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EDITORIAL

The publication of Amity Law Review which was started in the year 2000 has been maintaining a high standard. However, due to reasons beyond our control the publication had to be stopped for sometime. With the current issue, we are resuming the publication and we are confident that the same will serve as a ready reference for the legal fraternity.

Promotion of quality legal scholarship, which has been found to be declining over the past few years, is the need of the hour. Recently, there have been debates regarding the role played by legal scholarship and its relevance in judicial decision making, in other jurisdictions. Over centuries, this discipline has undergone drastic changes and is still in transition. In the late 19th and early 20th centuries, when decision making was viewed as a scientific and deductive process, the discipline was perceived as a coherent and self contained one for guiding proper adjudication of cases. The content of the legal scholarship as well as legal curriculum underwent a change in early 20th century with the influence of sociological school which advocated for reliance on social science materials as well for rendering more just and humane decisions. Later, in 1930's, the legal arena witnessed the growth of the legal realism. These changes and today's globalised world have morphed the traditional doctrinal approach to law to an interdisciplinary one. At the same time, contemporary legal scholarship is largely criticised as lacking association between the legal academia and legal profession.

Amity Law Review is an attempt to add to the legal scholarship in India a flavour of interdisciplinary approach and to bridge the gap between the legal academia and legal profession. Towards that end, the Journal has tried to assimilate articles written both by academicians and practicing lawyers, at the same time being interdisciplinary.

It is hoped that Journal will continue to present interesting and challenging contemporary legal issues to our readers. Our esteemed readers are requested to provide their support to this venture. Your views and suggestions about the Journal are most welcome.

Prof. M. K. Balachandran

INSTITUTIONAL REFORMS IN INDIAN HIGHER EDUCATION

Prof. (Dr.) N. R. Madhava Menon*

Higher education has been the subject of inquiry of a variety of expert committees in the recent past. The occasion was a series of complaints from various quarters in respect of limited access, declining quality, cross commercialisation, lack of innovation and excessive interference by multiple regulators. The report of the committees found merit in the complaints and recommended many radical institutional and management reforms which were awaiting the attention of Government for quite some time.

Current Decade - A Turning Point in Higher Education

2009 marked a turning point in educational reforms in several respects. The Right to Education Act came to be enacted after a great deal of deliberation between the Centre and the States which assured every child free and compulsory education up to 14 years. A Government with a comfortable majority in Parliament headed by a Scholar-Prime Minister, who liberalised the economy a decade earlier, and a reformist education minister who steered the science-technology agenda in the previous government, came to assume office heralding change. The fruits of liberalisation resulting in sustained economic growth unaffected by the financial meltdown in the West, in a sense, reduced resistance of forces inimical to change in the higher education sector. The advent of the knowledge economy and the demand for trained professionals, coupled with remuneration comparable to that in developed countries, inspired the youth to take advantage of emerging opportunities by seeking higher qualifications. This, in turn, led to private educational entrepreneurs and venture capitalists turning to higher education. The result has been the establishment of a number of professional schools and universities in the private sector across the country, some under public-private partnership. The Ministry of Human Resource Development of the Central Government announced its policy to enhance the gross enrolment to higher educational institutions from the present 12 percent to 30 percent

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by 2020. This necessitated ushering in new policy initiatives and partnerships which are now being packaged in the form of six different pieces of legislation presently under consideration of the Indian Parliament.

Pre-legislative Consultation and Independent Task Force in Policy Development

One aspect of Indian politics and governance deserve to be noted at the outset. Given the federal nature of the polity and the division of powers between the Central and the State Governments, particularly in respect of 'Education', the management of the reform initiatives may face hiccups, difficult to predict at present. Different States are ruled by different political parties and the Centre by a coalition of parties, some of which have conflicting interests in managing the transition. Anticipating possible resistance, the Central Ministry cleverly changed the usual course of bureaucratic policy planning and gave the task to a Task Force of independent experts drawn from higher education which was asked to consult all stakeholders including the State Governments in drawing up the legislative proposals based on expert committee recommendations. Nearly a year-long consultation in several rounds not only helped to bring about a law with the widest possible support incorporating views of State Governments, but also resulted in educating the civil society of the content of the new higher education law and its implications. In this sense, the task was half done even before the adoption of the enactment by the Parliament.

The Existing System of Multiple Regulators

While the Constitution keeps "Education, including technical education, medical education and universities ..." as a Concurrent Subject (meaning, thereby, that States and the Centre can both have concurrent powers to legislate on it), Entry 66 of the Union List gives exclusive jurisdiction to the Central Government to legislate for purposes of "co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions". In exercise of these powers, the Central Government established the University Grants Commission as an overarching body to maintain standards and co-ordinate activities of higher educational institutions.

In course of time, several independent professional councils were set up under

statutes to promote and regulate areas of technical and professional education. There are over a dozen of them functioning at present, regulating segments of higher education. Finally, an All India Council for Technical Education was also set up to control institutions imparting technical and management education. A Distance Education Council was also added to regulate distance education institutions and courses. Besides all these national level regulators of higher education, universities are functioning under statutes enacted by State or Central legislatures which provide a self-regulatory framework with varying degrees of Government involvement. The complaint has been that the Vice-Chancellors of universities and Directors of institutions of higher education spend most of their time negotiating with these multiple regulators leaving little time to plan and develop teaching and research in their respective institutions.

The National Commission on Higher Education and Research

A major reform proposed by the National Commission for Higher Education and Research Bill, 2010, is to restore the autonomy of higher educational institutions by integrating and unifying the regulatory function in a single apex body to be called the National Commission for Higher Education and Research (NCHER). NCHER is conceived more as a facilitator than as a regulator and universities are expected to act as responsible self-regulating bodies accountable to the laws, the Constitution and the world of scholarship.

Once the HER Bill is adopted and notified, the existing statutes under which universities function are supposed to be amended suitably to confer autonomy and to demand accountability from all institutions of higher learning and research. In fact, establishing new universities will become much easier as it is the NCHER's function to facilitate the process and guarantee their autonomy. Internal governance structures of existing universities and institutions of higher education may have to undergo changes to let autonomy and accountability become a living reality to every unit of the university system. Instead of licensing-inspection-and-control mechanism, the new arrangement of autonomy with accountability will be based on disclosure-verification cum authentication system. The treatment of State universities differently from Central universities will gradually disappear and all universities will stand or perish on their own performance and credibility. With norm-based funding and

block grants from Governments, universities will be able to plan utilisation of resources they consider best and attract resources from outside, thereby, reducing dependence on Government funding alone. Public-private partnership will assume greater significance under the new regime and institutions will get established under the Societies Registration Act or the Companies Act as well. In all these changes the key 'mantra' will be autonomy with accountability of higher educational institutions.

The NCHER is a body independent of Government consisting of scholars of eminence and standing in the field of academics and research with proven capacity for institution building and governance of institutions of higher learning. It will have an advisory body called the 'Collegium of Scholars' to recommend policies and strategies to promote academic excellence in different fields of knowledge. A General Council comprising the representatives of stakeholders including State Governments will direct the Commission through its recommendations for the proper discharge of its functions. The NCHER will have as many Expert Groups as needed in different fields of higher education for co-ordinating activities and functions. With the help of the Collegium, the NCHER will maintain a 'Directory of Academics for Leadership Positions' from which universities are free to select Vice-Chancellors and Directors of institutes.

There are two important subsidiary bodies of NCHER under independent managements to undertake collateral functions of the Commission. The 'Board for Research Promotion and Innovation' is to recommend measures for promoting and facilitating research in institutions of higher learning and to suggest measures for its funding. The 'Higher Education Financial Services Corporation' is to be a company with its own Board of Directors charged with the responsibility of disbursing grants as per the norms laid down by the NCHER. With the establishment of NCHER, the existing regulatory bodies will be divested of their regulatory functions and the professional councils will be looking after matters related to professional practice only. Their assistance, of course, will be sought by NCHER for prescribing standards for professional practice for higher educational institutions.

Issues of Access and Expansion of the Higher Education Sector

Available data indicate massive increase in demand for university education

in India which is likely to continue in the next few decades. Meanwhile, in the short run, the National Knowledge Commission has advised the Government to increase the number of colleges and universities at least three times (60,000 colleges and 1500 universities) by 2015 in order to provide access to 20 percent of the eligible population. Governments will have to necessarily seek private investment in higher education if these objects are to be achieved. Already Indian private investment in higher education has substantially increased in recent years which is expected to grow in a big way once the new legal architecture envisaged under the proposed laws is put in place.

Meanwhile, the Central Government seems to have adopted a two-fold approach to meet the increasing demand for university and technical education from Indian and foreign students. Firstly, the technology-aided distance education programmes are being strengthened and streamlined to maintain quality and spread of distance mode learning across disciplines. Secondly, participation of foreign educational service providers is being encouraged by liberalising the restrictions and sending the message how it is mutually beneficially and economically attractive to invest in higher education in India.

A New Foreign Education Providers' Law

The Foreign Educational Institutions (Regulation of Entry and Operations) Bill, 2010 is intended to facilitate entry and operation of foreign universities and institutions imparting higher education, including, technical and medical education and to award degrees and diplomas by them. Any foreign educational institution can seek recognition from the Central Government and offer education comparable to the standards laid down by the proposed National Commission on Higher Education and Research. The Government will have power to withdraw recognition if a foreign educational institution violates the provisions of the proposed legislation.

There are certain conditions laid down in respect of the quality of programmes offered in India by a foreign education provider and the use of income from corpus fund (of not less than 50 crore rupees) and investment of surplus in generating revenue in its Indian operations. The quality of curriculum, methods of imparting education and the faculty employed to impart education should be comparable to those offered by it to students enrolled in its main campus in the home country. The surplus income generated in Indian operations is to

be invested for the growth and development of the educational institutions established by the foreign education provider in India. Disputes and penalties under the Act shall be adjudicated in India by the National Educational Tribunal proposed under a different legislation.

The current policy on private participation in higher education is one of acceptance and promotion, though, with some restrictions to prevent commercialisation. The policy would favour ploughing back surplus revenues for growth and development of educational institutions. In the past there has been cases of private institutions indulging in unfair practices, like, charging capitation fee for admission, not issuing receipts for moneys received, low quality delivery of education services after making tall claims through misleading advertisements, etc. The courts have intervened at the instance of aggrieved students and the Government has now come forward with an unfair practices law for educational institutions which will be applicable to foreign educational services providers as well.

Quality Control in Higher Education: National Accreditation Regulatory Authority

A mandatory assessment and accreditation through transparent and informed external review process is accepted as effective means of quality assurance in higher education. This would require a large number of competent and reliable accrediting agencies to be recognized, monitored and audited for professionalism and integrity through an independent but accountable institutional mechanism with statutory backing.

The National Accreditation Regulatory Authority for Higher Educational Institutions Bill, 2010, provides for the establishment of such a statutory authority to register, regulate and audit the functioning of accreditation agencies. It is expected that a large number of internationally reputed accreditation agencies will be seeking business in India under the new regime. The recognised accreditation agencies would be invested with the responsibility of accrediting higher educational institutions and programmes conducted therein. These agencies would accredit institutions and programmes through transparent processes. The assessment would include physical infrastructure, human resources (including faculty), administration, course curricula, admission and assessment procedures and governance structures of the institution. Such

a mechanism, it is hoped, would find acceptability among peer group of international accreditation bodies, necessary for student and teacher mobility and institutional collaborations within and across borders.

Quality Control through Prohibition of Unfair Practices in Educational Institutions

With unprecedented growth in higher education in recent years especially in technical and medical education largely through private participation, there has been a spurt of complaints regarding collection of donations and capitation fee, not issuing receipts therefor, making false claims through prospectus and misleading advertisements, poor quality of education, appointment of unqualified persons as faculty, etc. Courts have intervened on many occasions and have given remedies in proved cases of unfair practices. In the absence of a law on the subject, Governmental action through the University Grants Commission or the All India Council for Technical Education has been slow and ineffective to curb the malaise. Recently, the Central Government had to supercede the Medical Council of India through an Ordinance when it found that the Regulator itself was privy to some of these unfair practices.

It is in the above context that an educational malpractices law is being enacted under the title 'The Prohibition of Unfair Practices in Technical Educational Institutions, Medical Educational Institutions and Universities Bill, 2010'. While the policy remains to give autonomy to institutions of higher education and research, the Bill proposes to curb adoption of unfair practices by misusing autonomy with a view to protect the interests of students and others in higher education.

The Bill prohibits acceptance of fees or charges not declared in the prospectus for admission or admitting students otherwise than through an entrance test where such test is required by law for admission. Publication of prospectus is mandatory. It also prohibits misleading advertisements not based on facts. Money collected in violation may be confiscated and monetary penalties imposed on offending institutions.

