarianism, which formed the basis of the Hague Convention No. IV of 1907. It made an attempt to accommodate military requirements to the principle of humanity in war. In due course of time, De Martens Clause has percolated into the

1. Sumio Adachi (1980), p. 18.
2. Howard s. Levie (2000), p. 342.
3. Christopher Greenwood (1998), p. 10.

corpus of general international law. It balances military necessity against the requirements of humanity. [1]

The First World War (1914-18) witnessed the use of methods of warfare that were, when not completely new, at least deployed on an unprecedented scale. These included poison gas, the first aerial bombardments and the capture of hundreds of prisoners of war.[1] The First World War had shown abundantly the insufficiency of the laws of war in force. Their revision was urgently needed. But the reaction was their complete neglect. This neglect of the laws of war since 1920—the paralysation of their revision, the hostility toward the whole subject, the fashion simply to ignore the problem, the fact that the very mentioning became, so to speak, taboo—all that was fully deliberate.[2] As early as 1920 an anonymous Article had given a nearly complete list of the arguments against the possibility and the desirability of any study and revision of the laws of war by the League of Nations.[2] The practice of states and the science of international law followed these ideas. The movement for the codification and revision of the laws of war nearly came to an end in the inter-war period. Even the existing Hague Conventions were ignored by most of the newly established states.[3] During the 1920s, the Red Cross turned its attention to promoting a convention to establish an International Relief Union (IRU). The first Relief Section was created in the Secretariat of the League of Red Cross Societies, inaugurating its role of coordination of Red Cross humanitarian assistance. Subsequently, the International Conference of Red Cross began to deal in detail with practical questions concerning international relief. A number of important resolutions were adopted setting out principles for action with the Red Cross.[4] The foundation of the League of Red Cross Societies was thus associated with the possibility of far-reaching developments in the field of international humanitarian assistance. The League of Nations, as the first governmental institution of the universal type, offered a new opportunity for the evoluation of humanitarian principles and action at the international level through the cooperative and coordinated responses of States to relief needs. At the same time, international law began to embraces an increasing range of concerns relating to human welfare, including humanitarian questions and disaster relief.[4] In the year 1921, the Resolution No. XVI, the Tenth International Conference of the Red Cross in Geneva, went on to define the role of the National Society in the country concerned, the role of

1. Gurdip Singh (1999), p. 116.
2. Josef L. Kunz (1956): "The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision." In: *The American Journal of International Law*, Vol. 57, pp. 37-61 (38).
3. *Ibid.*, p. 39.
4. "Historical Perspectives on Humanitarian Assistance." (1956), p. 18.

other National Societies and that of the ICRC, giving the Committee certain competence to intervene in such circumstances, especially to organise relief.[1]

As a matter of fact, between 1924 and 1929 the task of material assistance for refugees was entrusted to the International Labour Organisation, and protection functions became the main responsibility of the High Commissioner. In 1929, both tasks were reunited in the Office of the High Commissioner. On the Death of Dr. Nansen in 1930, the Nansen International Office for Refugees was created by a resolution of the Assembly of the League of Nations, as an autonomous body responsible for the exercise of functions of humanitarian assistance.[2] It will be appropriate to mention here that the Washington Convention of 1922 concerning submarine and chemical warfare never came into force. The Committee of Jurists for the elaboration of a plan for a Permanent Court of International Justice on 23 July 1920, recommended the revision of the laws of war and a new Hague Conference. But the League did nothing about it. The Committee of Jurists, created by the Washington Conference of 1922 for the purpose of revising the laws of war, elaborated two Draft Conventions on Control of Radio in time of war, and on aerial warfare. But the states ignored them.[3] In the same year, rules regarding Air Warfare were started with the Hague Regulations of 1907, which prohibited discharge of projectiles and explosives from balloons. This was followed by the Rules of Air Warfare drafted by the Commission of Jurists in 1922-23.[4] The *Institut de Droit International*, which prior to 1914, had given so much attention to the laws of war, has not once since 1920 treated a problem of the laws of war.[5]

In the field of prohibition on chemical and biological weapons, after the Second Hague Conference of 1907, the next significant step on the road to outlawing of toxic weapons was taken in 1925 at Geneva. A protocol, solely concerned with chemical and biological weapons was signed.[6] Since this Protocol has a seminal significance in the outlawing of CBW it may be appropriate to explain some of its important features:

- That it raises a presumption in favour of an already established customary rule prohibiting chemical warfare;

---

1. "ICRC Protection and Assistance Activities in Situation Not Covered by International Humanitarian Law." In: *International Review of the Red Cross*, No. 244 (January-February 1985), pp. 11-27 at p. 15.
2. "Historical Perspectives on Humanitarian Assistance." (1956), p. 16.
3. Josef L. Kunz (1956), p. 39.
4. Gurdip Singh (1996), p. 241.
5. Josef L. Kunz (1956), p. 39.
6. Rahmatullah Khan (1969), p. 505.

- That it extends this prohibition to methods of bacteriological warfare; and
- That it is inapplicable to wars between parties to the Protocol and non-parties.[1]

It is appropriate to mention here that these points are reaffirmed in many resolutions adopted by international organizations.

In 1927, a Diplomatic Conference and the creation of the International Relief Union (IRU) took place in an atmosphere of excitement based on the belief that a major step was being taken towards the realization of the humanitarian objectives of Articles 23 and 25 of the Covenant of the League of Nations. International solidarity, based on collaboration and mutual assistance in all fields, was a key word of times. The aim of promoting friendly international relations was pursued with enthusiastic optimism. However, the hopes raised by the Convention were excessive. When the Convention entered into force, over five years after its signature, the general economic depression foreshadowing a retreat into isolationism, nationalism, rearmament and war would seem to have doomed the original intentions of the Union's promoter.[2] The Convention establishing an International Relief Union was an anticipatory legal expression of international humanitarian concerns; the IRU itself was a premature institutionalization of the desire to take action for the benefit of the victims of disasters. Perhaps the IRU's activities are significant not for their achievements in the field, but rather as evidence of the early recognition by States of the need for collaboration in matters of humanitarian assistance through international organization, on the foundation of international law.[2]

The Inter-parliamentary Union adopted at its 24th Session, held in Paris in 1927, a resolution according to which any attempt to codify the laws of war should be abandoned in future. The Hague Academy of International Law banned, until the end of the twenties, any course on the laws of war. The proposal put forward by Senator Borah to convene a conference in 1928 for the codification of maritime warfare was lost. The League of Nations would have nothing to do with the laws of war. Even the teaching of the Laws of War was opposed by many.[3]

The inter-war period was filled with wars, civil wars and fighting: The Russo-Polish War, the Greco-Turkish War were recognized as wars by the practice of states. In the field of neutrality, the Pan American orbit the Sixth Conference of American States, held at Havana in 1928, adopted the

1. Rahmatullah Khan (1969), p. 506.
2. "Historical Perspectives on Humanitarian Assistance," (1956), p. 21.
3. Josef L. Kunz (1956), p. 39.

Convention on Maritime Neutrality.[1] In the same year (1928), the Pact of Paris, also known as the Kellogg-Briand Pact, which was ratified by sixty-three states, went further in actually requiring the renunciation of war as an 'instrument of national policy' and, being now accepted as *jus cogens* - however dubiously interpreted, may be taken as marking the definitive end of the 'Westphalia' period of the *jus ad bellum*.[2] Declarations of war and declarations of neutrality were made. Every belligerent insisted vis à vis his enemies on the observance of the laws of war; protests against their violation were made, diplomatic correspondence through neutial channels took place.[3]

While, the Regulations attached to the 1899 and 1907 Conventions respecting the Laws and Customs of War on Land had contained a number of almost identical provisions for the protection of prisoners of war, it was not until 1929 that an international conference drafted a convention dealing exclusively with that subject. The 1929 Convention related to the Treatment of Prisoners of War was in force during World War II.[4] This Convention was in turn, superseded by the 1949 Geneva Convention related to the Treatment of Prisoners of War.[5] The Geneva Convention of 1929, which in turn subsequently formed the basis of the Third Geneva Convention of 1949, included sections on conditions of captivity, as well as the first provisions conferring the right of prisoners to receive correspondence and relief parcels.[6]

The ICRC had proposed in 1929 to lay down the status of civilians at the same time as that of prisoners of war. However, objections were raised that the time was inappropriate. Soon after, the ICRC prepared a Draft Convention, which was adopted in 1934 at Tokyo by an International Red Cross Conference. However, the Diplomatic Conference that should have accorded its official sanction was convened only in 1940. It was too late: in the meantime, Second World War had broken out.[7] The next important Conference was the Evian Conference of 1938 that was convened to deal with political and economic questions arising from the exodus of refugees from Germany and Austria, it set up the Inter-Governmental Committee on Refugees, headed by the High Commissioner. However, World War II interrupted the activity of the new system and created additional problems

1. Josef L. Kunz (1956), p. 48.
2. Hilaire McCoubrey (2000): *International Humanitarian Law: The Regulation of Armed Conflicts*, Aldershot: Dartmouth Publishing Co. Ltd., p. 16.
3. Joseph L. Kunz (1956), p. 48.
4. However, Japan was not a party to the 1929 Convention.
5. Howard S. Levie (2000), p. 343.
6. "Historical Perspectives on Humanitarian Assistance." (1956), p. 10.
7. Jean Pictet (1975), p. 119.

that formed the background to the establishment of the Office of the United Nations High Commissioner for Refugees.[1]

After one year of the Evian Conference of 1938, in the Pan American orbit, the Panama Consultative Meeting of the Foreign Ministers of the American Republics passed Resolution I of 3 October 1939, containing a General Declaration of Neutrality and set up the Inter-American Neutrality Committee at Rio de Janeiro. Resolution VI of the same day dealt with the humanization of war and appealed to European nations to abstain from the use of poisonous gases and other chemical methods of warfare, from bombarding open cities, objects and places without any military value; from employing inflammable liquids; from poisoning water and disseminating bacteria; from employing offensive weapons which increase the suffering of the wounded; from imposing unnecessary rigorous measures upon civilian populations; from sinking merchant vessels without having first placed the passengers, crew and ship papers in a place of safety; and condemned the unrestricted application of measures causing unnecessary and inhuman suffering in injuring the enemy. All that shows that the American state practice regarded the laws of war as valid. On the same day Resolution VII on contrahand of war was adopted.[2]

In 1938, the League of Nations resolves spare and protect civilians from aerial bombardment.[3] The Second World War (1939-45) saw civilians and military personnel killed in equal numbers, as against a ratio of 1:10 in the First World War. In those tragic figures and more particularly to the terrible effects the war had on civilians, the Conventions then in force were revised and a new instrument was adopted: the Fourth Geneva Convention for the protection of civilians. Later, in 1977, the Additional Protocols were a response to the effects in human terms of wars of national liberation, which the 1949 Conventions only partially covered.[4] In the Second World War, the laws of war "were regularly and on a mass scale violated by all the belligerents." Most belligerents forgot the rule of Article 22 of the Hague Regulations (Convention IV) that the belligerents have not an unlimited right as to the means they adopt for injuring the enemy. The consequence has been an absolutely chaotic status of the laws of war at the present time.[5] The Second World War had not only shown the inadequacy of many existing laws of war, e.g., concerning prisoners of war, belligerent occupation and so on; it had not only demonstrated the disastrous result of the complete lack of regulation with regard to such problems as reprisals, hostages, economic

1. "Historical Perspectives on Humanitarian Assistance." (1956), p. 16.
2. Josef L. Kunz, (1956), p. 48-49.
3. Gurdip Singh (1996), p. 241.
4. "Historical Perspectives on Humanitarian Assistance." (1956), p. 11.
5. Josef L. Kunz (1956), p. 49.

warfare, aerial warfare. It had shown the necessity of regulating new methods of warfare, such as use of magnetic mines, atomic bombs, guided missiles and so on. But there were even more fundamental reasons for the chaotic status of the laws of war. It is often not possible to decide whether certain methods of conducting warfare, violative of the rules of war survive. The incomplete and often imprecisely formulated laws of war made it relatively easy to charge the enemy with a breach of the rules of war and to resort to reprisals, especially as there were no rules of war regulating reprisals.[1]

In a sub-committee meeting of the United Nations War Crimes Commission in 1944, Sir Arnold McNair, declared correctly that the state cannot be the subject of criminal liability and this position had not been altered by the Pact of Paris of 1928, which "has not abolished war as an institution regulated by law."[2] As far as the prosecution and punishment of war criminals is concerned, the London Agreement (August 1945) was a positive step in the development of international law in this area:

> The Charter defined the three categories of crimes coming within the jurisdiction of the Tribunal and for which there would be individual responsibility (crimes against peace, war crimes, and crimes against humanity). It also stated the principles of individual criminal liability, notably, the principle that the official position of defendants would 'not be considered as freeing them from responsibility or mitigating punishment', and the principle that an order would not free a defendant from responsibility but might be 'considered in mitigation of punishment if the Tribunal determines that justice so requires.'[3]

In 1945, the work of revising the Geneva Conventions was overshadowed by the urgent need to extend their protection to civilians. This was to be a much more difficult undertaking: it was no longer a question of grouping under one definition a limited, organised and clearly ordered class of person like the army; one was now dealing with a shapeless mass of civilians spread over the whole territory. Besides, it was not enough to protect the victims of conflicts; what was required was to prevent these persons from becoming victims. As Max Huber put it, "we were coming to grips with war itself, since it was no longer a case of alleviating suffering, but of removing its causes at their source." Furthermore, unlike the wounded and prisoners of war, civilians in most cases were not incapable of causing mischief.[4]

1. Josef L. Kunz (1956), pp. 49, 50.
2. *Ibid.*, p. 47.
3. V.R. Krishna Iyer (1999), p. 92.
4. J. Pictet (1975), p. 120.

The year 1949 marked the meeting of the Diplomatic Conference which shaped and expanded the Geneva Conventions to their present form. Following a holocaust of unprecedented dimensions, it was felt that it was essential to revise and supplement the fundamental charters of humanity in the light of recent experience. The ICRC, therefore, took up the challenge, following the method it had already used, which consisted in gathering a vast amount of material and then drawing up Draft Rules with the aid of international experts.[1] The Geneva Conventions marked a major advance in the development of humanitarian law. After decolonisation, however, the new States found it difficult to be bound by a set of rules that they themselves had not helped to prepare. What is more, the treaty rules on the conduct of hostilities had not evolved since the Hague Treaties of 1907. Since revising the Geneva Convention might have jeopardized some of the advances made in 1949, however, it was decided to strengthen protection for the victims of armed conflict adopting new texts in the form of Protocols additional to the Geneva Conventions. The Geneva Conventions of 1949 and their Additional Protocols of 1977 contain almost 600 articles and are the main instruments of international humanitarian law.[2] Now we come to the third phase of the historical development of international humanitarian law.

The Third Phase (1952-77)

The second phase discussed above has shown that international humanitarian law has passed through various stages. We have seen that in the second phase, lot many developments took place in the arena of international humanitarian law.

The ICRC convened a Commission of Experts, consisting of fifteen persons, which met at Geneva from 6-13 April 1954. The experts confirmed that certain basic principles of war established before aviation existed, such as those prohibiting direct attack on non-combatants or the causing of unnecessary harm, were still in force. They agreed that a code of rules for aerial warfare was most needed. They also recognized that military necessities must in certain cases give way to those of humanity. Finally, they agreed that attempts to produce a code of rules would be all the more effective if states would agree to renounce the use of weapons of mass destruction.[3] Draft Rules prepared by ICRC were presented at the International Red Cross Conference in New Delhi in 1956. Next year that is in 1957, the Nineteenth Conference of the Red Cross adopted the Draft Rules for the protection of civilians during war.[4]

1. J. Pictet (1975), p. 117.
2. "Historical Perspectives on Humanitarian Assistance." (1956), p. 13.
3. Joseph L. Kunz (1956): "The Laws of War." In: *The American Journal of International Law*, Vol. 50, pp. 313-37 (324).
4. Gurdip Singh (1996), p. 241.

The Resolution XXVIII of the XXth International Conference of the Red Cross meeting in Vienna in the year 1965 proclaimed the "fundamental principles upon which Red Cross action is based." These basic principles include: humanity, impartiality, neutrality, independence, voluntary service, unity and universality. Since that time, at every Conference, the representatives of the Red Cross world rise to their feet to hear the solemn reading of those principles. These fundamental principles will be discussed in details in the Chapter five of the Dissertation.