Fast Track Adjudication of Educational Disputes

Litigation involving students, teachers, employees and managements of

universities and research institutions linger long in the court system and sometimes, adversely affect studies and academic calendars of institutions of higher education. With the steady growth of such institutions there is indeed a large volume of litigation awaiting disposal at all levels of the judiciary. As part of the current package of educational reforms, Government found it expedient to institute separate set of educational tribunals at National and State level to adjudicate on the entire gamut of disputes that arise in the higher education system through a fast track, speedy and professional arrangement. Reform of institutional structure for educational disputes adjudication is what is contemplated by the Educational Tribunals Bill, 2010.

The State Educational Tribunal, consisting of a Chairperson and two members, will have jurisdiction on service matters of teachers and employees of higher educational institutions, on matters relating to affiliation to universities and use of unfair practices prohibited under law by higher educational institutions. The Chairperson is to be a sitting or retired judge of a High Court and members to be Vice-Chancellors or Chief Secretaries or such other persons who have adequate knowledge of higher education and educational administration.

The National Educational Tribunal consisting of a Chairperson and upto eight other members shall exercise jurisdiction on disputes between any higher educational institution and any appropriate statutory regulatory authority, any reference made to it by Statutory Regulatory Authorities and any inter-State disputes relating to affiliation. The Chairperson of the National Tribunal is to he a sitting or retired Supreme Court Judge. Among the members, two have to be Judicial Members, three shall be Academic Members and three Administrative Members who are or have been a Secretary to the Government of India or of equivalent rank.

Penalty for failure to comply with the orders of the Tribunal includes imprisonment for a term which may extend to three years, or with fine which may extend to ten lakh rupees, or both. Chief Judicial Magistrates alone shall try the offences and that too only on a complaint made by the officer authorised by the National Educational Tribunal or a State Educational Tribunal, as the case may be. Proceedings before the Tribunals are declared judicial proceedings. Frivolous or vexatious complaints can not only be dismissed, hut the Tribunal can impose costs on the applicant up to 50,000 rupees to be paid to the opposite

party, as may be specified in the order. The jurisdiction of civil courts on the specified educational disputes is barred under the Bill.

Push for Innovation and Competitive Excellence on a Global Scale

On top of all these legislative initiatives, the Central Government have also conceived a Bill for establishment of Universities for Innovation "which would be at the fount of making India the global knowledge hub and set benchmarks for excellence for other institutions of higher learning through promoting synergies between teaching and research". The object is to encourage world-class institutions constantly stretching the existing boundaries of knowledge, attracting outstanding faculty and students and sustaining a spirit of free inquiry. The expectation is that ideas will emerge, a new work culture will develop and innovation will be triggered if creative minds are assembled and a conducive academic environment is created.

The Innovation Universities, which the Government itself will establish with adequate funding, will have total freedom to pursue teaching and research. Under a Memorandum of Agreement with the Central Government each University for Innovation will have a separate Board of Governors and internal governance structures which the university considers appropriate. It is to be a not-for-profit legal entity which can retain title to the intellectual property generated under notification to Government. Rule making is with the Board of Governors and not with Government as in conventional universities. It will set standards much higher than the benchmarks laid for other universities by the NCHER/UGC and will have freedom to employ the best of minds on negotiated terms.

Conclusion

Higher education scenario in India is in for radical changes in the very near future. A new legal architecture is taking shape and the Government has shown indications to allow autonomy with accountability to universities and institutions of higher education. In the next 10 to 15 years, India will be the world's largest education provider with a student population which will be at least 30 percent more than China. The challenge is to leverage the strengths and harness the opportunities.

ROADSHOW FILMS PTY. LTD. v. *iiNET LIMITED*: AN INDIAN STANDPOINT ON SECONDARY LIABILITY OF COPYRIGHT INFRINGEMENT ON THE INTERNET

Latha R Nair*

Abstract

Secondary liability of internet intermediaries for copyright infringement by their users is one of the most debated issues in global copyright circles today. Despite specific provisions in their copyright legislation by countries like the USA and Australia, their judicial precedents teach that the finding of secondary liability on intermediaries is subjective and fact oriented. Though the Indian Copyright Act, 1957, is technology neutral, it suffers from lack of guidelines on such issues. India is yet to amend its copyright law to provide for secondary liability for copyright infringement by intermediaries. Further, the same is still an untested issue before the Indian judiciary. In that backdrop, this article examines the decision of the Federal Court of Australia in *Roadshow Films Pty. Ltd.* v. *iiNet Limited* and attempts to reach a finding of the issues raised therein in the Indian context. In conclusion, the article finds that the provisions of the Indian Copyright Act, 1957, as they exist are inadequate in arriving at a fair and balanced finding on such issues and that absent a specific provision in the said Act, the courts must look not only at judicial precedents elsewhere and but also take guidance from the WIPO Internet Treaties.

Introduction

In the good old days, writers, artists and musicians created works to purely satisfy their passion and were contented with the fame and recognition that followed. This situation began to change with the arrival of the printing press in the 15th century following which the British Parliament was constrained to enact the Statute of Anne in 1709 as "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers

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1 See, < http://en.wikipedia.org/wiki/Statute_of_Anne > (Visited on 30-1-2011).

2 See, < http://www.copyrighthistory.com/anne.html > (Visited on 30-1-2011).

of such Copies, during the Times therein mentioned"[1]. The preamble of the Act bore testimony of the circumstances that attended its enactment[2]:

> "Whereas Printers, Booksellers, and other Persons, have of late frequently taken the liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books;"

Not surprisingly, it was the increasing incidents of infringement of copyrighted works that led to the enactment of this statute in an effort to protect the authors thereof. It is, however, interesting to note that, while enacting the statute, the legislators of the first copyright statute in the world took into consideration both direct and indirect acts of copyright infringement caused through the printing press which replicated or copied the works. Indeed, the journey from the printing press to the ubiquitous internet was a long one, interspersed with numerous technological developments. Copyright law, in general, also has been making efforts to keep up with the developments in this journey. However, the advent of the internet in the 1990s and the unparalleled ease of replication and dissemination of works that followed without the need for human intervention necessitated some additional legal standards globally for the determination of liability of copyright infringement on the internet. The WIPO Copyright Treaty (WCT) and the WIPO Phonograms and Performances Treaty (WPPT), popularly referred to as the 'WIPO Internet Treaties', were born out of this necessity.

Although, the jurisprudence on many aspects of intellectual property infringement on the internet around the world has been evolving over the last two decades, there are still differing judicial views on the various challenges posed by the internet. Of particular interest is the evolving jurisprudence on the aspect of copyright infringement liability on social networking sites arising out of user generated content (UGC). While Facebook and Twitter are examples of social networking sites where people put up their profiles and network with other people and share content, UGC is, simply put, content

generated on the internet by users of a particular internet service and may consist of both copyrighted and non-copyrighted works. Though, most social networking sites prohibit uploading of copyrighted works, UGC that infringe copyright has, in the recent times, become the bane for many a copyright owner around the globe and has raised the issue as to the extent of liability of copyright infringement on the part of the social networking sites which act as an intermediary on the internet.

In this context, two cases, one in Australia and another in USA, garnered keen attention by copyright owners, social networking sites, intermediaries, media, academicians and copyright enthusiasts alike. These cases were, *Roadshow Films Pty. Ltd.* v. *iiNet Limited*[3] (hereinafter, '*the Roadshow case*') and *Viacom International Inc.* v. *Youtube Inc.*[4] (hereinafter '*the Viacom case*') respectively. While the Federal Court of Australia rendered its judgment on February 4, 2010, in the *Roadshow* case, the United States District Court of Southern District of New York issued the judgment in the *Viacom* case on June 23, 2010.

This article attempts to study the findings in the *Roadshow* case regarding secondary copyright infringement liability on the internet and to apply it in the context of the extent of liability for secondary copyright infringement of social networking sites under the Indian Copyright Act, 1957 (hereinafter, 'the Indian Act'). Prior to coming to a conclusion of secondary copyright infringement in a given case, primary copyright infringement would have to be established. At the time of writing this article, Indian courts have not had an occasion to decide a case involving secondary copyright liability arising out of an infringement occurring on the internet.

Roadshow Case: Facts, Issues and Findings Regarding Authorisation Leading to Secondary Liability

In the 200 plus pages judgment in the much tweeted or twittered *Roadshow* case, Justice Cowdroy of the Federal Court of Australia provided a five page summary of the same in which he stated as follows: "The result of this proceeding will disappoint the applicants. The evidence establishes that

3 *Roadshow Films Pty. Ltd.* v. *iiNet Limited* (No. 3), [2010] FCA 24.

4 Viacom International Inc., Comedy Partners, Country Music Television Inc, Paramount Pictures Corporation and Black Entertainment Television LLC [07 Civ. 2103 (LLS)] United States District Court, Southern District of New York.

copyright infringement of the applicants' films is occurring on a large scale, and I infer that such infringements are occurring worldwide. However, such fact does not necessitate or compel, and can never necessitate or compel, a finding of authorisation, merely because it is felt that 'something must be done' to stop the infringements."[5]

The said quote is perhaps a reflection of the judicial predicament not merely in Australia, but globally, while deciding issues of secondary copyright infringement liability of internet intermediaries where there is overwhelming evidence of primary copyright infringement by users of the intermediary's services.

Facts

The facts leading to the *Roadshow* case involved 34 plaintiffs representing major motion picture studios, both in Australia and USA, who sued iiNet, the third largest ISP in Australia. Besides the 34 plaintiffs, the Australian Federation against Copyright Theft (AFACT), who was not a party to the proceedings, played a central role in the case in the collection of evidence on behalf of the plaintiffs, most of whom were members of AFACT. While the exact nature of the relationship between the plaintiffs and AFACT was not clear, it was established that its members provide its budget and decide on its business plan as to what investigations and activities AFACT would undertake.

AFACT employed a company known as DetecNet to investigate copyright infringement occurring by means of a peer to peer (p2p) system known as the BitTorrent protocol used by subscribers and users of iiNet's services. The information regarding infringement obtained from these investigations was then forwarded to iiNet with a demand that iiNet take action to stop the infringements occurring. While the measures that AFACT wanted iiNet to take in respect of these demands were never precise or elucidated in the demand letters, the evidence during the trial indicated that AFACT wished iiNet to send a warning to the subscriber who was allegedly infringing and if such warning was not heeded to, AFACT intended that iiNet suspend the internet service of that subscriber. Even after that if the subscriber remained uncooperative, termination of the internet service was sought as the ultimate sanction. Further,

5 *Supra* n. 3, para. 19.

the plaintiffs also suggested that iiNet should block certain websites.

BitTorrent Protocol

In order to appreciate the issue of authorization leading to secondary liability for copyright infringement, it is essential to understand how the BitTorrent protocol works. The BitTorrent protocol is essentially a scheme for a highly efficient and decentralized means of distributing data across the internet. Unlike the traditional model of data distribution wherein the computer that has the data sends it to the computer that requested it, the BitTorrent protocol works on a p2p basis whereby all the computers seeking the data participate in the distribution of it. The BitTorrent protocol has three parts to it namely, the BitTorrent client, the .torrent file and the tracker.

The BitTorrent client is a computer program or software which allows a person to access groups of computers sharing a particular .torrent file. These groups of computers are known as 'swarms' and each computer in a swarm is known as a 'peer'. The BitTorrent client can have no operation by itself as it needs to be provided with information in order to fulfill its role, which comes from a .torrent file.

The .torrent file contains only the information necessary for the BitTorrent client to contact and participate in a swarm. In other words, while the .torrent file contains the name of the file sought, the size of the file, the hash value of the file, the hash value of the pieces of the file and location of the tracker, it has no underlying data of a film or television program. The BitTorrent protocol operates by breaking up large files into smaller parts and in order to ensure that each piece is received correctly and that the data is not corrupted, the BitTorrent client consults the hash values for each piece. A hash value is a means of converting a large amount of data into smaller value. In other words, a hash functions as an identifier of data. Hence when a BitTorrent client receives a piece of the file from another peer in the swarm, it checks that the piece hash of the piece is identical to the piece hash for that piece in the .torrent file. If it is, the BitTorrent client knows that the piece is the correct piece and was correctly received. If it is not, it is discarded and the requested piece is sought again.

Tracker is a computer program on a server made available for contact by BitTorrent clients by means of a Universal Resource Locator (URL) or a

website. Tracker monitors the particular swarm to which it is attached and monitors the IP addresses of peers in the swarm.

Justice Cowdroy poetically described the file being shared in the swarm as the treasure, the BitTorrent client as the ship, the .torrent file as the treasure map and the tracker as the wise old man that needs to be consulted to understand the treasure map.