In 1968, the Human Rights Year, twenty years after the birth of United Nations, it found active interest being taken in the law of armed conflicts and at the Tehran Conference diverse aspects of human rights in such situations figured in the discussions. The Tehran Principles gave better protection to civilians, prisoners of war, and upheld the prohibition of chemical warfare.[1] Evidence of the modern efforts to make land warfare more humane is to be found in a 1968 resolution of the General Assembly of the United Nations that stated in part as follows:

Affirms Resolution XXVII of the XXth International Conference of the Red Cross held at Vienna in 1965, which laid down, *inter alia*, the following principle for observance by all governmental and other authorities responsible for action in armed conflict:

(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

(b) That it is prohibited to launch attacks against the civilian population as such;

(c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

Invites the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study:

(a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;

(b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare (....)[2]

1. V.R. Krishna Iyer (1999), p. 93.

2. Howard S. Levie (2000), p. 344.

After one year, the Istanbul Declaration of Twenty First International Conference of the Red Cross was held in 1969 that announced "the universally recognized general principles of law demand that the rule of law be effectively guaranteed every where."[1] Resolution 2444 of the United Nations General Assembly in 1969 prohibits indiscriminate warfare, which may endanger protection of civilian population during war. This was followed by Resolution 2675 in 1970 laying down the basic principles regarding protection of civilians in armed conflict.[2]

On 10 April 1972, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction was opened for signature. It entered into force on 26 March 1975. The Convention prohibits the development, production, stockpiling or acquisition by other means, or retention of microbial or other biological agents or toxins, as well as of weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.[3] In 1974, at Geneva, a Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflict was convened which resulted in the adoption in 1977 of the two Additional Protocols to the Geneva Conventions of 1949, Protocol I for the protection of victims of international armed conflict and Protocol II for the protection of victims of internal armed conflicts.[4] At the Diplomatic Conference in Geneva, the demand regarding the right to war was made anew in favour of 'freedom fighters' struggling for decolonisation. This development was bound to cause new and extensive discussions.[5] This Conference was convened to fill in the lacunae, which had been found to exist in the 1849 Geneva Conventions. So, difficult was it to obtain strong support for various provisions that it was not until 1977 that the conference reached agreement on a Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), as well as a Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted on 8 June 1977.

1. Nilendra Singh (1996) "International Humanitarian Law: Perspectives and Challenges in the 21st Century." In: *Report of Seminar on International Humanitarian Law: Its Significance and Importance in the Modern World,* (28-28 August) organised by the ICRC and Indian Society of International Law, pp. 227-35 (228).
2. Gurdip Singh (1996), p. 241.
3. Jozef Goldblat (1997): "Biological Weapons Convention: An Overview." In: *International Review of the Red Cross,* No. 318 (May-June), pp. 251-65 (253).
4. Gurdip Singh (1996), p. 118.
5. Jean S. Pictet (1985): "New Aspects of International Humanitarian Law." In: *International Review of the Red Cross,* No. 244 (January-February 1985), pp. 399-406 (406).

In the year 1975, the United Nations General Assembly adopted two Resolutions, one on 11 December and the other on 16 December 1975 regarding the proposals and suggestions regarding the incendiary weapons including small-calibre projectiles, certain blast and fragmentation weapons, as well as some delayed action weapons and perfidious weapons.[1] They also stressed the need to continue discussion and for supplementary data to enable governments to reach further conclusions and to seek broad agreement. Next year in 1976, the United Nations passed two Resolutions on the Development of International Humanitarian Law, one on 24 November and the other on 10 December 1976. Resolution A 31/9 on Respect of Human Rights in Armed Conflict urged all participants in the Diplomatic Conference to do their utmost to reach agreement on additional rules which may help to alleviate the suffering brought about by armed conflicts and to respect and protect non-combatants and civilian objects in such conflicts, and to bring the Conference during its final session in 1977 to a successful conclusion.[2] Second Resolution A 31/64 was concerning the Incendiary and other Specific Conventional Weapons, which may be the subject of prohibitions or restrictions of use of humanitarian reasons.[3] In 1977, the United Nations Resolution on the Development of International Humanitarian Law on 19 November, at its thirty-second session was adopted. The Resolution reaffirmed the need to secure the full observance of human rights in armed conflicts pending the earliest possible termination of such conflicts. It also calls upon all the States to take effective steps for the dissemination of humanitarian rules applicable in armed conflicts.[4]

Although the post-1945 settlement of the four 1949 Geneva Conventions represents the current primary statement of international humanitarian law, the law, naturally, continues to develop in the light of changing circumstances, as the perceived need for the 1977 Additional Protocols demonstrated.[5]

Conclusion

In conclusion, we may say that the world of today is characterized by a more rigid mentality and by decadence in international morality. Struggles

1. "Two United Nations Resolutions on the Development of International Humanitarian Law." In: *International Review of the Red Cross* (January 1976), pp. 46-47.
2. "Two United Nations Resolutions on the Development of International Humanitarian Law." In: *International Review of the Red Cross* (February 1977), pp. 88-91 (89).
3. For Further details see: "Two United Nations Resolutions on the Development of International Humanitarian Law." In: *International Review of the Red Cross* (February 1977), pp. 88-91.
4. "United Nations Resolutions on the Development of International Humanitarian Law." In: *International Review of the Red Cross* (December 1977), pp. 548-49.
5. Hilaire McCoubrey (2000), p. 19.

are waged with hatred and fanaticism; the more passion enters into conflicts, the less is the rule of law applied. A frightful escalation of violence is developing. Acts of terrorism, committed against innocent persons, which are nothing but crimes, are labeled acts of war by some. And even in time of peace, it may happen that citizens who oppose a political regime are treated worse than captured enemy soldiers, are summarily detained, and are at times tortured or executed without trial. Finally, developments in nuclear physics have completely revolutionized military considerations. Scientists are dispassionately studying the means of destroying whole cities in one single blow, just by pressing a button. In which direction will the fateful pendulum's swing take it? Shall the world make the rule of law predominate, or will our civilization destroy itself? That is the dilemma before us. It is for us to decide.

The future of the right to war and also of the law of war, periodically challenged, is dependent on a natural law transcending political claims, which are unceasingly multiplied and wild, and which ignore the individual obligations that are a necessary counterpart to the rights demanded. It is not enough to acclaim and proclaim human rights to justify granting them without thought of requital. International law and order is here the necessary yardstick with which the claims for rights and the boundaries for such demands may be measured.[1] In understanding the difficulties of present time and in anticipating the continuing development of international humanitarian law in the context of modern armed conflicts the past development of the *jus in bello* and its relationship with the *jus ad bellum* is vitally important. It can be said that past patterns of development afford useful evidence of both a cautionary and an exemplary nature, and this may be of especial use in an area of law in which permissible latitude for ill-judged experimentation is even less than is commonly the case. Experience from 1864 onwards demonstrates that clearly stated provisions is far more valuable than worthy aspiration and if this is forgotten the very difficult role of international humanitarian law could become impossible to perform, at a great price in human suffering. If this is remembered then one may hope that progress may continue to be made and the calamities of armed conflict, while it occurs, may be reduced so far as may be possible.[2]

Thus, it is clear from the above discussion that international humanitarian law has developed through various ages and stages. It is worth mentioning the fact that India has been a major contributor to the development of humanitarian law as far as history of the law is concerned.

---

1. J.S. Pictet (1985), p. 406.
2. Hilaire McCoubrey (2000), pp. 19-20.

GENDER EQUALITY – THE VISHAKA CASE AND ONWARDS

Sumit Basu*

In 1997, Vishaka, a social worker associated with a non-governmental organisation, was gang-raped in a village in Rajasthan. This incident, though horrifying, would, rather than provoke an indignant nation out of its reticence, have been in ordinary circumstances relegated to insignificance after an all-too-brief passage through the portals of the media by a nation calloused and lulled into senselessness by a daily barrage of reportage on heinous crimes perpetrated against women.

Mercifully, the case involving the hapless Vishaka, instead of being allowed to be buried among the columns of the trivia that passes for daily news, galvanized a certain section of society into angry action and became, in time and through a logical series of events, the cornerstone of an activism by the Judiciary perhaps unprecedented in the recent annals of law relating to this particular genre of crime.

While criminal proceedings were initiated to bring the perpetrators to justice, a group of determined and spirited citizens filed a Public Interest Litigation petition under Article 32 of the Constitution. The Supreme Court, sickened by the sullen inactivity of the system in matters of atrocities perpetrated against women, and the indifference and hostility which is more often than not the reaction to crimes of this nature, took upon itself to articulate an effective policy to counter a trend which had, through callousness, indifference, societal attitudes and a general feeling of helplessness against a male-dominated system, become a depressingly mundane everyday occurrence.

The case heard in the Supreme Court was later titled *Vishaka* v. *State of Rajasthan*. The Bench of the Supreme Court hearing the matter was constituted of Chief Justice J.S. Verma and Justices Sujata v. Manohar and B.N. Kirpal. The Writ Petition was filed for the enforcement of fundamental rights of working women under Articles 14, 19 and 21 of the Constitution "In view of the prevailing climate in which the violation of these rights is not

* Advocate and Visiting Faculty Amity Law School, New Delhi.

uncommon". Thus, from the very outset, the right of equality and equal protection under the law, the various fundamental rights as espoused under Article 19, and the right to life and personal liberty were invoked and set the framework for the debate.

The petition was brought as a class action by social activists and non-governmental organisations with a view to evolving the law in tune with the increasing awareness and emphasis on gender justice and to create a true concept of gender equality. In its narrow sense, responding to the urgent need for formulation of a policy to counter the scourge of sexual harassment at the workplace, the debate was widened, as it was also sought to evolve a system by which to prevent sexual harassment of working women in all work places and, indeed, in all levels of life, through the judicial process and to fill the vacuum in existing jurisprudence.

The Bench proceeded to bring the full force and stature of the Constitution to bear in the matter, in a manner which is nothing short of visionary, and expanded the debate to include all aspects of human rights and fundamental rights. It invoked Article 15, which emphasizes that "the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them". Article 42 specifically provides that, "the State shall make provision for securing just and humane conditions of work and for maternity relief". Article 51 A rounds off the debate, providing as it does for "Fundamental Duties" and, specifically, under Article 51 A(e) that it shall be the duty of every citizen of India "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; *to renounce practices derogatory to women*".

Not willing to be bound by any specific parameters in which to anchor the debate, the internationality of our Constitution was brought to the fore by the Bench. Article 51, dealing with promotion of internal peace and security, placed squarely the responsibility of doing so on the State. Article 253 speaks of legislation for giving effect to international agreements, and states that "Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries of any decision made at any international conference, association or other body". The Constitution mandates the Union of India to enter into and give effect to the provisions of international agreements. Prominent among these conventions are the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Beijing Statement of Principles.

It was stated by the Bench that "in the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human

dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein". Any international convention not inconsistent with fundamental rights could be read into these provisions to enlarge the meaning and content and to "promote the object of the constitutional guarantee".

Thus, the core of the principled stand taken by the Supreme Court was that "gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right". The Court went on to declare that "the common minimum requirement of this right has received global acceptance".

Conscious of the significance of the case, in the spirit of close co-operation, the Bench, ably supported by the Solicitor General, the Bar Association and prominent counsel, formulated a policy in the course of the hearings appointed in the matter.

The guidelines formulated by the Supreme Court are comprehensive, taking into account a variety of situations and perspectives. The term "sexual harassment" has been defined by example, and runs the gamut from "physical contact and advances" to "any other unwelcome physical, verbal or non-verbal conduct of sexual nature".

Sexual harassment will have been deemed to have been perpetrated in a situation where the victim has a reasonable apprehension that in relation to the victim's employment or work, wherever the victim may work or be in employment, "such conduct can be humiliating and may constitute a health and safety problem". Also, it is discriminatory in a situation "when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work environment".

The guidelines emphasize upon the duty of the employer or other responsible persons in work places and other institutions. The Supreme Court has mandated that "it shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required". A very heavy responsibility indeed.

Employers have been given the additional responsibility of drawing up policies, regulations and rules to prevent incidents of sexual harassment. Hand in hand with the more public advertisement in the place of work of the evils of sexual harassment must go a complaints mechanism, supervised by executive committees which must be empowered to mete out disciplinary action if the situation so warrants. Extreme care must be taken, however, that the policy does not become an instrument of arbitrary action for *mala fide* purposes but, rather, must establish a reputation of a forum for participation by all employees for the purpose of airing justified grievances.

The only perceived lacuna in the bold judgment of the Supreme Court is that notwithstanding the categorical tenor employed by the Bench, the decision is not binding in the absence of legislation. However, the message is clear, and a topic which has, for too long, been relegated to the background has been placed centre-stage.

In the wake of the revolutionary judgment of the Supreme Court, a number of companies and commercial bodies have formulated their respective policies. They have been generically referred to as "Gender Policies". The value of a gender policy is that it advertises, for all employees to see, the values the company places in the creation and sustenance of a work environment which encourages gender equity, respect and dignity and equal opportunities of positive growth for all.

The Vishaka judgment was formulated specifically in light of the staggering number of atrocities which are perpetrated against women in all parts of the country literally on a daily basis. It is only natural that going by past and well-documented experience, and by the very nature of the crime, that the expression "sexual harassment" should conjure up an image of the ruthless male menacing the hapless female.

However, in some situations, we have seen the further evolution of the policy into what is known as a "Gender Neutral Policy". This envisages a situation, much as that which exists in an established corporate with diversified business interests, wherein the substantial workforce consists of a men and women in approximately equal numbers or even where women outnumber men in the workforce, a phenomenon which will become more common in future. The concept of sexual harassment in the workplace is evolving by sheer numbers and composition, and is playing a significant role in how employers view their employees with each passing day.

The Vishaka case was the first bold step made in an attempt to drastically alter a traditional mindset of the role of women *vis a vis* her professional life. Although unable to derive any benefit from legislation, the moral force behind the categorical pronouncements of the Judges of the Supreme Court nevertheless has provoked all right-thinking employers to evolve, in the first instance, a policy strictly in conformity with the requirements of the Vishaka case and, as a next step, a policy which respects the life and dignity of every employee working under its roof. Notwithstanding that specific legislation is still awaited, the assault on a social activist has injected life into a concept which was in danger of becoming moribund in perpetuity.

What a slur on the nation that it required brutality against a woman to evolve a policy against gender discrimination, a policy which should have been as sacrosanct as any of the founding principles of the Republic.

DUAL CITIZENSHIP FOR THE INDIAN DIASPORA: AN APPRAISAL

Siddhartha K Wagav*

Migration of people across the globe is an inseparable part of human history. Indian emigration has been taking place for centuries but never before in history, India witnessed such massive movements of people from India to other parts of the world as in the 19th and 20th centuries. Among the immigrants of diverse nationalities, overseas Indians constitute a sizeable segment. In terms of sheer numbers, they make the third largest group, next only to the British and the Chinese. The people of Indian origin constitute more than 40% of the population in Fiji, Mauritius, Trinidad, Guyana and Suriname. They are smaller minorities in Malaysia, South Africa, Sri Lanka, Uganda, UK, USA and Canada.[1] This Indian Diaspora is so vast and wide-spread that sun never sets on the Indian Diaspora.[2] The Indian Diaspora stretches across the entire nook and corner of the globe, where their industry, economic strength, educational standards and professional skills are widely acknowledged. Wherever they are, they have earned a good name for their mother country india with their hard work, talent and of course their loyalty to the country that they are citizens of. They have contributed to the economic prosperity and cultural heritage of their host countries. Their contribution and achievement have been of a very high order. Ascending the ladder of success, initially working mostly at the lower rungs of the economic ladder in their host countries, they have rapidly climbed up. It is a matter of great pride that many Indians are now heading large banks, airlines, consultancy firms and of course, information technology companies abroad besides being the core professionals like doctors, engineers and architects. They are among the richest in many

* Assistant Professor, Amity Institute of Advanced Legal Studies, New Delhi.

1. "The Indian Diaspora- some facts" *World Focus*, March 2001, p. 22.
2. L.M. Singhvi, "Sun never sets on Indian Diaspora"- statement to press on 15-9-2000, *World Focus*, March 2001, p. 18.

countries and as they become more and more prosperous, they are naturally looking to India as an attractive place for investment and doing business.[1] The protection of the life and well being of these large numbers of Indian nationals and settlers who have business and other interests in these countries is one of the vital concerns of India's foreign policy.[2]

The Indian Diaspora's contribution are not merely confined to the culture and economy of their adopted countries. Living abroad they have made deep impressions on the political processes of their adopted countries. The active participation of people from India in the nationalist movement in Africa as early as the beginning of the 20th century is well documented. Mahatma Gandhi's baptism in mass politics was in South Africa. His joining the struggle against racial injustice and discrimination was an event that proved to be a turning point in history not only in South Africa but also in India.