Issues

The plaintiffs sought declarations that iiNet had infringed the copyright in the films in question by authorizing the making in Australia of copies of, and by authorizing the communication in Australia to the public of, the whole or a substantial part of those films without the license of the plaintiffs. The main issues that arose for consideration were, (a) whether there was primary infringement of copyright by iiNet users and (b) whether the primary infringements were authorised by the defendant, iiNet. While examining the issues, it is important to bear in mind that the BitTorrent protocol is not owned by or controlled by iiNet, the defendant herein. Nor did the plaintiffs make the owner of BitTorrent protocol a party to these proceedings.

Case Law and Findings

As for the first issue, namely whether there was primary copyright infringement, the Court examined several witnesses of AFACT and DetectNet as well as those of the defendant, iiNet. Having examined the witnesses, the Court accepted that copyright subsisted in 86 identified films and that the plaintiffs had the right to bring the action for copyright infringement against the defendant. Court also noted the fact that iiNet conceded that there have been primary infringements committed by iiNet users. It is significant to state here that the evidence adduced in the case pointed to only those infringements occurring by way of use of BitTorrent system by iiNet users.

Based on the evidence adduced by both the parties, the Court found that iiNet users have made available online, electronically transmitted and made copies of the plaintiffs' 86 identified films without license of the plaintiffs. Having found that the plaintiffs have proven primary infringement on the part of

6 *University of New South Wales* v. *Moorhouse & Another*, (1975) 133 CLR 1.

iiNet users, the next task of the Court was to examine if iiNet, the defendant, could be said to have authorised the acts of infringement by its users. In that inquiry, the Court relied upon some of the Australian precedents that dealt with 'authorisation'. Of particular significance was the *Moorhouse* case[6] which dealt with the issue of 'means of infringement'. In addition to *Moorhouse*, the Court also dealt with the cases of *Kazaa*[7] and *Cooper*[8].

Moorhouse is an oft-referred to judgment in cases involving secondary copyright infringement liability. Decided in the year 1975, it considered the factual circumstance relating to coin-operated photocopiers provided by the University of New South Wales in its library and secondary liability for copyright infringement by the University. One Mr. Brennan copied a short story out of a specific copyrighted work and, at first instance, it was found that although Mr. Brennan infringed copyright in the work, the University had not authorised the same. On appeal, the appellate court reversed the said finding. The main points of reasoning by the appellate court in *Moorhouse* are summarised as follows:

- One could not be said to authorise the infringement of copyright unless one had some power to prevent it;
- While indifference could lead to authorisation, authorisation required a mental element such that it would not be found where one was inactive and did not know or have reason to know that infringements were occurring;
- A person who had under his control the means by which an infringement may be committed and who made it available to other persons knowing, or having reason to suspect, that it was likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement which resulted from its use;
- Hence, means, knowledge and control were all that were necessary to constitute a finding of authorisation;

7 *Universal Music Australia Pty. Ltd. and Others* v. *Sharman License Holdings Ltd & Others*, (2005) 65 IPR 289.

8 *Universal Music Australia Pty. Ltd. and Others* v. *Cooper & Others*, (2005) 150 FCR 1.

- The role of 'reasonable steps' was to take authorizing conduct, or a situation which could be authorizing infringement, out of that context, and thereby render what would otherwise be infringing conduct non-infringing;

- Authorisation could be found in situations where an express permission or invitation was extended to do the act comprised in the copyright or where such a permission or invitation may be implied.

Unlike *Moorhouse* which was decided in the context of infringements occurring in brick and mortar environment, the decisions in *Kazaa* and *Cooper* concerned infringements occurring on the internet and these decisions were issued in the year 2005, much subsequent to the decision in *Moorhouse*.

Kazaa dealt with the issue of copyright infringement liability arising out of a p2p file sharing software which allowed users to search for and obtain files contained in the computers of others on the system. The Court found that the defendants, who were responsible for the creation and maintenance of the *Kazaa* system had authorised the infringement because the evidence showed that they had the technical means to prevent or at least substantially reduce the number of infringements which were occurring by the use of the *Kazaa* system but did not prevent the infringements to protect their financial interests.

Cooper concerned the operation of a highly structured and user-friendly website created by Mr. Cooper which contained hyper links to other websites or remote servers containing music files. A person who visited Mr. Cooper's website, therefore, was provided with the means to quickly and easily download copyright infringing music files. The Court in *Cooper*, found that the website was intended and designed for copyright infringement and was the means for infringement. Further, the Court found the Internet Service Provider (ISP) which hosted the website in *Cooper* had the power to prevent infringements occurring by Mr. Cooper's website by refusing to continue to host it, but did not do so.

In the light of *Moorhouse*, *Kazaa* and *Cooper*, the Court analysed the concept of authorisation and found that the findings of authorisation in all these cases were predicated on a finding that the particular authoriser was the person who provided the 'means' of infringement, and that the analysis of considerations relevant to authorization such as knowledge and power to prevent were

predicated upon the initial finding that the 'means' of infringement had been provided by the authoriser. Considering *Moorhouse* to be the foundation of the contemporary law of authorization in Australia, the Court divided the cases that followed *Moorhouse* into 'technology cases' and 'APRA cases'. Technology cases were *Kazaa, Cooper* and the Roadshow case and APRA cases were *Metro*[9] and *Jain*[10]. Court observed that while both technology cases and APRA cases followed the *Moorhouse* principles, they were factually distinct.

In *Metro* and *Jain* the plaintiff, APRA or the Australasian Performing rights Association Limited, which owned the performance rights to a vast majority of music sued the respective defendants, Metro on George Pty Limited and Mr. Jain, who had owned or controlled the premises in which live music was performed in public. The context of these two cases went beyond Moorhouse because it would have been far easier to use a copier in a library in a way that did not infringe copyright than it would be to use a live music venue in a way that did not infringe APRA's performance rights. In both the cases, secondary copyright liability on the defendants was established. In *Jain*, it was held by the Court that Mr. Jain had the power to control what music was played at the tavern and also to determine whether a license from APRA would be applied for. In *Metro*, it was found that the promoters had not obtained the licenses from APRA and Metro knew about it.

The Court found that the decisions in the 'technology cases' displayed the requirement for the authoriser to have provided the means of infringement even more clearly. Court pointed out that it was important to distinguish between the provision of a necessary precondition to infringement occurring and the provision of the actual means of infringement. In the *Moorhouse* case, the mere provision of a photocopier was not the 'means' of infringement; rather it was only the 'means' of infringement in the particular context in which the infringements occurred. Other preconditions existed, such as the supply of power and the physical premises in which the infringements occurred and the presence of each of these factors was a precondition for the infringements to occur but, the Court found that, that did not necessarily lead to the conclusion

9 *Australasian Performing Rights Association Ltd.* v. *Metro on George Pty. Limited & Others,* (2004) 61 IPR 57.

10 *Australasian Performing Rights Association Ltd.* v. *Jain,* (1990) 26b FCR 53.

that a person who individually provided each of those preconditions could equally be found to have authorised the infringements. While the provision of internet by iiNet was a necessary precondition for the infringements to occur, internet was not the means of infringement. The Court, then went on to hold that the use of the BitTorrent system as a whole was not just a precondition to infringement and that it was in a very real sense, the 'means' by which the plaintiffs' copyright was being infringed because even the evidence filed in the case did not point to infringement occurring other than by way of the use of BitTorrent system. In short, the Court found that, absent the BitTorrent system, the infringements could not have occurred because the infringing iiNet users must seek out a BitTorrent client and must seek out .torrent files related to infringing materials themselves and in doing so, they were provided with no assistance from iiNet. Hence, it was not iiNet, but rather the BitTorrent system as a whole which is the 'means' by which the plaintiffs' copyright was being infringed. While it was correct that absent the internet service of iiNet, the infringements could not have taken place, it was equally true that more than an internet connection was required to effect the infringements, namely, the BitTorrent system over which iiNet had no control. In addition, the Court made the following observations on authorisation:

- One could not have said to have the power to prevent infringement if the step to be taken to prevent the infringement was not a reasonable step in the circumstances.

- Consequently, the only relevant power iiNet had to prevent infringement was to warn and then terminate/ suspend its subscribers' accounts based on the AFACT notices.

- The warning and termination of subscriber accounts on the basis of AFACT notices was not a reasonable step nor would it constitute relevant power on the part of iiNet to prevent the infringements from occurring.

- Further, though termination of accounts would stop infringement, it would do much more and in the circumstances it would not be reasonable. Consequently, warning and termination/ suspension did not relevantly constitute a power to prevent infringement on the part of iiNet.

- While there was a relationship between iiNet and its users who were infringing, such relationship itself did not persuade the Court that iiNet was authorizing the infringements of the iiNet users

- It would be very difficult to make a finding of authorisation at the level of knowledge alone. While iiNet had general knowledge of copyright infringement committed by its users or knowledge that infringement was likely to occur on its facilities, at such a level of abstraction it was very difficult to act on such knowledge in any meaningful way. In other words, the mere knowledge or the power to prevent was not, ipso facto, authorisation.

- There was only a legal prohibition on doing an act comprised in the copyright without the license of the owner or exclusive licensee of that copyright or authorizing another to do that copyright infringing act. Consequently, merely being indifferent or inactive in the knowledge that copyright infringement was occurring cannot possibly constitute authorisation.

- Finally, the Court did not find that iiNet approved or sanctioned or even countenanced the copyright infringement by iiNet users as all those terms implied a sense of official approval or favour of the infringements which occur and such approval or favour could not be found.

An Indian Standpoint

Secondary copyright liability for infringement occurring on the internet is still an untested position before the Indian judiciary. India has the largest movie industry in the world and also has a large number of its population, young and old, highly active on social networking sites and other similar platforms sharing UGC. Often such UGC consists of film music and audio visual clippings from films, uploaded and posted on such websites by these users. Like the plaintiffs in the Roadshow case, the first impression on seeing such rampant infringement by users of a particular social networking site would always be that the website owner must be held liable for infringement of copyright as the same was happening on his site. However, the Roadshow case suggests that careful consideration has to be given while identifying a defendant in such cases. Justice Cowdroy stated in the judgement as follows:

> "It is unfortunate that the outcome of the Court's findings is that the applicants will continue to have their copyright infringed. However, the fault lies with the applicants for choosing the wrong respondent. The current respondent does not stand in the way of the applicants pursing those who have directly infringed their copyright nor in the way of the applicants pursing any of the constituent parts of the BitTorrent system for authorisation. This decision in no way forecloses the applicants pursuing those other avenues to obtain a suitable remedy. The existence of infringement of copyright, however regrettably extensive, can never compel a finding of authorization[11]."

One issue that arises in such cases is whether to sue the owner of the website or the users thereof. Or should all those who played a part in the chain of events that led to the infringement be sued? For instance, if a particular social networking site is found to have UGC that violates third party copyright, besides the owner of the social networking site, should liability be cast on the internet service provider who helped access the social networking site as well as the cyber café which provided the computers to the users with internet enabled terminals? What about the users of the site who uploaded the content? Casting liability on all the relevant players in the chain of events leading up to infringement in such a case would be akin to casting liability for copyright infringement caused by the lessee of a shop premises in a mega mall consisting of hundreds of other shops, on the owner of the mall as well as the owner of the shop in question who leased it to the infringer. What, therefore, are the principles of copyright that should apply in such situations under the Indian law to impose liability on the owner of the website in question?

It would be relevant in this context to quote from one of the earliest cases in the United States of America that paved the way for enactment of the Digital Millennium Copyright Act (DMCA) which deals with copyright infringement liability on the internet[12]. The short question that came up for consideration in the case of *Religious Technology Center* v. *Netcom On-Line Services Inc.*[13],

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11 *Roadshow Films Pty. Ltd* v. *iiNet Limited* (No. 3), [2010] FCA 24, p. 134.

12 See, <http://digital-law-online.info/misc/HRep105-551pt1.pdf> (Visited on 2-2-2011) for the report of the US House Representatives being H. Rept. 105-551, Part 1, pp. 24-25.