India's struggle for independence was greatly strengthened by the substantial support of overseas Indian communities. The India League in the UK and the Gadar party in the USA played an important role in mobilizing support for our struggle for independence. Netaji Subhash Chandra Bose and his INA received the unstinting support of Indians living in South East Asian countries. Since then, the Indian community living abroad has come to play a determining role in the politics of their adopted countries, not only as leaders of the Indian Diaspora, but also as leaders in the truest sense of the term.[3]

Ever since India achieved independence, there has been a persistent demand from the Indian community especially in North America and some other advanced countries, like Australia, New Zealand, Singapore for the grant of dual citizenship.[4] Living in different countries, speaking different languages and engaged in different vocation, what gives them their common identity are their Indian origin, their consciousness of their cultural heritage and their deep attachment to India. The demand for dual citizenship stems from the practical convenience and advantages of the citizenship of the country where they have made their home, on the one hand, and their desire to maintain a strong linkages with their country of origin as well as their desire to forge emotional and cultural bonds of their future generations with India, on the other.[5] These overseas Indians have been returning to seek their roots and explore new avenues and sectors for mutually beneficial

1. Surinder Kumar Singh, 'Recognizing Indian Diaspora's Contribution' *The Tribune*, and *World Focus*, March 2001, p. 14.

2. *The Report of the High Level Committee on the Indian Diaspora*, December 2001.

3. 'PM inaugurates International Convention of GOPIO (Global Organization of People of Indian Origin)' *World Focus*, March, 2001, p. 20.

4. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 510.

interaction from investment, transfer of skill and technology and charitable works. Nay, it is believed that this measure would also facilitate the contribution of the Diaspora to India's social, economic and technological transformation and national development as the PIO's settled in the economically more advanced countries of the world have skills and expertise in vital sectors including information technology, biotechnology, space, financial services, infrastructure, education and health care and management consultancy.[1] Though they have adopted western customs and manners, still their urge for maintaining the Indian identity is very much pronounced. They have built a number of temples in USA, Canada, UK and other countries which also serve as the venue for social get-togethers. They have contributed to the various schemes and projects launched by the Government of India to attract foreign capital. Their love and admiration for India has not diminished.[2] So much so, the liberalization of the Indian economy and efforts made by the Indian Government to attract investments from Indians living abroad have given encouragement to sections of the Indian community in Western countries to demand that New Delhi introduce "dual citizenship".[3]

Every independent nation makes its own decision as to who its citizens will be. A person possesses dual or multiple citizenship when more than one country recognizes him as its citizen.

Citizenship is a complex matter because of the great variety of citizenship laws throughout the world. Some countries allow dual citizenship. Some take away the citizenship of a person who acquires another citizenship. Some do not recognize that person's new citizenship. Some allow a wife to retain her citizenship and acquire that of her husband, while others give her the husband's citizenship and no longer recognize the citizenship she had before her marriage. Some countries give a child the citizenship of the father, or of the mother, or of either or of both and so on.

Dual citizenship may carry with it certain benefits, but it may involve a person in unexpected difficulties- legal proceedings, taxation and financial responsibilities, military service, denial of emigration, even imprisonment for failure to comply with obligations in one of the countries of his citizenship. Legally citizenship of any country is acquired as a birth right, blood right, by marriage and bestowment by legal acquisition. As the world goes smaller by virtue of spectacular communications and technological developments, people move around more than ever before. In doing so and prompted by financial, educational, political and social forces, many find themselves in need of either opting for a new citizenship or even dual citizenship wherever applicable.

1 *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 510.

2. Baleshwar Agrawal, 'Indian Diaspora', *World Focus*, March 2001, p. 3.

3. V. Suryanarayan, 'Indian Communities Abroad', *World Focus*, March 2001, p. 13.

To some people, dual citizenship offers practical advantages *e.g.* in social security or employment. It may also enhance their feeling of belonging, because they have strong personal ties to more than one country.

However, it is important to realize that there can be hazards and disadvantages as well. Possession of a second passport could result in its being confiscated or even result in a fine. There may be laws in a country which may not apply on a foreign traveller but may be applied on a person as a citizen such as—there may be a restriction on exit, there may even be a military service which could be involved, special taxes or financial compensation for past services received, including educational costs etc.

Irrespective of the disadvantages attached to dual citizenship, there has been a sea change in the terms of the growing acceptance of dual citizenship. As of 1999, more than 70 countries permitted dual citizenship by allowing their citizens to retain or regain citizenship after being naturalized in another country. Many more foreign countries are putting out the welcome mat for various reasons. Dozens of countries have smoothened the way for people with or without ancestral ties, to have their feet firmly planted in two or more lands. In many countries, citizenship can be passed on to the children.

United States has long been a beacon of welcome for immigrants. In the last five years alone nearly four million foreigners became American citizens, but an inverse trend is also taking hold. A growing number of Americans, either born in America or naturalized citizens are taking advantage of more liberal policies in other countries and in the United States to become dual citizens. The Congress of the United States is vested with the authority to enact legislation concerning United States' nationality, and to set criteria for acquisition or loss of United States citizenship. The United States has steadily relaxed its policies over the last two decades and thanks to the 1967 Supreme Court ruling in *Afroyim* v. *Rusk*, 387 US 253 (1967) whereby the United States Supreme Court held that Congress does not have the power under the Constitution to take away a citizen's citizenship without his or her assent. It could not strip away an American citizenship because of a person's attachments to another nation. Again in *Vance* v. *Terrazas*, 444 US 252 (1980) the Supreme Court held that to establish loss of citizenship, the Government must prove the person not only voluntarily performed the expatriating act but intended to relinquish citizenship. It added that the intent may be shown by the person's words or proven conduct. It was hereafter that the Congress amended section 349 in 1986 to require that loss of citizenship would result only when a potentially "expatriating" (citizenship-losing) action was performed voluntarily and "with the intention of relinquishing US nationality." On April 16, 1990, the State Department adopted a new policy on dual citizenship, under which US citizens who perform a potentially expatriating act are normally presumed not to have done so with the intent to give up US citizenship. Assuming a

child may have lost US citizenship through the performance of the acts prescribed under sub-sections (3) and (5) of section 349 of the INA, he/ she is entitled to a claim to United States nationality within six months after attaining eighteen years[1] [INA section 351 (b)].

Generally Americans become eligible for citizenship in another country in one of two ways: by a direct bloodline (called *jus sanguine* in Latin or right of blood) for those with a parent or grandparent who was born in the second country or through naturalization for others including those who marry nationals. Many American citizens whose parents or grandparents were immigrants are finding that they may be eligible for citizenship in their ancestral homelands. In some countries like Ireland, simply having a parent or grandparent who was born in the country may be enough. But elsewhere the rules are often much more complicated.[2] Indian Americans who seek dual citizenship can begin the application process immediately for the Indian passports. But this dual citizenship to these seekers will not come free. Indian consulates will be in charge of verification of applications. The passport ideally would make it smoother for Indians overseas to deal with immigration, custom, banking procedures and other areas. Speaking to the India West, Sh. S. Krishna Kumar, Secretary in India's new Ministry of Overseas Indian Affairs, said the forms are available at the Ministry of Home Affairs' Web site.[3]

In United Kingdom, with the enactment of the new nationality law (British Nationality Act, 1981) which came into effect on 1 January, 1983 the provisions for the recognition of dual nationality and the procedure for renunciation of British citizenship have been retained. Thus the law in UK no longer visits voluntary acquisition of another citizenship with the loss of local status. The present law of UK favours plural citizenship.[4]

A British citizen may return and resume residence in Britain at any time, regardless of being a dual national, provided that he has not made a formal declaration of renunciation of British citizenship. British citizens who are also citizens of another country cannot be accorded official British protection when they are in the territory of the other citizenship. If, under the law of that country, they are liable for any obligation (such as military service) the fact that they are also British citizens does not exempt them from it.

1. Cyrus D Mehta,"Dual citizenship for children born in the US to Indian parents', *Immigration Post*, October 15, 2004, p. 44.
2. Amy Cortese, 'As rules ease, more citizens choose to fly 2 flags', *The New York Times*, Sunday, July 15, 2001, p. 10.
3. Richard Springer, 'Dual Citizenship Now Open: Official', *India west*, Oct. 29, 2004, p. A1 (A24).
4. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 520.

Even the French amended the Civil Code in 1973 to liberalize the citizenship laws to permit dual nationality and to prevent the automatic loss of nationality on acquisition of another nationality.[1]

Unlike the Citizenship Act in effect in Canada until 1977, the present Act allows a Canadian citizen to acquire foreign citizenship without automatically losing Canadian citizenship. Since February 15, 1977, a Canadian citizen may retain Canadian citizenship, unless he or she voluntarily applies to renounce it and the application is approved by a citizenship judge. The present Act, thus, makes it possible to have two or more citizenships and allegiances at the same time for an indefinite period.

The laws of Italy provide that an Italian citizen who acquires or regains or chooses a foreign citizenship shall keep the Italian one. Nevertheless he may renounce the Italian citizenship if he resides or settles down abroad. But an Italian citizen, in case he acquires or regains or chooses foreign citizenship, must communicate it by statement to the registrar of the place of residence or if he resides abroad, to the entitled consular authority, within three months from the acquisition, recovering or option, or from the achievement of full age, if it is subsequent.

Finland got a new citizenship Law on 1 June, 2003. The most important change is that dual (multiple) citizenship is now acceptable. Finnish citizens will no longer lose their Finnish citizenship when they assume another citizenship. Similarly foreign nationals who are granted Finnish citizenship will not need to give up their present citizenship. However, it is important to note here that it is a requirement under Finnish Laws that, laws in both Finland and the other State in question must permit dual (multiple) citizenship the acquisition of a second citizenship. Finnish citizens may retain their Finnish citizenship if the State whose citizenship they apply for permits that. In the same way, foreign citizens who are granted Finnish citizenship may retain their present citizenship if that State allows it.

The Australian legislature also joined the league of comparative nations like Canada, New Zealand, USA, Italy, France, UK and others in allowing its citizens to pursue dual citizenship. Australia repealed sections 17 of the Australian Citizenship Act, 1948. The new law allows Australians to acquire another citizenship without sacrificing the Australian citizenship. The law recognizes that Australians will always be Australians irrespective of how many foreign citizenships they will acquire in their international journey.

In India, provision for citizenship are made in Part II (Articles 5 to 11) of the Constitution. Part II of the Constitution, *i.e.* Articles 5 to 9 determine as to who are the Citizens of India at the commencement of the constitution. The provisions in Part II of the Constitution were enacted to meet the immediate requirements in deciding who will be Indian citizens at the

1. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 521.

commencement of the Constitution and the enactment of a permanent citizenship law was left to the Parliament.

Article 5 is the primary provision and under it, a person who was, on 26th January, 1950, domiciled in India, and—

(1) was born in the territory of India,

(2) either of whose parents was born in the territory of India, or

(3) who had been ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the Constitution became a citizen of India.[1]

Article 6 is a special provision for persons who have migrated to India from Pakistan as a result of the political changes that have taken place following partition of the country. It deals with, as Supreme Court has remarked in *Shamsu Devi* v. *Mangal Sain*, AIR 1961 SC 58, 'secondary citizenship'. Under this Article, a person who has migrated to India from the territory now included in Pakistan shall be deemed to be a citizen of India provided that (a) he or either his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (b) if he had migrated before the 19th July, 1948 had been ordinarily resident in the territory of India since the date of his migration or in the case where such person had migrated on or after the 19th July 1948 he had been registered as a citizen of India by an officer appointed in that behalf by the Government of India on an application made by him for the purpose, after being resident in the territory of India for six months immediately preceding the date of his application.[2]

Article 7 expressly provides that "notwithstanding anything contained in articles 5 and 6 a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not deemed to be a citizen of India."[2]

Article 8 is another special provision governing certain persons of Indian origin who are ordinarily resident outside undivided India and who are not covered by the provisions of Article 5 of the Constitution. Under this article, a person who or either of whose parents or any of those grand-parents was born in India as defined in the Government of India Act, 1935 *i.e.* undivided India and who had been ordinarily residing in a country outside undivided India could become an Indian Citizen if he had got himself registered as a citizen of India on an application made for this purpose to the Consular representative of India in the country of his residence.[3]

1. P.M. Bakshi, *The Constitution of India*, 3rd. ed., 1997, p. 8.

2. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 518.

3. V.N. Shukla, *Constitution of India* , Ninth ed., 1994.

Article 9 enacts that a person who has voluntarily acquired the Citizenship of a foreign state shall not be a citizen of India by virtue of articles 5, 6 or 8. Foreign State means any state other than India [Article 367(3)]. Article 9 does not deal with the loss of Indian citizenship or acquisition of citizenship of foreign states at any time after the commencement of the Constitution. The effect of voluntary acquisition of a foreign citizenship after the 26th January, 1950 is provided for in a section of the Citizenship Act, 1955.[1]

Under Article 10, a person who became an Indian citizen under any of the provisions of the Constitution continues to be such a citizen subject to any law that may be made by Parliament. Article 11 constitutes an overriding exception to the other provisions of Part II of the constitution. It provides unequivocally and unreservedly that, "none of the provisions in Part II of the Constitution shall derogate from the power of Parliament to make any provisions with respect to the acquisition or termination of the citizenship and all other matters relating to the citizenship". Article 11 thus confers a flexible and plenary power on the Parliament to enact any law or provision with respect to acquisition or termination of the citizenship and all other matters relating to citizenship.[2]

As the Constitution did not make any provision with respect to the acquisition of citizenship, or termination of citizenship after its coming into force that is, 26 January, 1950 it conferred power on Parliament under Article 11 of the Constitution to make laws with respect to acquisition and termination of citizenship in order to fill this vacuum in the Constitution. Exercising this power under Article 11 of the Constitution, the Parliament enacted the Citizenship Act, 1955 which came into operation on 30th December,1955. This Act provides not only for the acquisition of Citizenship but also for the deprivation, termination and renunciation of Indian citizenship and other matters incidental thereto after the coming into force of the Constitution.[3]

Under the Citizenship Act, 1955 there are five modes of acquiring Indian citizenship. They are:

Section 3: Citizenship by birth. The section says, except as provided by section 2, every person born in India—

(a) on or after the 26th day of January, 1950 but before the commencement of the Citizenship (Amendment) Act, 1986,

(b) on or after such commencement and either of whose parents is a citizen of India at the time of his birth, shall be citizen of India by birth.

1. V.N. Shukla, *Constitution of India* , Ninth ed., 1994.

2. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 519.

The section further says that, A person shall not be such a citizen by virtue of this section if at the time of his birth—

(a) his father possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and is not a citizen of India, or

(b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy.[1]

Section 4: Citizenship by descent. The section says, (1) a person born outside India—

(a) on or after the 26th January, 1950 but before he commencement of the Citizenship Amendment Act, 1992, shall be a citizen of India by descent if his father is a citizen of India at the time of his birth, or

(b) on or after such commencement shall be citizen of India by descent if either of his parents is a citizen of India at the time of his birth:

Provided that, if the father of such a person, referred to in clause (a), was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless--

(a) his birth is registered at an Indian consulate within one year of its occurrence or the commencement of this Act, whichever is later, or, with the permission of the Central Government after the expiry of the said period; or

(b) his father is, at the time of his birth, in service under a Government in India: provided further that if either of the parents of such a person referred to in clause (b) was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless—

(i) his birth is registered at an Indian consulate within one year of its occurrence or the commencement of the Citizenship Amendment Act, 1992, whichever is later, or, with the permission of the Central Government, after the expiry of the said period, or

(ii) either of his parents is at the time of his birth, in service under a Government in India.

The section further says, (2) If the Central Government so directs, a birth shall be deemed for the purpose of this section to have been registered with its permission, notwithstanding that its permission was not obtained before the registration. To continue further, (3) the section says, for the purpose of the proviso to sub-section (1), any person born outside undivided

1. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 523.

India who was, or was deemed to be, a citizen of India at the commencement of the Constitution shall be deemed to be a citizen of India by descent only.'