13 907 F. Supp. 1361.

decided in 1995 by the Northern District Court of California was whether the operator of a bulletin board service (BBS) and an Internet access provider that allowed the BBS to reach the Internet, should be liable for copyright infringement committed by a subscriber of the BBS. The Court found as follows:

> "... Although the Internet consists of many different computers networked together, some of which may contain infringing files, it does not make sense to hold the operator of each computer liable as an infringer merely because his or her computer is linked to a computer with an infringing file. It would be especially inappropriate to hold liable a service that acts more like a conduit, in other words, one that does not itself keep an archive of files for more than a short duration. Finding such a service liable would involve an unreasonably broad construction of public distribution and display rights. No purpose would be served by holding liable those who have no ability to control the information to which their subscribers have access, even though they might be in some sense helping to achieve the Internet's automatic "public distribution" and the users' "public" display of files."[14]

At the time the said case was decided by the District Court of the Northern District of California, there was no enabling legislation in the United States of America that dealt with copyright infriugement liability issues on the internet. Indian courts, if faced with such issues, would be in a similar predicament to sit in judgement of such issues without any specific enabling provisions under the Indian Act regarding copyright infringement liability on the internet.

Provisions on Secondary Copyright Infringement Liability under the Indian and Australian Laws

The *Roadshow* case sheds some light on the factors that would determine the liability of website owners in such situations. While attempting to apply the facts of the *Roadshow* case to the Indian legal scenario, it would be instructive to understand the Australian legal provisions governing secondary copyright infringement liability occurring on the internet under the Copyright Act, 1968 (hereinafter, 'the Australian Act'), as well as the corresponding provisions

14 *Roadshow Films Pty. Ltd.* v. *iiNet Limited* (No.3), [2010] FCA 24, para. 22.

under the Indian Act.

Section 101 of the Australian Act that deals with infringement and section 112E that deals with liability of carriage service providers are reproduced below:

> "101. Infringement by doing acts comprised in copyright
>
> (1) Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the license of the owner of the copyright, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright.
>
> (1A) In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in a copyright subsisting by virtue of this Part without the license of the owner of the copyright, the matters that must be taken into account include the following:
>
> (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
>
> (b) the nature of any relationship existing between the person and the person who did the act concerned;
>
> (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.
>
> 112E - A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in an audio-visual item merely because another person uses the facilities so provided to do something the right to do which is included in the copyright."

While the Indian Act has no provisions dealing with the liability of carriage service providers or internet service providers, Section 51 thereof provides for both primary and secondary liability for copyright infringement. Section 51 reads as follows:

"51. When copyright infringed Copyright iu a work shall be deemed to be infringed—

(a) when any person, without a license granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act

i. does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

ii. permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

...

[Provided that nothing in sub clause (iv) shall apply to the import of one copy of any work, for the private and domestic use of the importer]

Explanation - For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to he an "infringing copy".

A reading of Section 51(a) (i) unambiguously conveys that lack of knowledge (that infringement is being committed) plays no role in primary infringement cases. Liability for secondary copyright infringement is dealt with under Section 51(a)(ii) which uses the words, "permits for profit any place to be used for the communication of the work". Even though the Indian Act has no specific provisions dealing with the liability of internet service providers, it may be said to be technology neutral in its language[15]. The words, "any place" under this section could, therefore, be construed to include even the internet.

15 For instance, the definition of 'communication to the public' under Section 2(ff) reads as follows:

Further, though section 14 of the Indian Act[16] that explains the 'meaning of copyright' in respect of each category of the works protected therein uses the word, 'authorise', section 51(a)(ii) has left out the said word while defining copyright infringement and has instead used the word 'permit'.

Secondary liability for copyright infringement under Section 51(a)(ii), therefore, hinges on proof of three aspects, namely, (i) permission by a person to use the premises for communication of the work for a profit, (ii) knowledge on the part of such person that the communication of the work to the public constituted copyright infringement and (iii) presence of reasonable grounds for believing that such communication constituted infringement.

In comparison, the language on secondary copyright infringement liability under subsection (1A) of Section 101 of the Australian Act is strikingly clearer than those under Section 51(a)(ii) of the Indian Act. Apart from using the specific word 'authorise', Section 101(1A) of the Australian Act gives a non-exhaustive list of factors to be taken into account to determine whether there was authorisation in a given situation. Interestingly, despite such specific guidelines and scope for broader interpretation of authorization appearing in the language of Section 101(1A) of the Australian Act, it took the Court meticulous discussions of nearly 200 pages on the Australian copyright jurisprudence to arrive at its findings.

Interpretation of Section 51(a)(ii) of the Indian Act in the Factual Matrix of the Roadshow Case

If the secondary copyright infringement liability issue vis-à-vis *iiNet* were to be raised before an Indian court, the challenge would be to arrive at a finding against the lack of precedents, absence of provisions under the Indian Act

"(ff) 'communication to the public' means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.

Explanation For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public."

16 Section 14 reads: "Meaning of copyright For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-..."

regarding liability of internet intermediaries, such as, iiNet in such situations and the lack of details or guidelines for determination of secondary copyright infringement liability in the statute.

The three aspects of secondary copyright infringement liability under Section 51(a)(ii) discussed above would have to be considered in any such case by an Indian court. Applying the first of such aspects, it is to be examined if iiNet permitted its users to communicate the plaintiffs' works for a profit. It is relevant to consider here that by merely permitting its users to access the internet using its services, iiNet could not be said to have permitted its users to communicate the plaintiffs' works to the public. While it is true that iiNet did receive money from its users for internet connections, the additional factor that enabled any communication on the internet of the plaintiffs' works by these users was the BitTorrent protocol. Absent the BitTorrent protocol (which was described by the Federal Court of Australia as the 'means' for committing infringement), the communication of the plaintiffs' works could not have taken place on the internet. In other words, what was granted by iiNet to its users was a mere permission to use the 'premises' (which in this case was the internet) as opposed to a permission to use the premises for communication of the work for a profit. It would, therefore, emerge that the first criterion that is to be satisfied for arriving at a finding of secondary copyright infringement under the Indian Act has not been satisfied.

As regards the second and the third aspects, namely, knowledge that the communication of the work to the public constituted copyright infringement and presence of reasonable grounds for believing that such communication constituted infringement, respectively, the language of Section 51(a)(ii) requires close consideration. The language used is, "unless he was not aware and had no reasonable ground for believing". While the first part of the sentence is about actual knowledge, the second part deals with constructive or implied knowledge that such communication would constitute infringement. The use of the word 'and' instead or 'or' raises the issue whether a plaintiff who proved actual knowledge should also establish constructive knowledge. Tracing the legislative history of the section, the language of the Indian Act was mostly borrowed from the Copyright Act, 1956, of the United Kingdom. A comparison of the language of section 51(a)(ii) of the Indian Act with section 5 of the UK Act of 1956 would reveal the substantial similarity between the two. Section 5 is reproduced below:

"(5) The copyright in a literary, dramatic or musical work is also infringed by any person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work:

Provided that this subsection shall not apply in a case where the person permitting the place to be so used

(a) was not aware, and had no reasonable grounds for suspecting, that the performance would be an infringement of the copyright, or

(b) gave the permission gratuitously, or for a consideration which was only nominal or (if more than nominal) did not exceed a reasonable estimate of the expenses to be incurred by him in consequence of the use of the place for the performanceThough in the 1988 amendment, the UK Act removed the 'and' and replaced it with 'or'[17], the language of the Indian Act remained the same over the years despite amendments to the copyright law in 1983, 1984, 1992, 1994 and 1999. However,

17 See, the amended UK Act, 1988, ss. 25 and 26. "S. 25 Secondary infringement: permitting use of premises for infringing performance (1) Where the copyright in a literary, dramatic or musical work is infringed by a performance at a place of public entertainment, any person who gave permission for that place to be used for the performance is also liable for the infringement unless when he gave permission he believed on reasonable grounds that the performance would not infringe copyright. (2) In this section "place of public entertainment" includes premises which are occupied mainly for other purposes but are from time to time made available for hire for the purposes of public entertainment.

S. 26 Secondary infringement: provision of apparatus for infringing performance, etc

(1) Where copyright in a work is infringed by a public performance of the work, or by the playing or showing of the work in public, by means of apparatus for

(a) playing sound recordings,

(b) showing films, or

(c) receiving visual images or sounds conveyed by electronic means,

the following persons are also liable for the infringement.

(2) A person who supplied the apparatus, or any substantial part of it, is liable for the infringement if when he supplied the apparatus or part

(a) he knew or had reason to believe that the apparatus was likely to be so used as to infringe copyright, or

(b) in the case of apparatus whose normal use involves a public performance, playing or showing, he did not believe on reasonable grounds that it would not be so used as to infringe copyright.

(3) An occupier of premises who gave permission for the apparatus to be brought onto the premises is liable for the infringement if when he gave permission he knew or had reason to believe that the apparatus was likely to be so used as to infringe copyright.

> it could not have been the intention of the legislators that a plaintiff must establish both actual and constructive knowledge for establishing secondary liability as it places an unduly heavy burden on a plaintiff and shows some sort of leniency towards a defendant. Further, such an interpretation would not be in alignment with the judicial interpretation of the requirement of knowledge in such cases."

Recently, the United States District Court, Southern District New York had the occasion to interpret the statutory phrases "actual knowledge that the material or an activity using the material on the system or network is infringing" and "facts or circumstances from which infringing activity is apparent" under the DMCA in the Viacom case[18]. While interpreting the same, the Court went into the legislative history that led to the enactment of the DMCA and observed that the legislative history suggested that by limiting the liability of internet service providers, the efficiency of the internet would continue to improve and the variety and quality of services on the internet would continue to expand[19]. It is relevant to quote from the observations of the Court from the said ruling as follows:

> "The tenor of the foregoing provisions is that the phrases 'actual knowledge that the material or an activity' is infringing and 'facts or circumstances' indicating infringing activity, describe knowledge of specific and identifiable infringements of particular individual items. Mere knowledge of prevalence of such activity in general is not enough. That is consistent with an area of the law devoted to protection of distinctive individual works, not of libraries. To let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users' postings infringe a copyright (sic) would contravene the structure and operation of the DMCA." [20]

While deciding the *Roadshow* case, the Federal Court of Australia also held that it would be very difficult to make a finding of authorisation at the level

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18 *Supra* n. 4.

19 *Supra* n. 4, p. 8, cited from the US Senate Committee on the Judiciary report, S. Rep. No. 105-190 (1998).

20 *Supra* n. 4, p. 15.

of knowledge alone and pointed out that the general knowledge possessed by iiNet of the copyright infringement committed by its users or knowledge that infringement was likely to occur on its facilities was in the abstract and that it was very difficult to act on such knowledge in any meaningful way. The line of 'Technology cases' as classified by the Federal Court of Australia in that case displayed the requirement for the authoriser to have provided the means of infringement even more clearly.

Clearly, there is no judicial guidance under the Indian Act for an interpretation of the degree of knowledge that is required in such cases. An Indian court addressing such issues must, therefore, not only look at the evolving global jurisprudence on the issue, but also look at the global standards laid down by the WIPO Internet treaties. It is relevant to quote from the Agreed Statement to Article 8[21] of the WIPO Copyright Treaty in this context as follows:

> "It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention..."[22].

While there is no obligation on India to amend its laws to conform to the WIPO Internet Treaties even before its accession to these treaties, Indian courts, as and when required to decide a law suit raising such issues could consider all the above aspects.

Lastly, the law relating to copyright in India is currently under consideration for amendment. Some provisions have been proposed in the Copyright Amendment Bill, 2010, as to amend Section 52 of the current Act to include certain acts not amounting to infringement so as to cover on-line copyright infringement liability. The sections are reproduced as follows[23]:

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21 WCT, Article 8 reads: "Right of Communication to the Public -Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."

22 See, < http://www.wipo.int > (Visited on 2-2-2011).

23 See, < http://copyright.gov.in/Documents/CopyrightAmendmentBill2010.pdf> (Visited on 2-?-2011).

"(b) The transient and incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

(c) Transient and incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy.

Provided that if the person responsible for the storage of a copy, on a complaint from which any person has been prevented, he may require such person to produce an order within fourteen days from the competent court for the continued prevention of such storage:"

Sadly, the proposed amendments do not deal with the specific issue of liability of intermediaries in clearer language as found in the Australian Act. A review of the proposed amendments compels one to comment that the same are more oriented towards empowering authors though ostensibly the amendments are meant to conform to the WIPO Internet Treaties. Looking at nuances involved in on-line copyright infringement liability and the need to preserve the efficiency of the internet by limiting the liability of the service providers, it is hoped that the amendments would incorporate detailed and unambiguous language to address such issues. This would also equip the Indian judiciary for a fair and balanced consideration of the issues involved.

ALL INDIA BAR EXAMINATION - FACTS, REALITY AND THE LAW

John Varghese*

Abstract

The Bar Council of India has gone ahead with the All India Bar Examination (AIBE), despite opposition from a wide section of law students and lawyers. While the results of the first AIBE, where only 71.3% of the applicants were able to clear the test, justifies the objective of the AIBE to bring standardisation in the quality of legal professionals, there are a lot of issues surrounding the AIBE, including, the manner in which it is conducted and the legal provisions enabling such a step. This article examines the legal position regarding the AIBE conducted by the Bar Council of India, in the light of the previous decisions of the Hon'ble Supreme Court in this regard.