Section 5: Citizenship by registration. The section says, (1) Subject to the provisions of this section and such conditions and restrictions as may be prescribed, the prescribed authority may, on application made in this behalf, register as a citizen of India any person who is not already such citizen by virtue of Constitution or by virtue of any of the other provisions of this Act and belongs to any of the following categories

(a) persons of Indian origin who are ordinarily resident in India and have been so resident for 5 years immediately before making an application for registration;

(b) persons of Indian origin who are ordinarily resident in any country or place outside undivided India;

(c) persons who are, or have been married to citizens of India and are ordinarily resident in India and have been so resident for five years immediately before making an application for registration;

(d) minor children of persons who are citizens of India; and

(e) persons of full age and capacity who are citizens of a country specified in the First Schedule; provided that in prescribing the conditions and restrictions subject to which person of any such country may be registered as citizens of India under this clause the Central Government shall have due regard to the conditions subject to which citizens of India may by law or practice of those country, become citizens of that country by registration.

Explanation.—For the purpose of this sub-section a person shall be deemed to be of Indian origin if he, or either of his parents was born in undivided India.

No person being of full age shall be registered as a citizen of India under sub-section (1) until he has taken the oath of allegiance in the form specified in the Second Schedule.

No person who has renounced or has been deprived of his Indian Citizenship, or whose Indian citizenship has terminated under this Act shall be registered as a citizen of India under sub-section(1) except by order of the Central Government.

The Central Government, may, if satisfied that there are special circumstances justifying such registration cause any minor to be registered as a citizen of India.

A person registered under this section shall be a citizen of India by registration as from date on which he is so registered, and a person

1. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 523.

registered under the provisions of clause (b) (ii) of Article 6 of the Constitution shall be deemed to be a citizen of India by registration as from the commencement of the Constitution or the date on which he was so registered, whichever may be later.

Section 6: Citizenship by naturalization—(1) Where an application is made in the prescribed manner by any person of full age and capacity who is not a citizen of a country specified in the First Schedule for the grant of a certificate of naturalization to him, the Central Government may, if satisfied that the applicant is qualified for naturalization under the provisions of the Third Schedule grant to him a certificate of naturalization:

Provided that, if in the opinion of the Central Government, the applicant is a person who has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress generally, it may waive all or any of the conditions specified in the Third Schedule.

(2) The person to whom a certificate of naturalization is granted under sub-section (1) shall, on taking the oath of allegiance in the form specified in the Second Schedule, be a citizen of India by naturalization as from the date on which that certificate is granted.

Section 7: Citizenship by incorporation of territory- If any territory becomes a part of India, the Central Government may, by order notified in the Official Gazette, specify the persons who shall be citizens of India by reason of their connection with that territory, and those persons shall be citizens of India as from the date to be specified in the order.

It is to be noted that section 12 of the Constitution is capable of conferring dual citizenship on the people of Indian origin abroad. It contains the seeds of dual citizenship within its orbit. It provides an indicative model on the basis of which a specific concept of dual citizenship can be elaborated. The section 12 reads as follows:

(1) The Central Government may by order notified in the official gazette, make provisions, on a basis of reciprocity for the conferment of all or any of the rights of a citizen of India on the citizens of any country specified in the First Schedule.

(2) An order made under sub-section(I) shall have effect notwithstanding anything inconsistent therewith contained In any law other than the Constitution of India or this Act.[1]

The frequent use of the term Diaspora, NRI's and PIO's calls for a semantic annotation of them. The term 'Diaspora', though of Greek origin, now is commonly used for communities of migrants living or settled

1. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, pp. 524-525.

permanently in other countries. They are aware of their origins, identity and maintaining varying degrees of linkages with the mother country. The committee has also used the term Diaspora to refer to Indians who migrated to different parts of the world and have maintained their Indian identity.

The term NRI or Non Resident Indians are to mean those Indian citizens holding Indian passports and residing for an indefinite period, whether for employment or for carrying on any business or vocation or for any other purpose.

On the other hand, PIO's or People of Indian Origin applies to the foreign citizen of Indian origin or descent, belonging to one of the three following categories:

(1) a person who has any time held Indian passport;

(2) one whose parents or grand parents or great grand parents were born in and permanently resided in India provided he /she was never a citizen of India;

(3) spouse of citizen of India or a person of Indian origin, covered in the above two classes.[1]

Thus, there are generally two distinct categories of overseas Indians—first, are POI's, who have acquired the citizenship of other countries. Their legal status is defined by the law of the country of which they are citizens. Under the Indian laws their status is that they have acquired the citizenship of another country and renounced that of India, and second, NRI's, who continue to hold Indian passports and are citizens of India. It is the Indian laws which appiy to them except in certain situations of conflict of laws of the countries in which they reside.[2] Most PIO's, except those in North-America, Europe, Australia, New Zealand and Singapore have not evinced any particular interest in dual citizenship. Those PIO's are more interested in the PIO's card.[3]

The history of the Indian Diaspora all began in November 1977, when a seminar was held at the India International Centre in New Delhi, in which the current (then) status and problems of Indian communities living overseas were considered. The then Minister of External Affairs (who happened to be our previous Prime Minister, Mr. Atal Bihari Vajpayee) in 1977 in his inaugural address said, "The subject of overseas Indians is one which is very dear to our hearts.....India will never disown them or fail to appreciate and respect their essential loyalty to the culture and heritage of the mother country".[1]

1. *The Report of the High Level Committee on the Indian Diaspora*, December 2001.

2. Girijesh Pant, 'Gulf NRI's: From Expatriates to Entrepreneurs', *World Focus*, March 2001, p. 11.

3. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 509.

Many seminars have been held since then, both in India and abroad on the same subject, but the Diaspora experience has not always been without problems and challenges.

As a step in the direction towards this end, a High Level Committee on Indian Diaspora was appointed under the Chairmanship of Dr. L.M. Singhvi in September 2000 by the Ministry of External Affairs, with the approval of the then Prime Minister Mr. Atal Bihari Vajapyee, to study the entire range of issues concerning the Indian communities living abroad and their expectations from India. The committee is to make recommendations relating to the grant of dual citizenship on the People of Indian Origin Abroad besides the prospects of trade and investment and other issues like education and cultural contacts. The committee will also study the role that people of Indian origin and non-resident Indians can play in the field of economic, social and technological progress of India. It will also recommend measures to resolve the problems faced by them when they visit India. The appointment of the High Level Committee on Indian Diaspora is considered as a historic step. Although this committee was required to submit its report to the government within a period of 180 days starting from 1 September 2000, the Government of India allowed the Committee additional time to do justice to the important task assigned to it.[1]

The High Level Committee identified broadly 3 distinct elements in the Indian Diaspora:

(1) Those who began their journey during the colonial period and in majority of cases, they were economically beleaguered labour force, during the colonial periods, seeking their livelihood in distant lands.

(2) This wave of migrants ventured out into the Gulf and other neighboring areas in recent past as professionals, artisans and factory workers.

(3) This wave consisted of professionals and the educated elite of India who sought better economic opportunities in the more advanced countries.[1]

Of these Indian Diaspora, are seen the emerging elected leaders, politicians, eminent professors and other professionals, managers and entrepreneurs in their adoptive homelands, who are also playing an important role in mobilizing support on vital issues concerning India, in their countries of domicile. It is because of their increasing economic strength, that the members of Indian Diaspora are well situated to play an eminent role in energizing and augmenting bilateral trade, investment, transfer of technology and tourism with those countries.

1. *The Report of the High Level Committee on the Indian Diaspora*, December 2001.

The High Level Committee on Indian Diaspora strongly recommended that the experience in the management, financial, corporate trade and banking sectors available in our Diaspora, should be tapped for the economic rejuvenation of India. The committee is of the opinion that it did not wish to advocate, dual citizenship only for Diaspora's investments and remittances, important though, they are for the country's development.

The demand for dual citizenship stems from the practical convenience and advantages of the citizenship of the country where they have made their home, on the one hand, and their desire to maintain a strong linkages with their country of origin as well as their desire to forge emotional and cultural bonds of their future generations with India, on the other. The committee is also of the opinion that the grant of dual citizenship will remove, for those who have taken foreign passports, obstacles in travel to and from India, promote investment in business ventures and foster a greater sense of belonging. Many NRI's would also like to take foreign nationality without losing their Indian citizenship. Under the existing Indian legislation, namely the Citizenship Act, 1955 and number of Judicial decisions, Indian citizenship is automatically forfeited when an Indian citizen acquires the passport of a foreign country. PIO's however, hold that it is simply for the functional reasons that they are forced to acquire foreign passports but that is not itself a reason to imply that they have renunciated their loyalty to India.[1]

The High Level Committee addressed the vexed issue of dual citizenship in considerable depth and detail including legal, constitutional and security aspects. According to it, the principal rationale of the demand of the Diaspora for dual citizenship, is sentimental and psychological, a consideration which is in the same measure as do the social, economic and political factors. So much so, with the grant of dual citizenship the links of the younger generation of the Diaspora with India will get cemented as they will be keen to be in touch with their elders in India as well as relate to their roots.[2]

There are many apprehensions attached to the issue of Dual Citizenship. The most frequent and forceful argument against dual citizenship is the argument including security implications. The entry and exit of persons to whom dual citizenship may be granted would become impossible to regulate under the Foreigners Act and may ultimately jeopardize the sensitive internal security scenario in the country.[3] However, the committee was not convinced that regulation of the entry and exit of any person would become difficult or impossible, if dual citizenship is

1. *The Report of the High Level Committee on the Indian Diaspora*, December 2001.
2. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 511.
3. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 526.

introduced. Even at present, the entry and exit of persons into India is insufficiently regulated and according to media reports, there are about millions of illegal migrants and entrants in India especially from neighboring countries some of whom might be security risks and the existing legislation including the Foreigners Act and the Illegal Migrants Act has not been able to deal with the problem effectively. The committee is of the considered opinion that a person of Indian origin living in the countries specified and to whom a proper document of dual citizenship would be granted would be subject to more effective regulation than the lakhs of visitors entering India without any visa or work permit. In fact a person travelling on a document of dual citizenship would be like any other visitor or a PIO card-holder or an Indian national returning to India.[1]

Security implications are minimal in case of dual citizens of Indian origin, because those who desire to have dual citizenship would have to make an application in the first place, they would have to make a full and faithful disclosure, they would be subject to scrutiny before dual citizenship is granted to them. Whenever they come and go, they will have to fill the form, they will be able to stay only for a period of one year at a time subject to appropriate exceptions in case of students and senior citizens.[2]

It is also erroneously assumed that induction of the persons having dual citizenship in the sensitive organizations and armed, paramilitary forces is implicit in the concept of dual citizenship. Not convinced with this argument, the committee clarified in its report that it is not the intention of the Government of India that persons having dual citizenship would have the right of employment in the civil services or in the defence services or for that matter in any sensitive organizations. Exceptions may, however, be made so far as any appointment is concerned by a special order of the Central Government. But at no cost national security will be undermined.[3]

The committee carefully considered the provisions of the Constitution and the Citizenship Act, 1955, as amended and is of the view that its provisions would have to be amended and can be constitutionally and legally amended to provided for the grant of dual citizenship to the members of the Indian Diaspora belonging to certain specified countries if they satisfy the conditions and criteria laid down in the legislation. The committee, however, did not recommend the automatic conferment of Dual citizenship. As one of the stipulations, it recommended that the electoral rights and the right to contest elections to elective bodies in India particularly if those rights have to be exercised outside India need not be extended to those who acquire dual citizenship.[3]

---

1. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 527.
2. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 528.
3. *The Report of the High Level Committee on the Indian Diaspora*, December 2001, p. 530

It was only after exhaustive study and examining in great depth the security consideration involved, the Committee recommended that dual citizenship should be permitted to foreign citizens of Indian descent settled in certain countries who satisfy the conditions and criteria laid down in the legislation to be enacted, for which amendment to the relevant provisions of the Citizenship Act, 1955 be carried out. However, for this, amendment of the constitution is not required. A framework and a legislative pattern are already in existence in the Citizenship Act waiting to be adapted.

In the light of these recommendations, the Dual Citizenship Bill was introduced in Rajya Sabha on May 8, 2003. The Bill, then, had listed eight countries where dual citizenship would be applicable. However, later the number of these countries in the Bill was raised to 16.[1] Participating in the debate, P.R. Dasmunshi (Cong.), P.H. Pandian (AIADMK) and Raghuvansh Prasad Singh (RJD) supported the bill and said the government should state as to how it would go about to make the intellectual and financial capabilities of the PIO's contribute towards India's development.[2] After an intense and a long debate in Parliament, the Dual Citizenship Bill was passed on December 22, 2003. The Bill got the assent of the President on January 7, 2004 where after it became the Citizenship Amendment Act, 2003 granting dual citizenship to the people of Indian Origin living abroad in selected 16 countries.[3]

On analyzing this Citizenship Amendment Act, 2003, we find that section 2 which pertains to the definition clause introduces two definitions in the Citizenship Act, 1955. First, as to who is "overseas citizen of India" under section 2(ii) (ee). It means a person who—

(1) is of Indian origin being a citizen of a specified country, or

(2) was a citizen of India immediately before becoming a citizen of a specified country, and is registered as an overseas citizen of India by the Central Government.

The second definition introduced is that of "specified country" in sub-clause (iii) (gg) which means a country specified in the Fourth Schedule.

Section 2 (i)(b) of the Amendment Act, 2003 defines "illegal migrants". It is a foreigner who has entered into India—

(1) without a valid passport or other travel documents, or

---

1. C.R. Jayachandran, 'Parliament passes Dual Citizenship Bill', *Times of India.com*, Monday, December 22, 2003.

2. 'Parliament passes Bill granting dual citizenship', Monday, December 22, 2003, p. 1 *(http://www.expressindia.com/fullstory)*.

3. 'Citizenship Amendment Act, 2003', p. 1, *The Gazette of India: Ministry of Law and*

(2) with a valid passport or other travel documents and such other document or authority as prescribed under law but remains beyond the permitted period of time.[1]

Section 7A, which is an important provision of the Amendment Act, 2003, describes that a person can be registered as an overseas citizen of India if he—

(1) is of Indian origin with citizenship of a specified country, or

(2) had obtained citizenship of a specified country on or after coming into force of this Act and immediately before the commencement of this Amendment Act was a citizen of India.

The section further provides that the person shall be a registered overseas citizen of India from the date on which he is so registered.

Explanation to section 7A deals with the term "person of Indian origin" to mean

- a citizen of another country eligible to become a citizen of India at commencement of Indian Constitution.
- a citizen belonging to a territory which became part of India after 15 August, 1947

children and grand children of a person under clauses (i) and (ii) subject to conditions mentioned therein.[2]

Section 7B deals with the rights of such overseas citizen of India as the Central Government may specify in this regard.

The section further categorically denies certain rights to an overseas citizen of India which are available to an Indian citizen.

(1) under article 16 of the Constitution with regard to equality of opportunity in matters of public employment

(2) under article 58 of the Constitution for the election of the President

(3) under article 66 of the Constitution for the election of Vice-President

(4) under article 124 of the Constitution for appointment as a Judge of the Supreme Court

(5) under article 217 of the Constitution for appointment as a Judge of the High Court

---

Justice (Legislative Department, New Delhi, 8 January, 2004/*Pausa*, 1925, *Saka*).

1. 'Citizenship Amendment Act, 2003', p. 2, *The Gazette of India: Ministry of Law and Justice (Legislative Department*, New Delhi, 8 January, 2004/*Pausa*, 1925, *Saka*).

(6) under section 16 of the Representation of the People Act, 1950 in regard to registration as a voter

(7) under sections 3 and 4 of the Representation of the People Act, 1951 with regard to the eligibility for being a member of the House of the People or of the Council of States

(8) under sections 5, 5A and 6 of the Representation of the People Act, 1951, with regard to the eligibility for being a member of the Legislative Assembly or a Legislative Council of a State

(9) for appointment to public services and posts in connection with the affairs of the Union or of any State except for appointment in such services and posts as the Central Government may by special order specify in this regard.

Every such notification issued under this section shall be laid before each House of Parliament.[2]

Section 7C of the Citizenship Amendment Act, 2003 talks about renunciation of overseas citizenship, *i.e.* if such a registered overseas citizen renounces his citizenship, upon registration of such renunciation by the Central Government he shall cease to be an overseas citizen of India.