Introduction

When the Bar Council of India (BCI) proposed an All India Bar Examination (AIBE) to test the standards of new entrants to the legal profession, the move was opposed by a wide section of the students and advocates[1]. The stated aim of the AIBE is to improve the quality of the fresh entrants to legal profession. Despite the opposition from various quarters, BCI has gone ahead and conducted the AIBE in 45 centres across the country. While the results of AIBE[2], shows that there is much lacking in the quality of legal education in the country, since only 71.3% of the advocates enrolled for the examination could pass the basic test, the questions regarding competency of BCI to conduct such a test on an all India basis remains disputed, and the matter is pending final decision of the Court.

An examination of the history of the legal profession would reveal that a threshold test has been adopted on several occassions to ensure the quality of

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1 See, *Indian Express*, March 7, 2011, available at <http://www.indianexpress.com/news/Bar-raised--Exam-a-success/758662/> (Visited on 5-5-2011).

2 Available at <http://www.barcouncilofindia.org/wp-content/uploads/2011/03/ResultDetails.pdf> (Visited on 5-5-2011).

entrants to this noble profession. A comparative analysis would further reveal that such a qualitative examination is already in vogue in many countries, the prominent among them being USA. However, despite the usefulness and value addition such a test would bring to the legal profession, the questions of propriety and legality of the AIBE needs to be examined in the light of the existing statutory provisions in India.

History of Bar Examination

Historically, the legal profession developed from the guilds that were a fashion in the early 14th and 15th century England[3]. Hence, as in the case of any other professional body that developed during the period, in the initial years, admission to the bar was strictly based on peer recognition and recommendation[4]. However, this soon became misused, and the courts took over the responsibility of admitting persons to the bar, with the rationale that the integrity and competency of practicing attorneys directly affect the quality of justice dispensed. In order to test the knowledge of the new entrant to the legal profession, the courts began asking some questions before letting him appear before the court. Perhaps, the first formalised bar examination for admission to legal profession was created in USA[5].

USA

While it was the responsibility of the individual states to determine the standards of admission to legal profession in each state, till 1828, the general trend was to repose the duty of determining the competency of new entrants to the legal profession to experienced attorneys.[6] This led to an elitist bar, which

3 Susan G. Munch *et. al.*, *Maximising Law Firm Profitability: Hiring, Training and Developing Productive Lawyers*, ALM Properties Inc., New York, 1991, p. 50.11; also see, <http://www.jrank.org/history/pages/7534/legal-profession.html> (Visited on 28-7-2010).

4 Richard A. Posner, *Overcoming Law*, Harvard University Press, USA, 1995, p. 39.

5 In the State of Delaware, a formal Bar Examination for admission into the legal profession was created as early as 1763, available at <http://lawbrain.com/wiki/Bar_Examination> (Visited on 19-7-2010).

6 See, <http://lawbrain.com/wiki/Bar_Examination> (Visited on 19-7-2010). This tradition predates the U.S. Constitution by more than six centuries, when English courts governed who would be allowed to practice law.

7 Strict rules developed by lawyers at that time typically required an individual to obtain a college degree and work several years as an attorney's apprentice before being admitted to the practice of law. Because attorneys controlled who would get apprenticeships, the general public perceived the system as catering to the elite.

would admit only a highly qualified person belonging to respectable families.[7] It would be interesting to note that till 1860 only 9 states in USA required any form of legal education to be admitted to the bar.

Post 1828, when the election of Andrew Jackson as President of USA marked the decline of elitist trends, State legislatures divested the attorney's of the authority granted to them for admission into Bar and took over control of Bar Examination standards making it far less stringent and far less exclusive. During this period, the opportunities to study law increased, and the way of articleship in law, for entry into legal profession became redundant. Organisations like American Bar Association (ABA) and American Association of Law Schools (AALS) that were founded during the period encouraged tougher bar admission standards including the requirement that all bar candidates complete a written examination which is to be used to assess their fitness to practice law. In USA, after 1880's, beginning with New Hampshire, States began to set up Central Boards of Bar Examiners within their respective territories. Originally, these Central Boards were conducting oral examinations, but by 1958, most of these boards had introduced written tests. In 1958, ABA along with AALS developed a Code of Recommended Standards for Bar Examinations[8]. Since 1930's, National Conference of Bar Examiners (NCBE), which is a not for profit organisation, has been working towards attaining uniformity in the standards for admission to legal profession and in the mode of conducting the bar examination. In 2010, the NCBE has proposed a Uniform Bar Examination (UBE). It is expected that by 2011 most states in USA would switch over to UBE.

If we take a closer look at the origin of bar examination, it can be seen that the bar examination in USA has come into vogue as a divestiture of courts power to admit members to the bar.

United Kingdom

In UK, there was no formal examination conducted by a professional body for entry into the bar, there has always existed a bench mark professional course. Historically legal profession in England is divided into solicitors and

8 Prof. Margo Melli, "Passing the Bar: A Brief History of Bar Examination Standards", available at <http://www.law.wisc.edu/alumni/gargoyle/archive/21_1/gargoyle_21_1_2.pdf> (Visited on 20-7-2010).

9 Bar Vocational Course for Barristers and Legal Practice Course for Solicitors.

barristers. Only those who have completed professional trainings[9] conducted by professional bodies responsible for admission into the legal profession in England are allowed entry into the legal profession. Admission to these professional trainings were restricted to those who have acquired a first degree in law, and others must undergo a one year qualifying course culminating in an examination called the CPE, or Common Professional Examination) in the core subjects of law before being eligible for the qualifying courses. Even after qualifying, solicitors should complete at least one year training as a trainee solicitor and barristers in a barrister's chamber.[10]

While it can be safely said that In England there is no general examination that is an essential requirement for entry into legal profession, in order to become barrister, the students have to pass a series of examiuations known as Bar Vocational Course. Almost similar practice exists in Ireland, which was till recently a part of England. Similarly, there is also Legal Practice Course for solicitors. The responsibility for conducting this examination, was till recently was with the Law Society of England. With the passing of Legal Services Act, 2007, this responsibility is now vested with independent regulatory authorities, which has an over all control over the entry, discipline and management of the legal profession.[11]

Bar Examination in Other Countries

In the modern period, while most of the countries have allowed law graduates to directly go for legal practice, some countries require a bar examination for admission to the legal profession, like, USA, France, Brazil, Hungary, Ireland, Philippines, Poland, etc. We will examine below the requirements in these countries and the pattern of the test to understand the rationale and methodology followed by the AIBE in a better manner.

1. USA

In USA, each State conducts its own bar examination, administered by a State Bar Licensing Agency, which is invariably an agency attached to the judicial branch of the government. The organisation which is responsible for

10 See, <http://www.llrx.com/features/uk2.htm> (Visited on 20-7-2010).

11 Legal Services Act, 2007, s. 20, defines approved regulators and relevant approved regulators who shall be responsible for regulation of any activity designated as reserved legal activity.

the bar examination varies from state to state- in some states the examiuation is conducted by the State's intermediate or Superior Court and in other states by the State Bar Associations, and there are also slates where the Bar Examination is conducted by sub units of State Bar Associations. In some cases, the integrated bar membership (i.e., formal membership of an integrated bar association, whieh is a public corporation eontrolled by judiciary) and the admissions ageney are different bodies. There is also a natiouwide testing ageney, the National Conferenee of Bar Examiners (NCBE) whicli conducts a nationwide ethics test called Multi State Professional Responsihility Examination (MPRE), which have now been adopted by many states as an essential requirement for passing the bar examination[12].

In USA, standards of the bar examination in each state is determined by the agency which is conducting the examination, and there are generally no nationwide standards for the test. However, generally, the bar examination covers a number of legal topics which will be tested by either essay, multiple clioice or a combiuation of essay and multiple choice questions. In many states the test will be spread over two days, but there are also states where the bar examination is a three day test.

Iu order to bring a sense of uniformity to the standards of admission to bar in various states, NCBE has introduced the following tests wlncli have been adopted by mauy states in lieu of parts of the state tests and in others as an additional requirement:

- Multi-State Bar Examination (MBE), lirst formulated in 1972, which is a standardised multiple choice examination of about 200 questions, testing 6 subjects wlncli are common in all US territories. The examination is divided into two periods of three hours each, one in the morning and one in the afternoon, with 100 questions in each period.

- Multi-State Essay Examination (MEE), introduced in 1988, is a collection of 30-minute essay questions. Tlie MEE offers nine

12 Nick Touati, "The American Bar Examination", available at <http://www.mmu.ac.uk/careers/students-and-graduates/resources/guides/american-bar-examination.pdf> (Visited on 29-07-2010); also see <http://en.wikipedia.org/wiki/Bar_examination#United_States> (Visited on 29-07-2010).

questions per examination, and the State agency can choose six questions from the nine questions offered by NCBE.

- Multi-State Performance Test (MPT), first tested in 1997 to analyse in a more realistic manner the measure of actual lawyering skills acquired by the lawyer. The candidate is presented with a stack of documents representing a fictitious case and is asked to draft either a memorandum, motion or an opinion.

- Multi-State Professional Responsibility Examination (MPRE), which is a 60-question, two-hour-and-five-minute, multiple-choice examination administered three times each year.

2. Brazil

The Bar Examination in Brazil is administered by Brazilan Bar Association, named *Ordem dos Advogados do Brasil*. The examination is divided into two stages, and the candidate can move to the second stage only after passing the first. The first stage consists of 100 multiple choice questions covering all the subjects learned at the University, out of which the candidate must score at least 50% marks. Second stage consists of five essay questions, the elaboration of a motion or opinion document of a chosen discipline (Administrative Law, Civil Law, Commercial Law, Constitutional Law, Labour Law, Criminal Law, or Tax Law, and their respective procedures), with a pass mark of 60%.

3. Hungary

In Hungary, after nine semesters of law school education, and passing a state law examination, every prospective entrant to legal profession should complete three years of clerkship. The clerkship is completed by four special oral and written examination[13].After completing the clerkship, the prospective entrant to legal profession is also required to pass a bar examination called "*Jogi Szakvizsga*", which can be translated as "Legal Profession Examination". The rules of Bar Examination are framed by a decree promulgated by Minister of Justice. The Bar Exam is uniform and is not specialized in Hungary and is administered by the Bar Examination Committee of the Ministry of Justice and Law Enforcement. This exam is composed of three parts:

13 See, Website of Budapest Bar Association, <http://www.bpugyvedikamara.hu/attorneys_in_hungary/> (Visited on 29-07-2010).

1. Part I: Criminal Law, Criminal Procedural Law and Penal Law
2. Part II: Civil Law, Civil Procedural Law and Economic Law
3. Part II: Constitutional Law, Administrative Law and Law of the European Union.

The candidates can select one out of the three areas of a written examination, which will be four hour examination where the candidate has to drafting a legal brief, decision or legal opinion based on the question provided. Further every candidate will have to appear for oral examination in all the three areas before a three member panel of Bar Examination Committee. The maximum time period of passing bar examination is five years, after which successful examination already taken will expire and the entire test will have to be repeated[14].

4. France

In France, in order to enter into the bar school[15], a prospective entrant have to pass a specific examination, which can be undergone only after having successfully finished first year of Master of Law. After passing the CRPFA, the students should complete 18 months of internship and training on practical aspects of lawyering and ethics, the prospective entrant to legal profession should take a bar exam known as CAPA[16]. Doctors of Law, certain categories of employees including professors and lecturers in law schools are exempt from taking CAPA[17]. For others, CAPA consists of a practical examination of five hours of consultation followed by a pleading or other legal act, and oral examination in any of the six topics[18] after three hour presentation, a further oral examination on professional ethics and EU law, a third oral examination on any one of five modern languages other than French, a discussion about twenty minutes with the board from a report prepared by the candidate following courses previously made and submitted to the jury consisting of

14 Marta Pardavi, "Legal Profession in Hungary", available at <http://www.osce.org/documents/odihr/2009/02/36501_en.pdf> (Visited on 29-07-2010).

15 Called CRFPA, école du barreau.

16 Certificat d'Aptitude à la Profession d'Avocat, see <http://wapedia.mobi/en/Legal_education#5> (Visited on 29-07-2010).

17 See, <http://www.lerecouvrement.com/avocats.html> (Visited on 29-07-2010).

18 An oral examination lasting 15 minutes after a three hour preparation covering a record of civil, commercial, social, criminal, administrative or community law.

faculty members and tutors on the quality of work each candidate. The written tests are on the topics chosen by jury and oral examination is public. CAPA is issued by Ecole De Formation Professionelle Des Barreaux De La Dour D' Appel De Paris (literal translation as School of Vocational Bar Training For the Court of Appeals in Paris)[19] Students are graded on a scale of 0-20 and to qualify the students should at least get a grade of 10 out of 20.

Bar examination is an essential requirement of entry into legal profession in other countries like Philippines, Malaysia, Poland, etc.

An analysis of the tests conducted in various jurisdictions reveal some basic characters about the bar examination:

(i) Testing is done to analyse the actual legal skills of the incumbent lawyers and hence simple multiple choice tests have given way to a combination of multiple choice and essay questions, in addition to practical apfitude tests in most jurisdictions.

(ii) Many countries where bar examination is in vogue has started oral examinations to test interpersonal skills of the incumbent lawyers.

(iii) Practical aptitude tests in many jurisdiction relates to testing the ability of student to understand, analyse and present given data in a simulated environment.

(iv) Bar examination in most of these countries is an elaborate affair, spread over two-three days.

(v) There is minimum pass mark requirement of not less than 50% of marks in almost all these countries.

(vi) In most jurisdictions, conduct of the test has statutory backing and is conducted by specialised professional bodies.

Overview of the Indian Position

In British India, the role of admitting qualified persons to bar was vested with the courts. Since in the initial days, no specific qnalifications were prescribed,

19 See, <http://www.efb-paris.avocat.fr/pages fi/capa.aspx> (Visited on 29-07-2010).

the admission to the bar was administered by the courts by peer recognition and personal interviewing. Formal legal education was not an essential or desirable requirement, since till 1855[20] there was no formal law college in India. During the period from 1855 to 1957, the professional skills needed for a lawyer were seldom identified and if one aspired to do something higher in law, he could go to England and join the Inns Court[21]. Even though Bar Council was established in India in 1920's they remained as almost a professional association and the admission to the legal profession was still controlled by the judiciary.

Though the legal education during this period produced some of the best talents in socio-political field, including Mahatma Gandhi, it was generally felt that the legal education was not up to the international standards. Accordingly, the Law Commission Report on Legal Education, 1958, recommended that the practical training on the professional aspects of law be given by the Bar Councils. This was similar to the recommendation of the Bombay Legal Education Committee, 1949, which said that if a person after undergoing legal education wishes to join the legal profession, he will have to take a practical course in law to be imparted by professional bodies like Bar Council.

Under the Government of India Act, 1935[22], as well as under the Constitution of India[23], the Apex Court always retained the right to regulate the persons who were entitled to appear before them. The Supreme Court Rules[24], framed under the Constitution of India, provides for a compulsory training for one year and an examination thereafter for advocates to be registered as Advocate on record before the Supreme Court of India. In india, in many States[25], the High Court's conduct an interview before admitting a person enrolled before the State Bar Council to appear before it, as a matter of practice.

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20 The first professorship in law was established in Government Elphinston College, Bombay in 1855. Till then there was no legal qualification in India, and since all statutes were in English, any person who knew English and could read the statutes were considered qualified to practice law in India.

21 Sushama Gupta, *History of Legal Education*, Deep and Deep Publications Pvt. Ltd., New Delhi, 2006, p. 57.

22 The Government of India Act, 1935, s. 214(1) reads: "The Federal Court may from time to time, with the approval of the Governor-General in his discretion make rules of Court for regulating generally the practice and procedure of the Court including rules as to the persons practising before the Court..."

23 Art. 145(1)(a) of Constitution of India allows Supreme Court of India to make rules as to persons practicing before the Court with the approval of President of India.

After the enactment of the Advocate's Act, 1961, Bar Council of India (BCI) became the apex body for the entire legal profession. Section 7(1) of Advocate's Act, 1961, provides that one of the functions of BCI is to recognise universities whose degree in law shall be a qualification for enroiment as an advocate. Section 24 of the Advocate's Act, 1961, as it stood before the amendment in 1964, required an advocate to compulsorily undergo a course of training in law, and passed an examination after such training, and also empowered State Bar Councils to prescribe both the training and the examination.[26] Hence, from 1961 to 1964 all advocates in India were required to compulsorily undergo a training for a period of one year and then pass an examination prescribed by BCI to get themselves enrolled as an advocate. By virtue of the Amendment Act, 1964, the provision for passing an examination conducted by State Bar Councils as a prerequisite for enroiment as an advocate was taken away.[27] Later, by the Advocates (Amendment) Act, 1974, the requirement of compulsory training by State Bar Councils was also take away, thereby, giving an almost automatic right for anyone who has acquired the qualifications prescribed by State Bar Councils to get himself enrolled before the State Bar Council, provided he pays the fees and complies with other requirements under section 24 of the Advocate's Act, 1961.

During various periods BCI has tried to prescribe age limit and compulsory training for enrolment as advocates, but both these imtiatives were set aside as

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24 The Supreme Court Rules, Order IV, Rule 16(1) (as amended in 1962) reads: "16. No Advocate shall be qualified to be registered as an Advocate on Record unless he- (1) has undergone training for one year with an Advocate on Record approved by the Court, and has thereafter passed such tests as may be held by the Court for Advocates who apply to be registered as Advocates on Record, particulars whereof shall be notified in the Gazette of India from time to time; provided however, that an Attorney shall be exempted from such training and test; (2) has an office in Delhi within a radius of 10 miles from the Court House and gives an undertaking to employ, within one month of his being registered as Advocate on Record. A registered clerk; and (3) pays a registration fee of Rs. 25".

25 In Karnataka, there generally exists a practice of an informal interview of prospective lawyers in High Court before allowing them to practice before the Courts in Karnataka. Similar practices also exist in Allahabad, Madras, Bombay, and Calcutta High Courts, which were established under Letters Patent during the British rule. For e.g. see, the Letters Patent of High Court of Judicature of Presidency of Bombay, 1865, Rules 9 & 10, gives the High Court the power to approve admit and enrol advocates etc. and to make rules for qualification of such advocates etc.

26 The Advocate's Act, 1961, s. 24(d) reads: "he has undergone a course of training in Law and passed an examination after such training both of which shall be prescribed by the State Bar Council..."

being ultra-vires the powers of BCI.[28]

All India Bar Examination: An Overview

In 2009, during the hearing of a matter before the Apex Court[29] the BCI had come up with the idea of instituting AIBE.

The BCI has prescribed that AIBE shall be mandatory for all law students graduating from the academic year 2009-2010 onwards[30]. For those who have acquired a law degree prior to 2009-10 this test would not be applicable. Only those who have enrolled as an advocate under section 24 of Advocate's Act, 1961, shall be eligible for applying for AIBE. BCI has specified that any person who has not appeared for AIBE cannot practice law, file vakalatnama, appear before courts, issue opinions, etc, in their name. The candidates will be free to choose the examination center from the list of centers available and also the language of the test from the testing languages. The test will be a multiple choice open book test, with 100 questions of entry level, divided into two parts, each part requiring a minimum pass mark separately as well as an aggregate pass mark[31]. Aggregate pass mark is 40%. There will not be any negative marks. The students can bring any reading material to the examination hall except electronic equipment. AIBE will be an OMR based test and the candidates will only be informed whether they have cleared the examination or not. The Bar Council will not release any percentage/percentile/ranking score for any candidate, and a candidate can attempt the test any number of times.

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27 Advocates Amendment Act, 1964, substituted the words "and passed an examination" with the following words: "in clause (d) - (i) the words after such training shall be omitted; (ii) in the proviso, for paragraph (i) the following paragraph shall be substituted, namely :- (i) a person who has obtained a degree in Law from any University in India on the results of an examination held before the 31st day of March, 1964 or such other later date as may be prescribed, or a barrister who was called to the Bar before such date, or a barrister who, having qualified after that date, has received such practical training in Law as may be recognised in this behalf by the Bar Council of India;"

28 The age limit was struck down by Supreme Court in *Indian Council of Legal Aid & Advice & Ors.* v. *Bar Council of India & Anr.*, 1995 (1) SCC 732 and the training was struck down in *V. Sudeer* v. *Bar Council of India*, AIR 1999 SC 1167.

29 *Bar Council of India* v. *Bonnie FOI Law College & others*, Special Leave to Appeal (Civil) No(s).22337/2008 before Supreme Court of India.

30 The notification bringing the All India Bar Examination into force was passed by the Legal Education Committee and the members of the Bar Council of India at duly constituted meetings on April 10, 2010 and April 30, 2010.

BCI website[32] mentions AIBE is intended to test an advocate's ability to practice the profession of law in India. The notification dated 5th June 2010 from BCI states that the AIBE is conducted in furtherance of the power vested in BCI to lay down conditions subject to which the advocate's shall have the right to practice the profession of law[33].

The Legality of the All India Bar Examination

While the objectives of AIBE are laudable, and such a uniform examination would bolster a movement towards unified standards for legal education, some questions still remain unanswered. Not less that 3 writ petitions have been filed in the matter and many State Bar Councils have expressed their reservations regarding the conduct of the test[34].

The main issues involved in AIBE are the following:

1. Whether the action of BCI ultra-vires its powers?

2. Whether the classification of students for the purpose of the test as pre 2009-10 graduates and post 2009-10 graduates is arbitrary, having no rational nexus with the object sought to be achieved by the test, and hence violative of Art 14 of the Constitution of India?

3. Whether the right to practice as enshrined in the Advocates Act, 1961, is getting compromised by the AIBE?

4. Whether AIBE is an unreasonable restriction on the right of the advocates under Art 19(1)(g) of the Constitution?

5. Whether the conduct of AIBE only in certain languages violates the

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31 Advocates need to get at least 31 marks in the first section, comprising the 'Category I' subjects, and at least nine marks in the second section, comprising the 'Category II' subjects. Available at <http://www.barcouncilofindia.org/about/first-all-india-bar-examination/all-india-bar-examination-frequently-asked-questions/#minimumpercentage> (Visited on 20-07-2010).

32 See, <http://www.barcouncilofindia.org/about/first-all-india-bar-examination/> (Visited on 29-07-2010).

33 See, <http://www.barcouncilofindia.org/all-india-bar-examination-rules-2010-notified/> (Visited on 29-07-2010).

34 See, <http://www.barandbench.com/index.php?page=brief&id=811&gn=0> (Visited on 29-07-2010) which says that Chairman of Bar Council of Punjab and Haryana has resigned in protest against implementation of AIBE.

right to equality of students in certain regions?

An attempt is made in the following sections to analyse the above issues with the reference to the appropriate legal provisions and case laws.

1. Powers of Bar Council of India

BCI has ventured into the conduct of AIBE on the presumption that it is enjoined by the Advocates Act, 1961, to lay down the conditions subject to which the advocates shall have the right to practice the profession of law. The contention that BCI may take is that it is enjoined with such rule making power under S 49(ah) of Advocate's Act, 1961,[35] though neither the notification nor any other communication from BCI refers to this power. The only reference is to section 24 of Advocate's Act, 1961, and hence we would deal with the power of BCI under the said section first before dealing with its powers under section 49(ah) of the Act.

Since 1961, the enrolment of Advocates in India is regulated by the Advocate's Act, 1961. Section 24 of the Advocates Act, 1961, prescribes the conditions for enrolment as an advocate[36]. This section iterates the following qualifications for a person to be enrolled as an advocate:

1. Citizen of India
2. Completed age of 21 years
3. Obtained a law degree
4. fulfills such other conditions as may be specified in the rules of State Bar Councils.
5. Pays the requisite stamp duty, if any and requisite fees for enrolment.

A reading of this section shows that it is the State Bar Councils and not the BCI, which has a rule making power to decide the other conditions for enrolment

35 S. 49 reads: "(1) The Bar Council of India may make rules for discharging its functions under this Act and particular, such rules may prescribe:

...