Further, the section states that where the person ceases to be an overseas citizen of India, every minor child of that person registered as an overseas citizen of India, shall also cease to be an overseas citizen of India.[1]

Under section 7D of the Amendment Act, the Central Government has the power to cancel the registration granted to an overseas citizen of India, if it is satisfied that:

- registration as an overseas citizen of India was obtained by means of fraud, false representation or concealment of any material fact, or
- overseas citizen of India showed dissatisfaction towards Constitution of India, or
- overseas citizen of India has, during any war, unlawfully traded or communicated with an enemy with which India is at war or was associated or performed any business or commercial activity that was to his knowledge carried on to assist such enemy, or
- the overseas citizen of India was sentenced to a punishment not less than 2 years within 5 years of his registration as an overseas citizen, or
- it is necessary to do so in the interest of sovereignty and integrity of India,
- security of India,

2. 'Citizenship Amendment Act, 2003', pp. 4-5, *The Gazette of India: Ministry of Law and Justice (Legislative Department*, New Delhi, 8 January, 2004/*Pausa*, 1925, *Saka*)

- friendly relations of India with any foreign country or
- in the interests of general public.[1]

Section 13 of the Amendment Act provides that redressal against the order of the Central Government can be had within the 30 days time from the date of such order by the aggrieved party. It is also provided that Central Government may entertain an application after the expiry of 30 days, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time.[2]

Section 19 of the Citizenship Amendment Act, 2003 which spells out the Fourth Schedule has a list of 16 countries. It is only the PIOs living in these 16 specified countries which will be entitled for the dual citizenship subject to the qualifications set up by the Central Government. Following are the 16 countries enumerated in sectino 19 or the Fourth Schedule of the Citizenship Amendment Act, 2003

1. Australia.
2. Canada.
3. Finland.
4. France.
5. Greece
6. Ireland.
7. Israel.
8. Italy.
9. The Netherlands.
10. New Zealand.
11. Portugal.
12. Republic of Cyprus.
13. Sweden.
14. Switzerland.
15. United Kingdom.
16. United States of America.[3]

---

1. 'Citizenship Amendment Act, 2003', p. 5, *The Gazette of India: Ministry of Law and Justice (Legislative Department*, New Delhi, 8 January 2004/*Pausa*, 1925, *Saka*).

1. 'Citizenship Amendment Act, 2003', pp. 5-6, *The Gazette of India: Ministry of Law and Justice (Legislative Department*, New Delhi, 8 January, 2004/*Pausa*, 1925, *Saka*).

2. 'Citizenship Amendment Act, 2003', p. 6, *The Gazette of India: Ministry of Law and Justice (Legislative Department*, New Delhi, 8 January, 2004/*Pausa*, 1925, *Saka*).

3. 'Citizenship Amendment Act, 2003', p. 8, *The Gazette of India: Ministry of Law and Justice (Legislative Department*, New Delhi, 8 January, 2004/*Pausa*, 1925, *Saka*).

It was hereafter, as everybody is aware, that the 1st and 2nd *Pravasi Bharatiya Divas* (PBD) celebrations were held in New Delhi from 9-11 January, 2003 and 2004 respectively. Both the events were a huge success in developing mutually beneficial relationship with the Indian Diaspora. Maintaining the momentum generated by the success of the previous two *Pravasi Bhartiya Divas*, the Government of India celebrated the 3rd *Pravasi Bharatiya Divas* on an equally grand scale, but this time at the sprawling SN Kohli Stadium in Mumbai 7-9 January, 2005. The event was inaugurated by Hon. Prime Minister Manmohan Singh.

Understanding the sentiments of persons of Indian Origin to be closer to their original country and to reinforce their emotional bonds, as well as respecting their desire to participate in the development of the country of their origin, the Government of India has made an earnest resolve to frame a special scheme—a scheme for issuance of a Persons of Indian Origin (PIO) Card for those living abroad and having foreign passports. Under this Scheme, Persons of Indian Origin up to the fourth generation (great grand parents) settled throughout the world, except for a few specified countries, would be eligible. The Card would be issued to eligible applicants through the concerned Indian Embassies/High Commissions/Consulates and for those staying in India on a long term visa, the concerned Foreigners Regional Registration Officer (Delhi, Mumbai, Calcutta, Chennai) would do the same. The fee for the card, which will have a validity of 20 years, would be US $1000. Besides making their journey back to their roots simpler, easier and smoother, this Scheme entitles the PIO's to a wide range of economic, financial, educational and cultural benefits. The benefits envisaged under the Scheme will include:—

(i) No requirement of visa to visit India;

(ii) No requirement to register with the Foreigners Registration Officer if continuous stay does not exceed 180 days. If continuous stay exceeds 180 days, then registration is required to be done within a period of 30 days of the expiry of 180 days;

(iii) Parity with Non-Resident Indians in respect of facilities available to the latter in economic, financial, educational fields etc. These facilities will include:

(a) Acquisition, holding, transfer and disposal of immovable properties in India except of agricultural/ plantation properties;

(b) Admission of children in educational institutions in India under the general category quota for NRI's including medical/ engineering colleges, IITs, IIMs etc.

(c) Various schemes of Life Insurance Corporation of India, State Governments and other Government agencies;

(iv) All future benefits that would be extended to NRIs would also be available to the PIO Card holders;

(v) However, they shall not enjoy political rights in India.

The above steps would go a long way in renewing and strengthening the emotional bond amongst PIOs with the land of their origin. The attractive features of the Scheme will further exhort them to play an increasingly constructive role in the socio-economic and cultural development of the country of their origin as envisaged by the High Level Committee on Indian Diaspora in its report.

VAT—WHAT AND WHY

Sunita Kakkar*

Introduction

Value Added Tax (VAT) is a multiple system of tax on sale of goods which is likely to operate in all the Indian States and Union Territories. The major beauty of this system is that the tax shall be levied at multiple points. Now, there is no need to wait for VAT, a long felt necessity to make over sales taxation to cope with global market has compelled us to adopt this inevitable system. Everyone should feel happy that we would be enjoying the fruits of this novel system of taxation. On the global platform VAT also includes taxation of services. In India, this system of sales taxation covers only tax on sale, or purchases of goods, and services are not taxed owing to constitutional restrictions. Since VAT at the State level is being introduced for the first time and even at the Central level the taxation is only of goods under Central Excise Duty Law and there is separate legislation imposing service tax, the Value Added Tax presently designed will cover only goods. There is a broad consensus on the common tax regime and most of the States have already enacted relevant legislations.

Historical Background

The VAT was first provided by F. Vans Siemens in 1918 as an alternative to existing turnover tax in Germany. Maurice Laure and Carl Shoup have contributed a lot in the evolution to this system. In 1954 it was first introduced by France in the world which was termed as *'Taxes sur la ValeurAdjoutee'*. Initially this system did not emerge as a perfect system and later on it was added by tax on service and excises. Fairness, efficiency and simplicity of the Value Added Tax inspired other countries to adopt this system and as of today more than 120 countries of the world have acknowledged it to be the best form of indirect tax system. The countries like Canada, Australia, the European Union, Germany, Spain, United Kingdom and Japan have adopted this system and also our neighbouring countries like Pakistan, Sri Lanka, Nepal and Bangladesh have adopted this system.

* Legal Researcher.

Interestingly, in the US which has a Centre-State relation similar to India has not implemented VAT, the reason behind this appears to be on account of power game between the Federal Government and the States. Presently more than 120 countries of the world have adopted the VAT system.

VAT—What is it

VAT is a multi point system of taxation on sale of goods where a mechanism is provided to grant credit for the tax paid on inputs (purchased goods).

VAT is levied on the value addition at every point of sale. Presently tax on sale or purchase of goods is levied by virtue by Entry 34 in List II of Schedule VII of the Constitution of India. VAT is also leviable with respect to this entry. VAT is simply a form of sales-tax, the only difference is that it is collected at every point in the series of the sales by a registered dealer with the provisions of credit for input tax paid at the previous point of purchase thereof. Thus dealer is required to pay difference of what tax he has charged and what tax he has paid at the earlier stage. The basic requirement for this purpose is that the tax amount should be invariably shown in the invoice. Tax charged or collected invariably shown separately would not form part of the turnover.

VAT is a form of sales tax collected by the Government of destination State (*i.e.* State in which final consumer is located) on consumer expenditure. It is collected through business transaction involving sale of goods within the States. The terms "Value Added Tax" (VAT) is self-explanatory and brings forth the nature of the tax.

As the terms suggest, it is a tax on value added in the price of a commodity at each stage, may be due to passing through various hands in a channel of distribution or the value added in its price due to some activity on production or manufacture of process undertaken on the commodity.

It is a tax at the final or retail point of sale, which is collected at each State of sale when there is a value addition to the goods. Putting it in different words the total amount of tax, which is to be collected at the final, or retail point of sale is collected in instalments. VAT is essentially a form of sales tax only. In fact, it is nothing but a tax on retail sales collected in stages on multi-point sales basis in different stages of products and trade levied in such a manner that the added in each stage is taxed once and only once with a view to avoid cascading or tax-on-tax effect so that the burden to the final consumer is not more than what it is intended by the prescribed rates of tax.

VAT in its common form is thus a sales tax levied according to value added which can be called value added sales tax as well. Value added in manufacturing activity is the difference between the price at which commodity is sold and the cost of inputs and in case of trading the difference between value of sales and purchases.

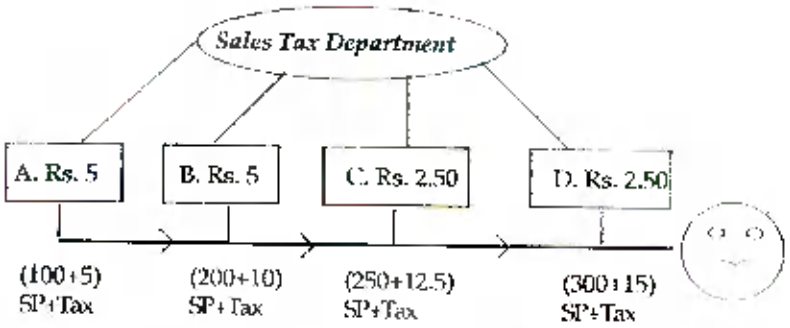
EXAMPLES

(1)

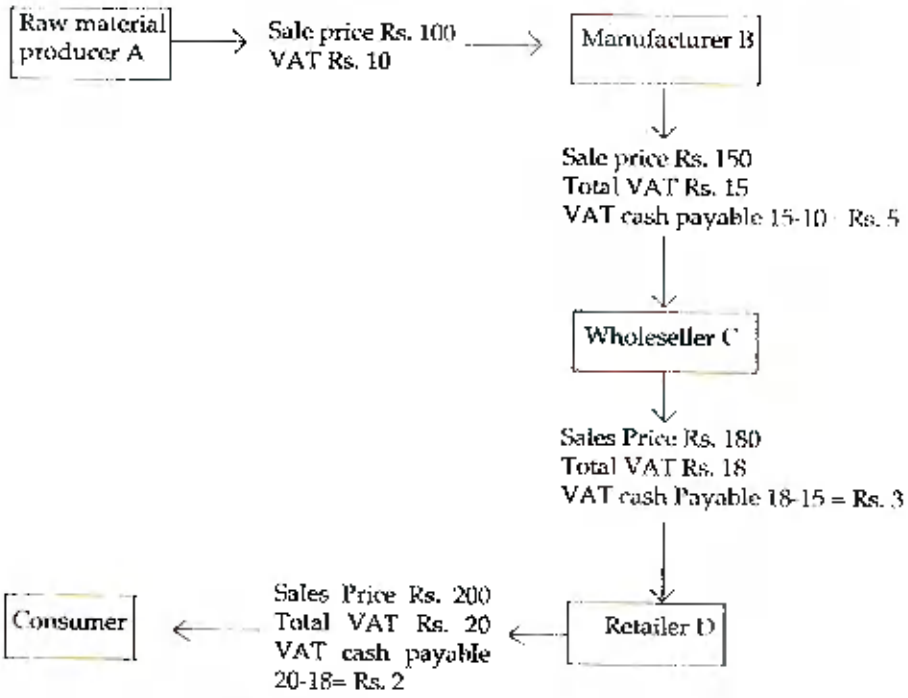
VAT 10	VAT 10	VAT 5	VAT 5
Tax paid Nil	Tax already paid 10	Tax already paid 20	Tax already paid 25
Tax charged 10	Tax charged 20	Tax charged 25	Tax charged 30
100 S.P.	200 S.P.	250 S.P.	300 S.P.
A	B	C	D
Producer of Raw material	Manufactures	Whole sellers	Retailer

A: Producer of Raw Material
B: Manufacturer
C: Whole seller
D: Retailer
Tax rate: 5%

(2)



(3)



Difference between VAT and Salex Tax

Sales tax is generally single point tax levy whereas VAT is multipoint levy. In sales-tax no tax is being levied on the value addition on subsequent sales. In VAT full set off of the tax paid at the earlier stage is granted. Thus, VAT eliminates tax cascading.

What sales are covered under VAT Law

In VAT, definition of sale includes the conventional sale, *i.e.* transfer of property in goods, supply of goods by a society, club, firm and company to its members, transfer of property in goods involved in execution of works contract, delivery of any goods on hire purchase or any other system of payment by instalments, transfer of right to use any goods for any purpose, whether or not for a specified period and lastly supply by way of or a part of any service or in any other manner whatsoever, of goods being food or any other article for human consumption of any drink..... .

VAT—Why

Simply VAT is based on the best international practices, characterised by trust, transparency, stability, simplicity, efficiency and a dealer-friendly tax administration. VAT is the' only solution to remove cascading and pyramiding effect to achieve economic efficiency. VAT reduces scope for under valuation and tax evasion. In VAT system invoice is must for claiming set off, this enables the authority to cross check declared transactions between tax payers. This system with its audit trail improves compliance and encourages self policing mechanism. It removes multiple taxes like surcharge, turnover tax etc., on goods and also provides efficient resource allocation, it ensures removal of various taxes and levies.

This system minimise litigation because of less rate slabes. It ensures no tax war between the States and promotes development of ancillary industries. It also assures a reliable information technology support to achieve automation e-filing of returns, etc., and also ensures prompt address to tax payers' queries in order to establish that the tax person is a facilitator. Further it ensures that all barriers to inter-state trade and commerce and export out of the territory of India should be removes and also provides broad tax base and ensures few tax exemptions. Lastly it encourage self-regulated mechanism. Similarly it provides effectively enforceable penalty system and it also makes the law sensible to demand and price.

Conclusion

The existing system of taxation on sale of goods have number of shortcomings which are as follows:

(a) The system is highly complex. The ultimate consumer does not know what amount of tax he is contributing to Government exchequer, transparency is not at all reflected.

(b) The present system has evolved a network of modes of evasion of taxes. Big fishes are rarely caught in the net and this results in low realizations of sales tax revenue. Consequently this also adversely affects the income-tax revenue and generation of black money goes on.

(c) In the name of STP goods many play fowl games. Inspite of there being bar against collection of tax when not payable, some unscrupulous dealers collects taxes which makes their pocket heavy, customers are befooled and Government remains devoid of this unauthorised collected tax.

(d) Mulliciplicity of tax rates leads to interpretation disputes and other complications.

(e) Levy of tax is at first point so there is low realisation of revenue as subsequent value addition remains untaxed.

(f) Presently no credit or set off is allowed on inputs, this clearly leads to cascading elfect. Widespread taxation of input promotes vertical integration to avoid tax, this works against the ancillary industries to grow.

(g) Getting statutory declaration forms from the sales-tax department is highly tiring job.

(h) Assessment procedures are cumbersome, during assessment proceedings some unscrupulous assessing authorities train their guns towards assesse and encash on the situation and arbitrarily determine the tax liability.

LEGAL ISSUES GOVERNING THE INTERNET CONTRACT

Sharmistha Ghosh*

"Every day it becomes more certain that the Internet will take its place alongside the other great transformational technologies that first challenged, and then fundamentally changed, the way things are done in the world."[1]

Law is not a static body of inflexible rules and unyielding tradition. The dynamism of contemporary economic, cultural, and technological evolution requires the law to adapt itself to modern demands. It is also starkly clear that the Internet will not be used to its fullest potential if providers and consumers cannot be confident that their electronic agreements are valid and enforceable.[2] Thus the ability to enter into valid and binding contracts on-line is crucial if the digital revolution is to continue, and for business and consumers alike to benefit from e-commerce. The Internet has undoubtedly redefined the modes of doing business. Not only are the costs substantially lower than the conventional ways, the speed with which transactions can be entered into is phenomenal. Since every e-commerce transaction, like any other commercial transaction, is in essence a contractual relationship between the transacting parties, there is a necessity to examine carefully, the legal issues governing the Internet contract.

---

* The author is a 5th year B.Sc./B.A. LL.B. (Hons.) student at the National University of Juridical Sciences, Kolkata.

1. *Louis v. Gerstener, Jr.*, Letter of the Chairman and Chief Executive Officer, International Business Machines ("IBM"), Inc., 1998 Annual Report 2 [1999] (visited January 16, 2000) <http://www.ibm.com/annualreport/1998/letter/ibm98arlsen01.html>.