(ah) The conditions subject to which an advocate shall have the right to practise and the circumstances under which a person shall be deemed to practise as an advocate in a court."

of advocates. Section 22 of the Advocates Act, 1961, provides that the State Bar Councils shall issue a certificate of enrolment in the prescribed form. Section 23 of the Advocate's Act, 1961, deals with right to pre audience and provides

36 S. 24 reads: "Persons who may be adopted as advocates on a State roll:(1) Subject to the provisions of this Act, and the rules made there under, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the following conditions, namely: -

(a) He is a citizen of India: Provided that subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practise law in that other country;

(b) He has completed the age of twenty-one years;

(c) He has obtained a degree in law-

(i) Before the 12th day of March, 1967 from any University, in the territory of India; or

(ii) Before the 15th of August, 1947, from any University in any area which was comprised before that date within India as defined by the Government of India Act,1935;or

(iii) After the 12th day of March, 1967, save as provided in sub-clause (iii) After undergoing a three years course of study in law from any University in India which is recognised for the purposes of this Act by the Bar Council of India; or

(iiia) After undergoing a course of study in law, the duration of which is not less than two academic years commencing from the academic year 1967-68 or any earlier academic year from any University in India which is recognised for the purposes of this Act by the Bar Council of India; or

(iv) In any other case, from any University outside the territory of India, if the degree is recognised 'for the purpose of this Act by the Bar Council of India or;

He is a barrister and is called to the Bar on or before the 31st day of December, 1976 or has passed the articled clerks' examination or any other examination specified by the High Court at Bombay or Calcutta for enrolment as an attorney of that High Court; or has obtained such other foreign qualification in law as is recognised by the Bar Council of India for the purpose of admission as an advocate under this Act:

[(d) * * *]

(e) He fulfills such other conditions as may be specified in the rules made by the State Bar Council under this Chapter;

(f) He has paid, in respect of the enrolment, stamp duty, if any, chargeable under the Indian Stamp Act 1899, and an enrolment fee payable to the State Bar Council of six hundred rupees and to the Bar Council of India, one hundred and fifty rupees by way of a bank draft drawn in favour of that Council: Provided that where such person is a member of the Scheduled Castes or the Scheduled Tribes and produces a certificate to the effect from such authority as may be prescribed, the enrolment fee payable by him to the State Bar Council shall be one hundred rupees and to the Bar Council of India, twenty-five rupees. Explanation -For the purposes of this sub-section, a person shall be deemed to have obtained a degree in law from a University in India on the date on which the results of the examination for that degree are published by the University on its notice-board or otherwise declaring (2) Notwithstanding anything contained in subsection (1) a vakil or a pleader who is a law graduate may be admitted as an advocate on a State roll, if he

(a) Makes an application for such enrolment in accordance with the revisions of this Act, not later than two years from the appointed, day, and

(b) Fulfills the conditions specified in clauses (a), (b) and (f) of subsection (1)

(3) Notwithstanding anything contained in subsection (1) a person who-

(a) [* * *] has, for at least three years, been a vakil or a pleader or a mukhtar or was entitled at any time to be enrolled under any law [* * *] as an advocate of a High Court (including a High Court of a former Part B State) or of a Court of Judicial Com-

that right to pre audience of advocates shall be determined by their respective seniority.[37] The section also provides that designated senior advocates shall have right to pre audience over other advocates. Further, section 30 of the Advocate's Act, 1961, provides that every person, whose name is entered in the state roll, shall be entitled as of right to practice throughout the territories to which the Act extends.

It is to be noted that in all these provisions, the BCI is not given any role in preparation or maintenance of roll or determining who should have the right to practice. Such a power is vested in the State Bar Councils.

Now coming to the rule making power of the BCI under section 49, it is pertinent to note that one of the alternate contentions raised by BCI in *V. Sudeer* v. *Bar Council of India*[38] is regarding the rule making capacity of BCI under section 49 of Advocate's Act, 1961. Taking note of the rival contentions by the parties in this regard, the Supreme Court of India categorically stated as follows:

> "We may now refer to Section 49 of the Act, which deals with general power of Bar Council of India to make Rules. Sub-section (1) thereof lays down that the Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe on various topics as enumerated therein from clauses (a) to (j). A mere look at the aforesaid provision makes it clear that the rule making power entrusted to the Bar Council of India by the legislature is an ancillary

missioner in any Union territory; or (aa) Before the 1st day of December, 1961, was entitled otherwise than as an advocate to practise the profession of law (whether by way of pleading or acting or both) by virtue of the provisions of any law, or who would have been so entitled had he not been in public service on the said date; or[(b) * * *](c) Before the 1st day of April, 1937, has been an advocate of any High Court in any area which was comprised within Burma as defined in the Government of India Act, 1935, or(d) Is entitled to be enrolled as an advocate under any rule made by the Bar Council of India in this behalf, may be admitted as an advocate on a State roll if he-
(i) Makes an application for such enrolment in accordance with the provisions of this Act;and
(ii) Fulfills the conditions specified in clauses (a), (b), (c) and (f) of sub-section".

37 The Advocates Act, 1961, s. 23(4).

38 AIR 1999 SC 1167.

39 Available at <(http://www.barcouncilofindia.org/about/first-all-india-bar-examination/all-india-bar-examination-frequently-asked-questions/#whoshould)>(Visited on 20-07-2010).

> power for fructifying and effectively discharging its statutory functions laid down by the Act. Consequently, Rules to be framed under Section 49(1) must have a statutory peg on which to hang. If there is no such statutory peg the rule which is sought to be enacted dehors such a peg will have no foothold and will become still born...Consequently, if any such rule is framed, supposedly by exercise of the rule making power as enumerated in section 49(1)(af), (ag) or (ah) on which also reliance was placed by Shri. Rao, the said rule having not been made for discharging any of the statutory functions of the Bar Council of India in this connection must necessarily fail as it would be ultra-vires the statutory functions of the Bar Council of India."

Thus, it is clear that in the absence of any statutory provisions any rule made by BCI for regulating the right to practice of advocates, would be ultra-vires the statute, and hence, is liable to be struck down. Neither section 7 nor section 24 of the Advocates Act, 1961, gives any right to BCI to prescribe that advocates who have been enrolled with the State Bar Councils should acquire an additional qualification for obtaining the right to practice and hence, the rule making power under section 49(ah) of the Advocates Act, 1961, cannot be exercised without adequate statutory amendments.

2. Enrolment and Practice of Advocates

Under the Advocate's Act, 1961, the functions entrusted to the BCI are mentioned in section 7, which does not include the power to prescribe the conditions regarding right to practice. However, another contention that could be taken by BCI is that section 49(ah) read with Section 7(1)(h)(d) and (h) of the Advocate's Act, does in fact confer the power on the BCI to prescribe the conditions subject to which an advocate has a right to practice and circumstances under which a person is deemed to practice as an advocate.

The BCI FAQ on All India Bar Examination provided in the BCI Website[39] states that one can apply to take the All India Bar Examination only after he/she has enrolled as an advocate with a State Bar Council. The extract of relevant portion of BCI FAQ reads as follows:

> "Do I have to wait till I undertake the All India Bar Council Examination

40 Available at <(http://www.barcouncilofindia.org/wp-content/uploads/2010/06/BarExam-notification.pdf)> (Visited on 20-07-2010).

to enroll?

> No. In fact, you are required to enroll as an advocate with the respective State Bar Council in order to be eligible to apply for the All India Bar Examination."

Later the BCI FAQ goes on to explain the impact of not appearing for the Bar Examination as follows:

> "The advocate... will not be allowed to actually practice law themselves (file a vakalatnama, issue opinions etc.) till they clear the All India Bar Examination."

As per the amended Rule 9 of Bar Council of India Rules, notified in the BCI website[40]:

> "No advocate enroiled under section 24 of Advocates Act, 1961 shall be entitled to practice under Chapter IV of Advocates Act, 1961 unless he successfully passes the All India Bar Examination conducted by BCI."

Now, this stand of BCI is problematic both from the legal perspective as well as from the practical perspective.

According to BCI a person who has obtained his law degree after 2009-10 shall not be entitled to practice unless he obtains a certificate of practice after clearing the All AIBE. In fact it creates two classes of lawyers- one class requiring AIBE, and the other who do not require AIBE to practice the legal profession in India. Since a person who has graduated in any year prior to 2009-10 can also enroll after the AIBE is notified, such persons can directly practice law without clearing AIBE, while another person who has enrolled with such person, on the same date, but graduated after 2009-10 will have to pass the examination. This would make it cumbersome to manage the rights to practice, and to understand who should be allowed to practice law and who should not be so allowed. Since the enrolment certificate does not mention the year of graduation, at least some advocates would be required to carry around his graduation certificate as well to show his eligibility to practice.

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41 *Supra* n. 24.

42 1995 (1) SCC 732.

On the legal ground, this stand of BCI goes against the decision of the Hon'ble Supreme Court of India in *V. Sudeer* v. *Bar Council of India*[41], as well as, in the earlier decision in *Indian Council of Legal Aid & Advice & Ors.* v. *Bar Council of India & Anr.*[42], that any person who has been enrolled as a advocate in the state roll will have an automatic right to practice. In fact, in *V. Sudeer* v. *Bar Council of India*[43], the Apex Court has categorically held as follows:

> "...conjoint reading of Sections 23, 29 and 33 leaves no room for doubt that once a person is found qualified to be admitted as an advocate on the State roll having satisfied the statutory conditions of eligibility laid down in sub-section (1) of Section 24, he will automatically become entitled as of right to practise full-fledged in any Court including the Supreme Court."

It then needs to be examined the scope of the rule making power of BCI under section 49(ah) of the Advocate's Act,1961 regarding the conditions of right to practice and the circumstances under which a person can exercise the right to practice. A contention that BCI can take in this regard is the explanation for this is given by Apex Court in *Indian Council of Legal Aid and Advice* v. *Bar Council of India*[44]. While examining the ambit of the term right to practice, and the rule making power of the BCI under section 49(ah) the Apex Court observed as follows:

> "On the plain language of the said clause it seems clear to us that under the said provision the Bar Council of India can lay down the 'conditions' subject to which 'an advocate' shall have the right to practice. These conditions which the Bar Council of India lay down are applicable, i.e., a person who has already been enrolled as an advocate by the concerned State Bar Council. The conditions which can be prescribed must apply at the post - enrolment stage since they are expected to relate to the right to practice".

The present rules made by BCI are pegged on the above observations of the

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43 *Supra* n. 24.

44 *Supra* n. 28.

45 The Advocate's Act, 1961, s. 7(1)(b).

46 The Advocate's Act, 1961, s. 7(1)(c).

47 The Advocate's Act, 1961, s. 7(1)(b).

Apex Court. However, it should be noted that the Court has not gone into detail regarding the ambit of the rule making power of BCI after enrolment since the very issue involved in the case was regarding the age limit for enrolment. Hence this observation was nothing but an *obiter*, and not applicable as a precedent.

So far as the Advocate's Act, 1961, is concerned, the BCI has power to lay down standards of professional conduct and etiquette for advocates[45], to lay down the procedure to be followed by its disciplinary committee and the disciplinary committee of each State Bar Council[46] as well as to exercise general supervision and control over the powers of State Bar Councils[47]. Thus, while the right to practice is an automatic right of any advocate who is enrolled with the State Bar Council, it is also empowered to take disciplinary action against the said advocate for professional misconduct. There need to be rules to determine which acts would constitute breach of discipline and hence, would render the advocate liable for removal from the rolls. In this regard, it is also pertinent to note the disciplinary powers and the penalties that can be imposed by BCI and State Bar Councils for breach of standards of professional conduct and etiquette. Section 36 of the Advocate's Act, 1961, lays down that the BCI can take disciplinary action against any advocate whose name is not entered in any state roll[48]. Under section 36(4), the disciplinary committee of the BCI has been vested with similar powers as that of disciplinary committees of the State Bar Councils in passing orders in disciplinary matters. Section 35(3) of the Advocate's Act, 1961, provides that if the State Bar Council finds an advocate guilty of professional or other misconduct, it can pass any of the following punishments[49]:

- Reprimand the advocate;
- Suspend the advocate from practice for such period as it may deemed fit;
- Remove the name of the advocate from the State roll of advocates.

48 Section 36 reads: "Disciplinary powers of Bar Council of India.

(1) Where on receipt of a complaint or otherwise the Bar Council of India has reason to believe that any advocate whose name is not entered on any State roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee.

Thus, the BCI and State Bar Councils are empowered under the rules to suspend or remove the advocate from practice for violation of standards of professional conduct. However, the Advocate's Act, 1961, does not mention what are the standards of professional conduct nor does it define "professional or other misconduct" appearing in section 35 of the Act. It is submitted that the rule making power of BCI under section 49(1)(ah) comes into place in this place only. Under section 49(1)(ah) of Advocate's Act two sets of words are used:

(a) The conditions subject to which an advocate shall have the right to practice and

(b) The circumstances under which a person shall be deemed to practice as an advocate in a court.

It is submitted that the first part of section 49(1)(ah) deals with the conditions, such as, confirming to standards laid down by the BCI and the second part deals with the grounds of disciplinary action. Thus, the rules made by BCI under section 7(1)(b) of the Advocate's Act, 1961, for laying down the standards of professional conduct will come within the first part, and the rules of disciplinary procedure made by BCI under sections 35 and 36 of the said Act would come

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(2) Notwithstanding anything contained in this Chapter the disciplinary committee of the Bar Council of India may,[either of its own motion or on a report by any State Bar Council or an application made to it by any person interested], withdraw for inquiry before itself any proceedings for disciplinary action against any advocate pending before the disciplinary committee of any State Bar Council and dispose of the same.