2. Bruce A. Lehman, Chairman of the Working Group on Intellectual Property Rights; cited in Jay Forder & Patrick Quirk, *Electronic Commerce and the Law*, John Wiley & Sons Ltd, Queensland, 2001.

1. Validity of the Internet Contract

By definition, a contract is *"a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."*[1] As regards the validity of a contract made on the Internet, the Model Law on Electronic Commerce of the United Nations Commission on International Trade Law, 1996, has declared - *"In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose."*[2] A *'data message'* has been defined as *"information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail....."*[3]

It is settled law that under the English legal system, contracts can be formed in any available manner – orally, by telephone, by written document or by fax.[4] Contract formation can even take place on the basis of the conduct of the parties. Thus parties are not debarred from forming contracts on the Internet. Upholding the validity of contracts formed instantaneously,[5] Lord Denning in *Entores Ltd.* v. *Miles Far East Corporation*[6] has been of the opinion that in cases of instantaneous communication, *"the contract is only complete when acceptance is received by the offeror and the contract is made at the place where the acceptance is received."*

The principle of the *Entores* case has been endorsed by the Supreme Court in *Bhagwandas Goverdhandas Kedia* v. *Girdharilal Parshottamdas & Co.*[7] It has been observed that in cases of instantaneous communication *"the contract becomes complete .....when the acceptance of the offer is intimated to the offeror."* Further, it is also apparent from a reading of the Indian Contract Act, 1872, that no restriction has been placed on the mode/modes of communication used for the purposes of formation of a contract.[8] The law has implicitly

1. Restatement (second) of Contracts § 1 (1979), *cited in* Delta & Matsura, *Law of the Internet*, Aspen Law & Business, New York, 2000. *See* section 2 (h) Indian Contract Act, 1872.
2. Article 11 (1).
3. *See* Article 2. *See also* Article 5: - *"Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message"*.
4. *See* Michael Chissick & Alistair Kelman, *Electronic Commerce - Law & Practice*, Sweet & Maxwell, London 1999.
5. Most contracts on the Internet are formed instantaneously.
6. (1955) 2 QB 327; cited in Pollock & Mulla, Mulla on Indian Contract & Specific Relief Act, Volume - 1, 12th Edition, Butterworths India, New Delhi, 2001.
7. AIR 1966 SC 543.
8. *See* sections 3 – 9 Indian Contract Act 1872. So far as contract formation over the Internet is concerned, the provisions of the Indian Contract Act, 1872 will have to be harmoniously read with the provisions of the I.T. Act, 2000.

recognized that with technological advancement, communication systems would undergo a change and hence has not prescribed any one mode of communication.[1]

In the United States, under the Uniform Commercial Code [hereinafter UCC][2] *" a contract for the sale of goods may be made in any manner sufficient to show agreement."*

2. Formation of the Internet Contract

The Internet provides four principal processes by which parties may enter into agreements - e-mail, listserv and chat services, World Wide Web interfaces and electronic data interchange (EDI).[3] While each process is similar to the other, subtle differences require that each receives separate legal attention. In the past, electronic contracts were mainly conducted in the context of Electronic Data Interchange[4] systems, which linked suppliers with retailers or assembly plants with parts manufacturers and thus eliminated paper work considerably. in sharp contrast, modern on-line contracts of cyberspace do not necessarily involve parties in a continuing relationship. Rather, they typically deal with real time, one-off transactions between parties who have never met. Additionally, many agreements utilize a combination of these processes during negotiation and in the formation of contracts.[5] *Electronic mail, or e-mail,* is the most basic process used to form agreements on the Internet. Simply stated, e-mail permits an individual to send an electronic message to another individual or group of individuals. A significant feature of e-mail is that the contents of the message generally are personal and communication includes only the sender and recipient. E-mail messages can also be "digitally signed" for authentication and verification purposes. Additionally, senders may "attach" other electronic files to an e-mail message that the recipient can view or use after opening the e-mail. The advantages of e-mail include ease of use, insignificant costs, and direct and

1. Section 3 of the Indian Contract Act, 1872: *"The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively are deemed to be made by an act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation or which has the effect of communicating it."*

2. Article 2 (1).

3. Donnie L. Kidd, Jr. and William H. Daughtrey, Jr., *"Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions"*, Rutgers Computer and Technology Law Journal, 2000. [Lexis-Nexis].

4. EDI is the transmission, in standard syntax, of unambiguous information between computers of two or more independent organizations; *See* Delta & Matsura, *Law of the Internet*, Aspen Law & Business, New York, 2000.

5. *See* Vivek Sood, *Cyber Law Simplified*, Tata McGraw Hill Publishing Co. Ltd., New Delhi, 2001.

personal communication.[1] Parties can use e-mail for business or commerce in a number of ways. The text of an e-mail may include information relating to negotiations, offer and acceptance, or a draft of the contract itself. Additionally, if the transaction involves electronic products, the e-mail itself, or an attachment to the e-mail, may be the object of the transaction. Individuals may also use *listservs or chat rooms* to form transactions. Listservs, or electronic bulletin boards, provide a forum for individuals to discuss particular topics by "posting" messages for others to read. Similarly, chat-rooms allow individuals to have real-time dialogues as each person types messages that are immediately viewable by other individuals in the chat-room. A listserv provides a public forum for persons to communicate on a wide variety of subjects. By typing a message or attaching files, an individual creates a "post" for a listserv. The posts are public and can be read by anyone who uses the listserv until the messages are purged after a given amount of time. The ability to communicate with other individuals offers the opportunity to create business opportunities. As stated above, listservs, like e-mail, allow individuals to engage in negotiations, make an offer or acceptance, send a form contract, or send material that constitutes performance of an agreement. The key difference is that communication is not private, instead it occurs in a public forum. Messages are not sent directly to specific individuals; they are posted to an open bulletin board. Additionally, a message is not retained indefinitely within the memory of an individual's computer, but is erased after an established time period from the listserv network computer.[2] Following a similar mechanism, chat-rooms are electronic forum in which individuals gather at the same time to engage in real-time dialogue. Once an individual types a short text message, the message is transferred from the individual's computer to the communications lines and sent to the chat-room network. The network adds the message to a continuous string of messages that is refreshed at short-time intervals to simulate real-time conversation. All individuals using the chat-room may read the stream of messages as they are updated and respond by sending their own message to the chat-room. Often, a systems operator moderates discussion and controls a chat-room through the power to edit messages or remove chat-room users. Messages are not saved or "posted" for later perusal, rather, a message usually appears and is gone within a minute. Again, the power of parties to pursue economic as well as social opportunities using chat-rooms is self-evident. Individuals in a chat room can exchange messages at a rapid pace for negotiation or contract formation purposes. Similar to talking over the phone or in person, messages sent through a chat-room provide nearly instantaneous dialogue, but with

1. *See* Vivek Sood, *Cyber Law Simplified*, Tata McGraw Hill Publishing Co. Ltd., New Delhi, 2001.

2. *Ibid.*

the disadvantage that no message is memorialized for any appreciable length of time.[1]

The third tool for Internet communications, including agreement formation, is the *World Wide Web*. The Web is a graphical user interface (GUI) for intercommunication between a Web page and an individual who visits that page. On a basic level, an individual uses an Internet browser to type in a Web page address, and the browser displays the Web page. The individual can then "navigate" the site through links and buttons to access additional text and graphical material.[2] The advantage of Web pages lies in the fact that they combine multimedia and the ability to intercommunicate. These characteristics not only permit a seller to provide product and service information, but also to communicate directly with potential buyers. Many electronic commercial Web sites include on line purchase forms and permit payment over the Internet. The individual only needs to type personal information into specified fields and click on a "return" or "accept" button to complete the transaction. Transactions may include the purchase of physical goods such as luggage or clothing, or may involve the purchase of software or electronic files that are downloaded to the individual's computer immediately upon payment. For these transactions, negotiations are not common. Finally, transactions may occur electronically using *electronic data interchange (EDI)*. The simple definition of EDI is the "computer-to-computer transmission of data in a standardized format." Essentially, in EDI, computers act as "electronic agents" for agreement formation without human intervention.[3] This process may be entirely automated without any human involvement once the process begins. Noticeably, EDI not only lacks negotiation of an agreement, but may also involve no human element during the process itself. While convenient and efficient, EDI demands investigation into whether computers have the legal capacity to contract as electronic agents, an issue which will be dealt with subsequently. Having examined the processes by which electronic agreements come into being, several conclusions emerge –all communication in the course of the formation of an internet contract is paperless and without a physical signature, the identity of the parties to an electronic agreement is observable only by the information that each party provides about itself, the mechanics of electronic agreements are all similar insofar as electronic communication disassembles messages into analog packets for transfer over communications lines. Differences arise, however, within each class of electronic communication. E-mail is private and sent directly among actively participating parties. Bulletin boards and chat rooms are public, but neither retain messages

1. *See* Vivek Sood, *Cyber Law Simplified*, Tata McGraw Hill Publishing Co. Ltd., New Delhi, 2001.
2. *Ibid.*
3. *Ibid*

indefinitely. Electronic-commerce Web pages contain standard forms for interested parties to complete without negotiation of the contract terms. EDI involves automated messaging without any human intent involved for the creation of the actual agreement.[1]

3. Pre - Contract Considerations on the Internet

It has been widely noticed that the culture of cyberspace is such that it encourages an attitude of 'anything goes' with the principle maxim being *caveat emptor* (let the buyer beware). However, electronic commerce is just like any other form of commercial activity and is thus bound by the same regulations and legal principles regarding pre-contractual behaviour.[2] When a person makes an offer, he/she is expressing a desire to enter into a contract on the understanding that if the other party accepts it, the agreement will be legally binding. English law states that if a reasonable person would interpret a particular action or communication as an offer, it is an offer whether the party intended it or not.[3] Under Indian contract law, an offer is the final expression of willingness by the offeror to be bound by his offer should the other party choose to accept.[4] Thus, where a party, without expressing his final willingness, proposes certain terms on which he is willing to negotiate, he does not make an offer, but only invites the other party to make an offer on those terms.[5] When a person orders merchandise from a website, a bilateral contract is formed because the merchant promises to send the goods in exchange of the money paid by the customer. The problem however arises when on-line advertisements have the ability to create unilateral contracts where the advertiser becomes unilaterally bound.[6] Such contracts are not only dangerous because a careless advertisement can create legal obligations, but also because they can be enforced by multiple parties.[7] It is also relevant to mention here that one of the primary reasons

1. *See* Vivek Sood, *Cyber Law Simplified*, Tata McGraw Hill Publishing Co. Ltd, New Delhi, 2001.
2. See Michael Chissick & Alistair Kelman, *Electronic Commerce, Law & Practice*, Sweet & Maxwell, London 1999.
3. Chitty on Contracts, 28th Edition, Volume – I, Sweet and Maxwell, London, 1999.
4. This is obvious from the definition of 'proposal' in section 2(a) of the Indian Contract Act, 1872, which emphasizes that there should be the expression of willingness to do or abstain with a view to obtaining the assent of the other party.
5. *Harvey* v. *Facey*, (1893) AC 552; cited in *McPherson* v. *Appana*, AIR 1951 SC 184.
6. When acceptance consists of a mere act, no further communication of acceptance is necessary. See *Carlill* v. *Carbolic Smoke Ball Co. Ltd.*, [1892] 2 QB 484; cited in Michael Chissick & Alistair Kelman, *Electronic Commerce, Law & Practice*, Sweet & Maxwell, London 1999.
7. *Carlill* v. *Carbolic Smoke Ball Co. Ltd.*, [1892] 2 QB 484; *Har Bhajan* v. *Harcharan Lal*, AIR 1925 All 539; cited in Pollock & Mulla, Mulla on Indian Contract & Specific Relief Act, Volume – I, 12th Edition, Butterworths India, New Delhi, 2001.

why the courts introduced the invitation to treat principle was to protect traditional businesses from supply shortages. The same argument can be extended to transactions entered into on the Internet since on-line merchants cannot necessarily and accurately assess the number of replies they will receive in response to a solicitation. In order to avoid the above-mentioned problems, on-line advertisements need to be carefully drafted to ensure that customers interpret them as advertisements and not unilateral contracts. Merchants have also been encouraged to use disclaimers to emphasize that the *'webvertisement'* is only an invitation to treat and not an offer as an extra safe-guard even though in law, a catalogue of prices is not an offer but only an invitation to the intending customers to offer to buy at the indicated prices.[1] Companies doing business on the Internet also have great difficulty in determining whether the customer or the prospective customer is forty-eight years old or merely eight. Age of the customer becomes especially relevant in the light of the fact that contracts with minors are void.[2] Further, sale of certain goods such as pornography, tobacco, alcohol etc. to minors is illegal in many countries. Thus, without adequate measures to ensure that customers are adults, website owners may again find themselves liable to civil or criminal sanctions. It is submitted that this problem can be suitably remedied through the use of Permanent Account Number (PAN) in Internet Transactions.

3. 'Acceptance' On The Internet

On the Internet, the instant of acceptance is the instant of contract creation.[4] The Indian Contract Act, 1872, grants parties to a contract the *freedom to decide on the mode of communication of the acceptance* (except where the mode of acceptance has been expressly prescribed in the proposal). Thus 'clicking' a button can be construed to be a legally permissible mode of accepting. The Information Technology Act, 2000, further makes the position clear by stating that where the originator of an e-record has not communicated to the addressee a particular mode by which the acknowledgement of receipt of an electronic record is to be made, an *acknowledgement may be given by any communication, automated or otherwise or by any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.*[5]

1. *Grainger & Son* v. *Gough*, [1896] AC 325; cited in *supra note* 19.
2. *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Ltd.)*, 1 All E R 482 (CA) *"It is a well- established principle that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is willing to treat but does not amount to an offer to sell...."*
3. *Mohiribibi* v. *Dharmodas Ghose*, (1903) 30 IA 114; *See* section 11, Indian Contract Act, 1872.
4. Except when the contract has been entered into *via* electronic mail.
5. Section 12(1).

Further the Act delineates that where the originator of the contract has stipulated that the e-record would be binding only on receipt of an acknowledgement of such record, then in such a situation, unless the acknowledgement is so received, the electronic record shall be deemed to have been never sent by the originator.[1] The above-mentioned provision as regards receipt of an electronic record has been derived from and is substantially based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, 1996.[2] It is rather interesting to note that contracts on the Internet can be accepted by a mere 'click-wrap'. A 'click-wrap' agreement is formed where the contract is presented in a window on-line and the customer is asked to click either the 'offer' or 'I accept' button. English courts have not yet dealt with the validity of 'click-wrap' agreements.[3] However, the validity of a click-wrap agreement has been upheld in the case of *Hotmail* v. *Van Money Pie*[4] in the United States. In this case, the court held that the defendant was bound by the terms of service posted on the Hotmail web site as a result of his act of clicking on the button which stated, "I agree". To utilize Hotmail services, one is required to agree to Hotmail's terms of service, which expressly prohibit the use of Hotmail accounts to facilitate the transmission of unsolicited commercial e-mail, known as spam. Users are required to agree to these Terms of Service by a click-wrap agreement, in which the customer, after being given the opportunity to view the terms of service on his computer, clicks a box indicating his assent to be bound thereby. In the instant case, the defendant sent spam to various persons, which allegedly advertised pornographic materials. He also altered the return address of the sent e-mails to falsely indicate that the mails were sent from a Hotmail account, rather than its true source. The Court upheld the validity of the click-wrap agreement by which the defendant had agreed to be bound by the plaintiff's terms of service and thus the defendant was declared guilty of breach of contract. The legality of 'shrink-wrap'[5] agreements has been the subject-matter of a controversy especially in the United States. The main argument against the validity of a shrink-wrap agreement is that the consumer does not get an adequate opportunity to know and consent to the terms and conditions of the software license before its purchase and until he tears open the shrink-wrap. On the other hand, it has been argued that the law has never required manufacturers of products, distributors, retailers and buyers to negotiate contracts at a round table and reach an explicit agreement on individual basis and terms.

1. Section 12(2).
2. Article 14.
3. *Ibid.*
4. C 98-20064 (ND Ca, April 20, 1998); *supra.*
5. The expression is taken from the method of packaging software products in cellophane-wrapped boxes and tearing of the wrap for entering into a license agreement. *Supra.*

In *Step-Saver Data Systems* v. *Wyse Technology*,[1] the court held that the contract between the parties was based on the invoice and it was formed at the time of shipment. Thus, the defendant's shrink-wrap license amounted to a counter offer that was not consented to by Step-Saver. The terms of the shrink-wrap license were never thus technically 'accepted' by Step-Saver. *ProCD* v. *Zeidenberg*[2] is another leading case on the issue of the validity of "shrink-wrap" agreements. In this case it was held that since the condition that the transaction was subject to a license was informed to the plaintiff beforehand and a right was granted to the plaintiff to return the software for a refund if the terms of license contained inside the shrink-wrap were unacceptable, the license agreement was valid and binding. Further in *Hill* v. *Gateway*,[3] where the product was sent to the consumer along with a list of terms which were said to be binding on him unless he returned the product (computer) within 30 days, the court held that if the customer had retained the computer for a period of less than 30 days, the contract was not binding but the moment it was retained for a period more than 30 days, the terms mentioned in the shrink-wrap were deemed to have been 'accepted'. However, in *Klocek* v. *Gateway*,[4] the court pronounced that since there was *"no evidence that at the time of the sales transaction, the defendant had informed the plaintiff about the fact that the transaction was conditioned on the plaintiff's acceptance of the standard terms"*, the standard terms did not constitute the terms of the transaction but were additional terms which were not acceptable by the plaintiff. Nevertheless, legislative measures have been initiated *inter alia* to protect shrink-wrap licenses in the United States through amendments in the UCC. The newly introduced Article 2B provides that terms inconsistent with customary practices or which conflict with previously negotiated terms may become part of the agreement only with conspicuous language and manifest assent.[5] In India, so far there has been no decision, which delves into the validity of shrink-wrap contracts. However, it must be reiterated that since the Indian Contract Act, 1872 and the Sale of Goods Act, 1930 do not prescribe any one particular mode of communicating the proposal or the acceptance, tearing of the shrink-wrap can be construed as a legally valid means of communication.[6]

1. 939 F2d 91 (3rd Cir 1991); *Supra*.
2. 86 F 3d 1447; *Supra*.
3. F3d 1147 (7th Cir, 6 January, 1997); cited in Margaret Jane Radin, John .A. Rothchild, Gregory M. Silverman, *Internet Commerce — The Emerging Legal Framework*, Foundation Press, New York, 2002.
4. 104 F Supp. 2nd 1332 (S. Kan. 2000); *Supra*.
5. Donnie L. Kidd, Jr. and William H. Daughtrey, Jr., *"Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions"*, Rutgers Computer and Technology Law Journal, 2000. [Lexis-Nexis].
6. *See* Vivek Sood, *Cyber Law Simplified*, Tata McGraw Hill Publishing Co. Ltd, New Delhi, 2001.

4. 'Communication' when complete in an Internet Contract

The Information Technology Act, 2000, is clear as regards when communication is complete between the parties to an Internet contract -- *"the despatch of an electronic record occurs*[1] *when it enters a computer resource outside the control of the originator of the contract."*[2] The Act also clarifies that an electronic record will be deemed to be despatched at the place of business of the originator and will be deemed to be received at the place of business of the addressee subject, of course, to a contract laying down otherwise.[3] These provisions have been derived in entirety from the UNCITRAL Model Law on Electronic Commerce, 1996.[4] Further where the addressee has designated a computer resource for the purpose of receiving an e-record, receipt of the same occurs at the time when the e-record enters the designated computer resource and if no computer resource has been designated, receipt of the e-record occurs when it is received by the addressee *i.e.* when it enters the computer resource of the addressee.[5] The Guide to the Enactment of the UNCITRAL Model Law on Electronic Commerce, 1996, elucidates that the mere indication of an e-mail or telecopy address on a letterhead does not amount to "designation" of a computer resource for the purpose of receipt.[6] In England, receipt of an electronic message occurs when the message is downloaded from the server, since one would expect a person to read the message after downloading it from the server. Thus whether or not the offeror actually reads the acceptance is immaterial. This rule was laid down in the case of *Schelde Delta Shipping* v. *Astarte Shipping Ltd.*[7]

In the United States, the Internet service providers have been viewed as public telecommunication providers. Thus, if the offeror has used an Internet Service Provider, for the purpose of entering into a contract, acceptance will only be complete when the electronic mail is downloaded off the server into a computer. This was laid down in *Zeran* v. *America Online*.[8]

1. "Electronic record" has been defined in the IT Act, 2000 as data record or data generated, image or sound stored, received or sent in an electronic form or micro-film or computer generated micro-fiche. *See* section 2(t).
2. Section 13 (1).
3. Section 13 (3). If the originator or the addressee do not have a place of business, their usual place of residence shall be deemed to be the place of business.
4. Article 15.
5. Section 13 (2).
6. *See* Vivek Sood, *Cyber Law Simplified*, Tata McGraw Hill Publishing Co. Ltd, New Delhi, 2001.
7. [1995] 2 Lloyd's Report 249; cited in Michael Chissick & Alistair Kelman, *Electronic Commerce, Law & Practice*, Sweet & Maxwell, London 1999.
8. [1997[No. 97 -- 1523 FED App 1523P (4th Circuit); cited in Margaret Jane Radin, John .A. Rothchild, Gregory M. Silverman, *Internet Commerce -- The Emerging Legal Framework*, Foundation Press, New York, 2002.

5. The issue of *'Mutual Assent'* on the Internet

Mutual assent consists of an offer by one party and an acceptance of that offer by another. Failing to satisfy a *"meeting of the minds"* on the terms and content of an agreement means that no contract has arisen between the parties. One of the advantages of electronic commerce is the automation of tasks, which previously required human involvement. English law has a tradition of attributing the actions of a machine to a person who instructs it to execute a particular routine.[1] In *Thornton* v. *Shoe Lane Parking*,[2] the court ruled that a customer contracted with a car-parking machine representing the owner when he fed in his money and received a claim ticket. It was observed that the offer in the instant case is *"made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot."* In the United States, the Uniform Computer Information Transactions Act [hereinafter, UCITA] provides that transactions between electronic agents are enforceable contracts.[3] Justifying the result by pointing at the reduced transactional costs and enhanced purchasing capabilities, UCITA promotes the use of electronic agents while avoiding fundamental issues of assent. It however concedes to the point that an electronic agent cannot give an assent "based on knowledge" of the terms. Due to the same reasons it has clarified that an electronic agent's "assent" can be traced back to the human mind that programmed the system or entered the data that the system utilized to search for purchases and accept them. It was due to this reason that in the case of *State Farm Mutual Auto* v. *Brockhurst*[4] the court ruled that since the computer only operated as programmed by the insurance company, contracts entered into by it were valid and binding. In India, under the Information Technology Act, 2000, an electronic record is to be attributed to the originator if it was sent *"by an information system programmed by or on behalf of the originator to operate automatically."*[5] Thus contracts formed by

1. *Haddock* v. *The Generous Bank Limited*, Computer 1578/32/W1; cited in Hammond Suddards, *E Commerce*, Butterworths, London, 1999.

2. [1971] 1 All ER 686; cited in M.T. Michele Rennie, *Computer, Internet Contracts & Law*, Sweet & Maxwell, London, 1999.

3. Section 112, comment 3(c).

4. 453 F. 2d 533 (10 Cir. 1972); cited in Michael Chissick & Alistair Kelman, *Electronic Commerce, Law & Practice*, Sweet & Maxwell, London 1999.

5. Section 11. It is also relevant to note that wherever there is a direct or indirect conflict between the Indian Contract Act, 1872 and the Information Technology Act, 2000, the mandate of the latter will prevail as the Information Technology Act, 2000, is a specific statute governing transactions on the Internet whereas the Indian Contract Act, 1872 is the general law on contract. Further, the I.T. Act, 2000 will prevail also because it has been legislated subsequent to the Contract Act, 1872. *See generally*, Vivek Sood, *Cyber Law Simplified*, Tata McGraw Hill Publishing Co. Ltd., New Delhi, 2001.

software agents are valid and binding. The provision relating to attribution of electronic records is analogous to that in the UNCITRAL Model Law on Electronic Commerce, 1996.[1]

6. Fulfilment of the requirement as to 'Writing' and 'Signature' on the Internet

A basic rule of contract law is that certain types of agreements must be in writing before they may be enforced. Employed over the years to guard against fraud and discourage perjury, the Statute of Frauds in the United States continues to require written contract in certain instances to *"promote certainty and deliberation . . . while limiting memory problems when the contract terms are questioned in court."* Although a long accepted tenet of contract law, the Statute of Frauds has not escaped exceptions and relaxation. For example, UCC § 2-201 has liberalized the rule to require only a writing that contains a quantity term for the sale of goods. Further, no writing is required unless the contract price is $ 500 or more.[2]

However, simple concepts in a paper-and-ink world are inapplicable in a paperless electronic universe. Thus, the question is whether the Statute of Frauds can apply to electronic contracts whose components simply do not fit the traditional interpretations of "writing" and "signature" that the Statute originally intended. It has hence been argued that in the present day, concepts of "writing" and "signature" must be developed to fit the electronic environment.

The UCC defines "writing" as any *"intentional reduction to tangible form"*. "Writing" preserves the agreement in a medium independent of the parties' memories and protects against the impermanence of oral promises that dissipate into thin air the moment they are made. Thus if an agreement is recorded within a medium that preserves the intention of the parties, the writing requirement surely would be satisfied.[3] The problem arises, however, when we pay heed to the fact that electronic contracts are not "reductions" to a tangible form at all, but instead are an intangible composite of electricity, computer code, and algorithms that lacks any "fixed" status.[4] While revising the writing rule, *UCITA uses the term "record" in place of "writing"*. A "record" has been defined to include any information *"that is stored in an electronic or other medium and is retrievable in perceivable forms"*. Further, fixation in the medium need not be permanent, so long as the information is capable of being recalled from a computer's memory, with or without the aid of a machine. Thus, if a record indicates that a contract

1. Article 13, Attribution of data messages.
2. Donnie L. Kidd, Jr. and William H. Daughtrey, Jr., *"Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions"*, Rutgers Computer and Technology Law Journal, 2000. [Lexis-Nexis].
3. *Ibid.*
4. *Ibid.*

was formed and reasonably identifies the subject-matter of the transaction, the "record requirement" is met.[1] The above-mentioned problem is not unique to the United States. The Information Technology Act, 2000, does not apply to transactions such as negotiable instruments, a power-of-attorney, a trust, a Will, any contract for the sale or conveyance of immovable property or any interest in such property and any such class of documents or transactions as may be notified by the Central Government in the Official Gazette.[2] The Information Technology Act, 2000 has tried to remedy the problem considerably by stating that *"where any law provides that information or any other matter shall be in writing or in the typewritten form or printed form..... such requirement shall be deemed to have been satisfied if such information is rendered or made available in electronic form and accessible so as to be usable for a subsequent reference."*[3] In addition to a "writing" requirement, the Statute of Frauds also requires the signature of the party in certain specified contracts. A party who physically signs a contract with his or her full legal name satisfies the signature requirement; however, due to the liberalization in the application of the Statute of Frauds, a full signature has never been required to satisfy this element, any mark or symbol executed by a party who intends to use that symbol as its signature when signing the writing is legally sufficient.[4] *UCITA advances one step further by wholly abandoning the term "signature" in favour of the concept of "authentication."* Although the definition of "authenticate" expressly includes signing a record or adopting a symbol, the term has also been *defined to include sounds, encryption, or any other process that indicates the intent of the party to identify itself, adopt or accept the terms, or verify the content of the record.* Although the comparison between "signing" a document and "authenticating" a record is inexact, authentication may be conceptualized as either a signature on the document or *a signature by process applied to the document*, either of which serves to indicate intent, acceptance, and verification.[5] Giving legal recognition to digital signatures, the Information Technology Act, 2000 states that *"where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed... such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of digital signature....."*[6]

1. Section 201.
2. Section 1(4).
3. Section 4.
4. Donnie L. Kidd, Jr. and William H. Daughtrey, Jr., *"Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions"*, Rutgers Computer and Technology Law Journal, 2000. [Lexis-Nexis].
5. The UCITA Landscape, (last visited on June 2004). <http://www.unc.edu/courses/pre2000fall/law357c/cyberprojects/spring01/whatis.htm —>
6. Section 5.

In England, the general rule of law has always been that contracts can be made quite informally, no writing or other form is necessary.[1] However, there are certain contracts, which require writing and signatures. These include leases for over three years,[2] consumer credit[3] and certain forms of insurance, deeds, Wills and the transfer of shares. Failure to abide by these requirements may render the contract inadmissible as evidence, unenforceable or completely void. Under the Interpretation Act, 1978, 'writing' is defined as *"typing, printing, lithography, photography and other modes of reproducing words in a visible form."*[4] Unfortunately, this definition does not answer the question as to whether a digital contract satisfies the requirement of writing. Nevertheless, the Court in *Derby & Co. v. Weldon*,[5] has held that computer databases and files are valid documents for the purposes of discovery. As regards the signature requirement it has been held in *Re a Debtor*[6] that a faxed copy of a signature satisfies the statutory signature requirement. In the instant case, in the court's opinion it was hard to see why some methods of *"impressing the mark on paper"* would be more valid than others.

Recognizing the aforementioned problem, the UNCITRAL Model Law on Electronic Commerce, 1996, has attempted to remove the writing and signature requirement in Internet contracts to provide greater certainty to on-line contracts and to promote electronic commerce.

The Model law encourages countries to reduce writing to its most essential legal property, permanence - *"where the law requires information to be in writing that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference."*[7]

Similarly, it encourages countries to reduce signature to its endorsement or authentication property – *"where the law requires a signature of a person, that requirement is met in relation to a data message if a method is used to identify that person and to indicate that person's approval of the information contained in the data message..."*[8]

---

1. Chitty on Contracts, 28th Edition, Volume – I, Sweet and Maxwell, London, 1999.
2. Section 52, Law of Property Act, 1925.
3. Consumer Credit Act, 1974.
4. Schedule I.
5. [1991] 1 WLR 652; cited in Michael Chissick & Alistair Kelman, *Electronic Commerce, Law & Practice*, Sweet & Maxwell, London 1999.
6. [1996] 2 All ER 345; cited in Michael Chissick & Alistair Kelman, *Electronic Commerce, Law & Practice*, Sweet & Maxwell, London 1999.
7. Article 6(1).
8. Article 7(1).

7. Conclusion

It has been rightly observed that the Internet can not be used to its fullest possible potential unless the providers of goods and services on the Internet as well as consumers as also businessmen are confident that transactions entered into on the Internet are both binding and enforceable. India has indeed come a long way from a country up against computerization to a nation which recognizes the validity of contracts entered into on the Internet.

It is however disheartening to note that most of the provisions dealing specifically with Internet contracts in the Information Technology Act, 2000, are either completely or substantially derived from the UNCITRAL Model Law on Electronic Commerce, 1996. Negligible effort has been made to draft provisions suited best for Indian conditions. Western cyber jurisprudence has been passively incorporated. There is thus a need to breathe life into the provisions relating to Internet contract in the I.T. Act, 2000, so as to enable the people in India to transact unhesitantingly on the Internet.

BOOK REVIEW

The Constitution of Jammu and Kashmir – Its Development & Comments, Fourth Edition 2004, Universal Law Publishing Co. Pvt. Ltd., Price: Rs. 425.

By Adarsh Sen Anand B.Sc., LL.B., Ph.D. (London), Barrister-at-Law, Fellow of the University College, London, Judge Supreme Court of India. (Later on Ex-Chief Justice of India and presently Chairperson, National, Human Rights Commission)

The book, a legal classic on the Constitution of Jammu & Kashmir, contains chapters alongwith Prefaces, Table of Cases, List of Abbreviations and Foreword by Chief Justice of India M.N. Venkatachaliah alongwith 11 Appendices, Bibliography and Subject Index.

Chapter 1 of the Book 'Introduction' introduces the contents and significance of the work. It is a study of Kashmir's political history and constitutional law, analysing the factors which led to the enactment of the Constitution of Jammu & Kashmir. According to the author, "The Problem of Kashmir has been discussed in great detail before various international forums but in these discussions there has been a remarkable dearth of reference either to the Constitution of Jammu & Kashmir or to its constitutional relation with India" but no investigation has been made into this aspect and there is no book or article which directly deals with this subject". The author refers to Andherson H.R. that "Politics nourishes the legal cells of the body of government. But there is no hard and fast dividing line between politics and constitutional law". (The Constitutional Framework, in Davies, S.R. (Ed.) the Government of the Australian States, Melbourne, 1960, P. 1).

Chapter 2 'Historical Background' traces the history of Jammu, Kashmir and Laddakh which were separate and distinct areas under

different rulers till the creation of Jammu & Kashmir State by the British Government in 1846 A.D. when Treaty of Amritsar gave Gulab Singh, the ruler of Jammu, title deed to Kashmir for a consideration of Rs. 25 lakh. Gulab Singh had already become Raja of Laddakh when he conquered Laddakh in 1834 A.D. After conquering Lhasa in 1842 and at the same time annexing Skaru and Baltistan, Gulab Singh had encircled Kashmir after accepting Prime Ministership of the State of Lahore which was vanquished by the British Government. The Chapter also traces the history of State of Jammu and Kashmir under Maharaja Gulab Singh, Maharaja Ranbir Singh, Maharaja Pratap Singh and Maharaja Hari Singh; Recommendations of Glancy Commission regarding religion, education and employment matter.

Chapter 3, 'Kashmiris Demand A Consfitution" focuses on Rise of Nationalism, the Jammu & Kashmir Constitution Act, 1939, with the observations "The Constitutional reforms in Kashmir gave the people in Kashmir some opportunity to associate themselves with the administration of the State, but this was not what the people had asked for. They had asked for a representative government and an elected legislature, they were not satisfied with a puppet assembly and a Council of Ministers responsible only to His Highness. The National Conference regarded the Constitution Act inadequate. In British India, political conditions were changing with astounding speed. The leaders of National Conference voiced their views once again". The chapter concludes with the role of National Conference and the Muslim Conference actively participating in the Legislature till 1946 but thereafter "their energies were constantly being diverted from the mutually agreed upon objective of responsible government to an inter party ideological conflict to the disadvantage of the two parties and the exclusive benefit of ruling dynasty". (Brecher Michel, Struggle for Kashmir, Canada, 1956, p. 5). This conflict between the two political parties was to have a very serious far reaching consequence in Kashmir".

Chapter 4, Kashmir and Indian Independence discusses 'Kashmir on the Eve of Indian Independence', Kashmir at the time of Indian Independence', 'Kashmir Accedes to India', 'Kashmir Accession and Security Council', 'The Kashmir Conspiracy Case and Accession'.

Regarding the accession, the author takes the view that no moral obligation of India to ascertain the wishes of Kashmiri people can affect the legality of the accession and no court can take notice of a moral obligation not embodied in the constitutional document. Furthermore, 'pious and moral obligation' cannot bind Kashmir to do what the then ruler of Kashmir never agreed to do. Regarding the proposal of India of holding plebiscite in Kashmir as the ultimate determinant of Kashmir's status, the learned author holds: It is not within the competence of the Security Council to reopen this question either at the instance of India or Pakistan. The only party which might have a right to demand it is the Ruler of Kashmir who signed the

Instrument of Accession or his successor in interest.....The Instrument of Accession did not give to the Dominion of India any power to barter the future of the State. As such it would seem that the undertaking given at the floor of Security Council is wholly *ultra vires* the Independence Act and the constitutional powers of the two Dominions.....{Mahajan M.C., Accession of Kashmir to India (the Inside Story), Sholapur Institute of Public Administration, n. d. P. 19 quoted).

To hold a plebiscite in one component part of the Indian Union implies the possibility of its secession; the Constitution of India does not permit secession ".....The State of Jammu and Kashmir cannot secede from India without an abrogation of the Constitution of Jammu and Kashmir, 1957 (Section 3, Constitution of Jammu and Kashmir).....Because of the constitutional limitations imposed by Article 253 of the Constitution of India, India cannot cede the State of Jammu and Kashmir. This position brings one to the conclusion that to hold a plebiscite would be repugnant to the Constitution of India and Kashmir".

Chapter 5 entitled, "The Constitution of India in Relation to Jammu and Kashmir with the break-up—The special position of Kashmir in the Indian Union" quotes Article 2 of the Constitution of India which reads - "Parliament may by law admit into the Union or establish new States on such terms and conditions as it thinks fit" (at p. 101). The chapter discusses the position under Article 370 of the Constitution marginal heading of which is "Temporary Provisions with respect to the State of Jammu and Kashmir". The learned author observes "In the present context the term 'temporary' has been used so as to minimise the difficulty in the way of amendment of the Constitution of India, whenever the necessity arises to abrogate, modify or extend the scope of Article 370 by agreement. (at p. 106). It also describes the replacement of hereditary ruler with Sadar-i-Riyasat in 1952.

The Chapter also discusses 'The Constitution (Application to Jammu and Kashmir) Order, 1950 and the Delhi Agreement, 1952 wherein 'The representatives of Kashmir Government conferred with the representatives of Indian Government and arrived at an arrangement (at p. 121) and on May 14, 1954, the President of India, acting under Article 370, issued an Order (Constitution Application to Jammu & Kashmir Order, 1954) endorsing the relationship of Kashmir with India as defined in the Delhi Agreement which recognised the unique position of Kashmir in the Indian Union.

The Chapter concludes with discussion of the Interim Constitution of Jammu and Kashmir State that the Kashmir Constitution Act, 1939 with various amendments served as the interim constitution of Jammu and Kashmir".

Chapter 6 is the "Constitution of India in Relation to Kashmir–II". It discusses 'Territory', Distribution of Powers between Kashmir and India,

Judicial Powers under the Constitution of India, Emergency Powers under the Constitution of India, Financial Powers, Fundamental Rights and Amendment of the Constitution. The author holds "There is no constitutional guarantee of equality of treatment of all the States under the Indian Constitution (Constitution of India, Article 2). Hence, the departure made in the case of Jammu & Kashmir in the distribution of powers is not a violation of the principle of equality before law" (at p. 139).

Chapter 7 "The Constitution of Jammu and Kashmir, 1957" is a discussion of all 158 Articles of Jammu and Kashmir with corresponding provisions of Indian Constitution.

It is a rarest of rare legal classic of very high order being highly informatory in nature and indispensable for legal, constitutional and political experts.

Surendra Sahai Srivastava

LIST OF CONTRIBUTORS OF ALR

A. Jayagovind
A.M. Singhvi
Abhinav Prakash
Anoop George Chaudhari
B.B. Das
B.L. Chavan
Bhavana Kumar Gupta
Brian Fitzgerald
Dana H. Freyer
Debashis Chakraborty
Edward Lightburn
Fali S. Nariman
Furqan Ahmad
G.I.S. Sandhu
Ganesh Rao
Graham Bassett
Gunjan Gupta
Gurjeet Singh
H.C. Jain
Harloveleen Kaur
J.K. Mittal
J.N. Barowalia
Janak Raj Jai
Julien Chaisse
Jyoti M. Pathania
K.D. Raju
Kanwal D.P. Singh
Karl Mackie
Karnika Sawhney Seth
Kunal Gupta
M.K. Sharma
M.L. Upadhyay
Maneka Gandhi
Manijit Dewan
Manish Arora
Markandey Katju
Mayank Vaid
Mukulita Vijayawargiya
Nandan Kamath
Nilendra Kumar
P.M. Bakshi
Poornima Sampath
Prabhash Ranjan
Prakash N.
Preeti Misra
Rajesh Gupta
Rajesh Kumar
Rita Khanna
Rodney D. Ryder
Rose Varghese
S. Parameswaran
S.N. Gupta
Sandeep Parekh
Sanjay Upadhyay
Sharmistha Ghosh
Sheweta Gupta
Shubhankar Dam
Siddhartha K Wagav
Sriniwas Gupta
Subhash C. Jain
Sudipta Bhattacharjee
Sujoy Bhatia
Sumit Basu
Sunanda Padhy
Sunita Kakkar
Surat Singh
Surendra Sahai Srivastava
Suresh C. Srivastava
Surya Malik
Swarupama Chaturvedi
T.K. Viswanathan
V.R. Krishna Iyer
Vibha Arora
Videh Upadhyay
Vijay Kumar
Vinay Reddy

BACK ISSUES OF ALR

The following are the details of all the back issues of **Amity Law Review.** We would be happy to send you a copy of the desired issues, on request.

List of contents of the inaugural issue of ALR:

Title	Author
Torture as a challenge to Civil Society and the Administration of Justice	Justice Markandey Katju
Animal Cruelty and Protection Laws	Maneka Gandhi
The American Experience in the field of ADR	Dana H. Freyer
International Mediation—The UK Experience	Karl Mackie and Edward Lightburn
Speeding up the wheels of Justice—Changes Needed for Court's Effective functioning	Dr. A.M. Singhvi
Mode of Search & Seizure under the Narcotic Drugs & Psychotropic Substances Act	J.N. Barowalia
Internet & The Copyright Law	Manish Arora
Legal Education & Legal Profession In India: How to bridge the Gap ?	Dr. Surat Singh
Interim relief under Consumer Protection Act	Rajesh Gupta and Gunjan Gupta
Justice for millions Half Clad—Half Hungry	Dr. Janak Raj Jai
India and the Geneva Convention	Brig. Nilendra Kumar
Whether the dishonour of a cheque can have a penal effect in case of Stop Payment	S.N. Gupta
The Debate on Capital Account Convertibility: The Indian Scenario	Prof. A. Jayagovind
Leading Questions in a Criminal Proceeding	Vinay Reddy and Prakash N.
Mergers and Acquisitions in India	Rodney D. Ryder
Virtual Courts	Rajesh Gupta
The Executive Powers of the President	Poornima Sampath

List of contents of Vol. 1 Part 2, Vol. 2 Part I; July 2000 – June 2001:

Title	Author
The Spirit of Arbitration	Fali S Nariman
Sexual harassment of women at workplace: In India & Abroad	Srinivas Gupta
Information Technology and Legislative Design	Nandan Kamath
Alternative Dispute Resolution	P.M. Bakshi
Questions to accused by the court under the provisions of the Army Rule 58	Brig. Nilendra Kumar
Piracy and Copyright Law—An Intellectual Battle	Manish Arora
Regulatory Norms in Indian Cyberspace: A reading of the Act	Rodney D. Ryder
Definition of Law	H.C. Jain
Human Rights – Asian Initiative	S. Parameswaran

AIDS and Human Rights with special Reference to prison inmates	Dr. Janak Raj Jai
Convergence in India & Its Regulation	Brig. Nilendra Kumar
Legal Aspects of Credit cards	S.N. Gupta

List of contents of Part 2, Vol. 2 July – Dec, 2001:

Title	Author
Global assault on terrorism & Law or war	Maj. Gen. Nilendra Kumar
The brides in the bath	P.M. Bakshi
Failure of Sterilization Operation – Claim for tort of Medical Negligence	S.N. Gupta
Defamation & the Internet: Analysing Risks and Liabilities under Indian Law	Rodney D. Ryder
Judicial Decision Making & Large Dams	Videh Upadhyay and Sanjay Upadhyay
Death Penalty and the Constitution	Dr. Janak Raj Jai
About Cyber Squatting, Bad Faith and Domain names	Mayank Vaid
Judiciary and the common man	Surendra Sahai Srivastava
Environment Poverty and the state in National Perspective	Vijay Kumar
Alternative Dispute Resolution to Online Dispute Resolution	Karnika Sawhney
Rights of the Child and International Law: A Critical Study	Shriniwas Gupta
Proper Law of a Contract	Mayank Vaid
Desirability of Restriction on Executive in the Appointment of Judges	Surendra Sahai Srivastava

List of contents of Jan - June 2002, Part I Vol. 3:

Title	Author
The Mimansa Principles of Interpretation	Justice Markandey Katju
Matter of Evidence in Cases of Global Sponsors Terrorism	Maj. Gen. Nilendra Kumar
Rights of Minorities under the Constitution of India	Prof. M.L. Upadhyay
International Commercial Arbitration: An Indian Legal Perspective	Anoop George Chaudhari
Terrorism, Drug Trafficking & Mafia	Dr. Janak Raj Jai
Consumer Protection Act, 1986 – Complaint of Deficiency in Service by Bank	S.N. Gupta
Justifying Intellectual Property Rights in a Globalised World	Nandan Kamath
Incestuous Relations & Sexual Abuse of the Children in India & Abroad	Shriniwas Gupta
A Study of Objectives of Juvenile Justice Act, 2000	Dr. B.B. Das and Sunanda Padhy
Regulation of Exchange Traded Financial Derivatives in India	Sandeep Parekh

List of contents Vol. 3 , Part 2; Vol. 4 , Part I; July 2002 – June 2003:

List of contents of Vol. 4, Part 2; July – December 2003

List of contents of Vol. 5, Part 1; January – June 2004

GUIDELINES FOR CONTRIBUTORS

Amity Law Review invites original research-based papers, articles on topics of current concern in the area of Law and related legal sciences. A general guideline for contributors is listed below:

1. Manuscripts should be sent along with the authorisation letter in favour of the Editor that it may be published after necessary editing and the copyright shall remain with the Editor. Manuscript should also accompany a brief resume of the author on a separate sheet.
2. Manuscripts should normally be of around 7,000 words (to an extent of 10 to 20 A-4 size pages, typed double space). Manuscripts should be submitted in duplicate with the cover page bearing only title of paper and author(s) names, designations, official addresses, phone/fax numbers and e-mail address.
3. Abstracts: All the manuscripts should include an abstract of about 100 to 200 words. No abstracts are required for review essays or case studies.
4. Footnotes: All footnotes should be indicated by serial numbers in the text and literature cited should be detailed under Notes at the end of the chapter bearing corresponding numbers.
5. Tables and Figures: Tables should approximate the appearance of printed tables and preferably submitted in a floppy disk. Tables/figures should be placed at the end of the text, after footnotes, appendices and references. Tables should contain a source and units of measurement. Their location in the text should be indicated as follows:

   Table 1.1 about here
6. References: Place the references at the end of the manuscript following the footnotes The list should mention only those sources actually cited in the text or notes. Author's name should be the same as in the original source. For more than one publication by the same author, list them in chronological order, with the older item first. For more than one publication in one year by the same author, use small (lower case) letters to distinguish them (*e.g.*, 1980a, 1980b). Following are some examples:
   Books - Kumar H.L. : A Practical Guide to Employees Provident Funds (2nd Edition, 2003) New Delhi, Universal Law Publishing Co. Pvt. Ltd.
7. No stops after abbreviations (UK, USA, etc.).
8. Use double quotes throughout. The use of single quotes to be restricted for use within double quotes, *e.g.*, "In the words of Churchill, 'Any one can suggest you when you are right; friends are there to support you when you are wrong" Quotations in excess of 50 words should be separated from the text with a line space above and below and indented on the left. Quotes should be cited accurately from the original source, should not be edited and should give the page numbers of the original publication.
9. Capitalisation should be kept to the minimum and should be consistent.
10. An author will receive a complimentary copy of the issue in which his/her paper appears.
11. Book reviews must provide the following details and in this order: Name of author/ title of book reviewed/place of publication/publisher/year of publication/number of pages, in Roman and Arabic figures to include preliminary pages and price, with binding.

Manuscripts and all editorial correspondence should be addressed to:

Editor, Amity Law Review
Amity Law School, Yasho Bhawan, Opp. Don Bosco Technical Institute
Okhla Road, New Delhi-110025
Tel.: 91-11-26325335, 26325901/3/4/7 Fax: 91-11-26325905
Visit us at: http://www.amity.edu

FEEDBACK FORM

Would you take a moment to evaluate this issue of the "Amity Law Review"? Your valuable comments will help shape future issues. Thank you!

	Highly Appreciable	*Somewhat Appreciable*	*Not Appreciable*	*Did not Read*
Articles	[ ]	[ ]	[ ]	[ ]
Legal Watch	[ ]	[ ]	[ ]	[ ]
Book Reviews	[ ]	[ ]	[ ]	[ ]

We'd appreciate your comments and suggestions about this issue of the "Amity Law Review" in general : _____

_____

Name : Mr/Ms _____ Designation: _____ Ph : _____

Organisation : _____

Address : _____

SUBSCRIPTION FORM

I wish to subscribe/renew my subscription to 'Amity Law Review' for 1/2/3/ year(s). A bank draft/cheque beanng no._____ dated_____ for Rs./US$_____ drawn ih favour of Amity Law School, New Delhi towards subscription for ____ __ years is enclosed.

Name _____

Address _____

City _____ Pin _____

Country _____

Phone _____ Fax _____

E-mail _____

SIGNATURE WITH DATE

SUBSCRIPTION RATES

Category *Indian (In Rs.)*	1 yr	2 yr	3 yr	*Foreign (in US$)*	1 yr	2 yr	3 yr
Institutions/Individuals	300	550	750	Air-mail	75	125	170
Alumni	250	400	500	Sea-mail	60	100	135
Students	200	350	425				

Please send the amount by DD/Crossed account payee cheque favouring *'Amity Law School'*, New Delhi for timely receipt of the Journal.

Printed at *Sita Fine Arts Pvt. Ltd.*, New Delhi.

AMITY UNIVERSITY PRESS