(3) The disciplinary committee of the Bar Council of India disposing of any case under this section, shall observe, so far as may be, the procedure laid down in Section 35, the references to the Advocate-General in that section being construed as references to the Attorney-General of India.

(4) In disposing of any proceedings under this section the disciplinary committee of the Bar Council of India may make any order which the disciplinary committee of a State Bar Council can make under sub-section (3) of Section 35, and where any proceedings have been withdrawn for inquiry before the disciplinary committee of the Bar Council of India the State Bar Council concerned shall give effect to any such order."

49 Section 35(3) reads: "(3) The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely: -

(a) Dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed;

(b) Reprimand the advocate;

(c) Suspend the advocate from practice for such period as it may deemed fit;

(d) Remove the name of the advocate from the State roll of advocates."

50 *Supra* n. 24.

within the second part of rule making power as contained in section 49(1)(ah) of the Advocate's Act, since, these are the only "statutory peg", to borrow the words of Justice S. B. Majumdar in *V. Sudeer* v. *Bar Council of India*[50], where the rule making powers of BCI under section 49(1)(h) can hung. Thus, under the powers under section 49(1)(ah) the BCI can make appropriate rules for determining under which circumstances an advocate who is found guilty of professional or other misconduct can be removed from the rolls. If the Bar Council of India requires any further power to regulate the right to practice, such as, bring in a mandatory examination for getting a certificate of practice, it need to have further 'statutory pegs' which needs to be inserted by an amendment of the Advocate's Act, 1961.

Hence, until a suitable amendment to these provisions of Advocates Act, 1961, is brought in place, the distinction between enrolment and right to practice remains contrary to law. Every person enrolled as an advocate, has, under the existing law, an automatic right to practice, full fledged in any court without any restriction. If the BCI brings in any rule which is contrary to the above statutory provisions, they will be viewed as ultra vires and may be struck down by the Supreme Court.

3. Management of Certificate of Practice

The amended Rule 9 of Bar Council of India Rules does to categorically state the utility of a certificate of practice- the rules does not make Certificate of Practice mandatory for undertaking legal practice, nor does it specify how the right to practice the profession of law will be regulated by such a certificate. Second part of Rule 9 clarifies that Bar Examination shall be mandatory for all law students graduating from academic year 2009-10 onwards and enrolled as advocates under section 24 of the Advocate's Act, 1961. The BCI website clarifies that for those students who have graduated prior to academic year 2009-10, the test is not mandatory[51].

From a practical angle, it is not clear how BCI is proposing to check whether any person enrolling as an advocate but deciding against appearing in Bar Examination is actually practicing or not. In fact, the very concept of practice

51 See, BCI FAQ on AIBE available at <http://www.barcouncilofindia.org/about/first-all-india-bar-examination/all-india-bar-examination-frequently-asked-questions/#whoshould> (Visited on 30-07-2010).

of the profession of law is amply wide and would encompass all activities undertaken by a lawyer. However, the problem is that there is no mandate in the Advocates Act or any other law, that certain acts like issuing legal opinions should be done by a practicing advocate, since, any person can do such acts as giving opinions of legal matters, etc., which only requires the confidence of the recipient on the giver. It should also be taken note of the fact that the courts and regulators could, till now, give only an inclusive definition of the term "practice of legal profession" and given, the multi-disciplinary atmosphere, it is difficult to give a comprehensive definition to the term "practice of legal profession". In such a scenario, it is doubtful as to how would the BCI or any agency check whether any person who has not passed the all India Bar Council is actually practicing or not. It is reliably learned that may fresh entrants to the legal profession of the 2009-10 batch, who have already enrolled, have started filing vakalatnamas, which has been accepted by the courts in the absence of any guidelines. Since, Bar Examination has been made mandatory to these persons for "practicing law", it would be interesting to see how the BCI is going to treat those law graduates of 2009-10 batch who have already started actual practice before the announcement of bar examination[52]. Any exemption to such students would violate the constitutional right to equality with their batch mates, and this would lead to a fresh legal imbroglio.

It would be also interesting to check whether the regulations made under Rule 9 would be vitiated as they are violative of Article 14[53] of the Constitution of India. Judicial interpretation of Article 14 has from time and again reiterated that if the legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a well defined class, it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons[54]. The two judicially laid down conditions for testing whether the legislation is reasonable are:

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52 The notification bringing the AIBE into force was passed by the Legal Education Committee and the members of the Bar Council of India at duly constituted meetings on April 10, 2010 and April 30, 2010 respectively, see BCI website at <http://www.barcouncilofiudia.org/about/first-all-india-bar-examination/> (Visited on 30-07-2010).

53 Art. 14 reads: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

54 *State of West Bengal* v. *Anwar Ali Sarkar,* AIR 1952 SC 75; *Sakhawat Ali* v. *State of Orissa,* AIR 1955 SC 166.

(1) the classification has to be found on an intelligible differential which distinguishes persons or things that are grouped together from others that are left out of the group; and

(2) that differential must have a rational relation to the object sought to be achieved by the statute in question[55].

If we examine the impugned regulations, it has been stated that the intention of the AIBE is to test the advocate's ability to practice the profession of law. Capability does not get increased or decreased by the year of passing the LLB examination. In fact, as it stands today, if any person has been doing some other profession after passing LLB, say for instance in 1960, and comes back to enroll as an advocate in 2010 or thereafter, the AIBE will not be applicable to such person and he can enroll as an advocate no matter whether he still knows how to spell "law" under the present rules. Had it been that the test was made mandatory for all persons who have applied for enrolment after a cut off date, irrespective of the year of graduation, the test would have been more rationale and the Rule 9 would have had a rational nexus to the object sought to be achieved by it. In the present form, there is no intelligible differential between the persons sought to be classified under the Rule 9, and the rule has no rational nexus with the object sought to be achieved. Hence, it is submitted that the rule is bound to fail on the constitutional challenge under Article 14 of Constitution of India.

Further, the issue needs to be addressed from a practical perspective, since the students who have passed LLB examination prior to 2009-10 does not require a separate Certificate of Practice, as they would be automatically entitled to practice as a matter of right after their enrolment. Since, it is possible that some of the students may get themselves enrolled after 2010 also, it would be a nightmare to check whether any particular advocate is required to obtain certificate of practice before they file vakalatnama. Obviously, the overburdened courts are not going to take this onus, and hence, it would be for the BCI to come up with some fool proof mechanism to ensure that the Certificate of

55 *Budhan Choudhary* v. *State of Bihar*, AIR 1955 SC 191, 1955(1) SCR 1045; *Municipal Committee Patiala* v. *Model Town Residents Association*, AIR 2007 SC 2844, (2007)8 SCC 669.

56 Post amendment dated 5th June 2010.

57 AIR 1968 SC 888, (1964) 6 SCR 229.

58 AIR 1952 SC 369, 1953 SCR 1.

Practice issued by BCI is respected.

4. Right to Practice and Certificate of Enrolment

Neither the Advocates Act, 1961, nor the Bar Council of India Rules as it stands today[56] mention that an advocate, who has been duly enrolled by the State Bar Councils under the powers vested in them under section 24 of Advocate's Act, 1961, cannot practice the profession of law, unless he obtains a Certificate of Practice. Instead, Rule 9 of BCI Rules, simply state that no advocate who has been enrolment as an advocate shall be entitled to practice unless such advocate successfully passes the All India Bar Examination Conducted by Bar Council of India. Further, neither the Advocate's Act, 1961, nor BCI Rules clearly define what is meant by right to practice as an advocate.

In re Lily Isabel Thomas[57] the apex court had explained that right to practice as contained in Supreme Court Rules include both right to act and to plead and has stated as follows:

> "The words "right to practice" would in its normal connotation take in not merely right to plead but the right to act as well and if no rules had been made by the Supreme Court restricting the right to act, the petitioner could undoubtedly have had a right both to plead as well as to act."

In *Ashwani Kumar Ghosh* v. *Arabind Kumar Ghosh*[58] the Apex Court through the words of Justice Das has tried to define the word "practice" thus:

> "The words "to practice" used in relation to lawyers as a class, mean "to exercise their profession" which is their dictionary meaning and which is wide enough to cover the activities of the entire genus of lawyers. They are words of indeterminate import and have no fixed connotation or content. In their application to particular species of lawyers their meaning varies according to the scope and ambit of the profession of the particular species in relation to whom they may be used and such meaning has to be ascertained by reference to the subject or context."

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59 Art. 19(6) reads: "Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law impos-

Thus, the meaning of the term practice under section 49(1)(ah) of the Advocates Act, 1961, has to be ascertained with reference only to the legislative power of the BCI and cannot be read out of context to include all the activities that an advocate would undertake while engaging in the profession. If all activities are to be included, then the act of assisting a senior would also be included in the term, which is not intended by BCI, as can be seen from their FAQ on AIBE. As already seen, the rule making power of the BCI under the Advocates Act, 1961, is restricted to those activities which will be affected by disciplinary proceedings, in which case only those activities related to pleading and acting in courts of law are to be read in the term 'practice' as used in section 49(1)(ah) of the Act. On the other hand, the use of the word 'practice' under section 30 of the Advocate's Act, 1961, would mean all activities that an advocate may undertake while engaged in practice, including, drafting, giving opinions, advising clients, etc. This is especially so due to the distribution of powers of BCI and State Bar Councils under the scheme of the Act.

5. Language of the Test

Currently, BCI has announced the test to be conducted only in nine languages. It has not clearly specified the rational behind preferring these languages over the other languages, but, it can be presumed that these would be the languages in which legal education is imparted otherwise than in English. In any case, the language preference usually rests on place of birth of the candidate, and any preference given to any particular language over other could be viewed as discrimination on the basis of place of birth prohibited under Articles 15 and 16 of Constitution of India and may be challenged in Courts.

6. Freedom to practice profession

Article 19(1)(g) of the Constitution of India guarantees to every citizen the right to practice any profession or to carry on any occupation, trade or business, restricted only by the provisions of 19(6).[59] Since, the main condition for laying down restrictions for practice of trade and profession is that the restriction has to be reasonable; any unreasonableness in the restriction may make the

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ing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, [nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, -

(i) The professional or technical qualifications necessary for practising any profession

legislation vitiated. It has been time and again reiterated by the Apex Court that when a question arises as to reasonableness of the restriction, the action has to be tested on the prineiple of "proportionality"[60]. It has also been held that a restriction to be permissible under Art 19(6) has to be commensurate with the danger posed[61]. In the instant ease, by placing a criterion of year of passing the examination instead of date of enrolment, the restriction has bypassed the proportionality and has come to the red zone, and hence, it is submitted that the rights of the students under Art 19(1)(g) is also violated under the Act. However, in so far as the examination is eoneerned, it may not be hit by Art 19(6), sinee, laying down professional qualifications has been exempted as a reasonable restriction.

Possible Justifications of Bar Council of India

To get a wholesome picture about the efforts of Bar Council of India, we should also take into consideration the observations of the court in *V. Sudeer* v. *Bar Council of India*[62] as below:

> "These observations of the High Power Committee clearly indicate that it was the stand of the representative of the Bar Council of India before them that section 28(2)(b) which was earlier on the statute book and was deleted by the Parliament, was required to be reintroduced. In other words, it was felt by the Bar Council of India itself before the High Power Committee that for providing pre-enrolment training to prospective advocate's relevant amendments to the Act were required to be effected. It is easy to visualise that appropriate amendments in Sections 7 and 24(1) would have clothed the Bar Council of India with appropriate power of prescribing such pre-enrolment training for prospective entrants at the Bar. That would have provided appropriate statutory peg on which the appropriate rule could have been framed

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or carrying on any occupation, trade or business, or

(ii) The carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise".

60 *Omkumar* v. *Union of India,* (2001) 2 SCC 386, AIR 2000 SC 3689.

61 *Godawat Pan Masala Products IP Ltd.* v. *Union of India,* (2004) 7 SCC 104.

62 *Supra* n. 24.

63 *Ibid.*

64 See, <http://judis.nic.in/temp/2233720081141220009p.txt> (Visited on 30-07-2010).

and hanged. It is also necessary to note in this connection that merely leaving the question of providing pre-enrolment training and examination to only the State Bar Councils may create difficulties in the working of the All India Statute. It goes without saying that as an enrolled advocate is entitled to practise in any court in India, common standard of professional expertise and efficient uniform legal training would be a must for all advocates enrolled under the Act. In these circumstances, appropriate statutory power has to be entrusted to the Bar Council of India so that it can monitor the enrolment exercise undertaken by the State Bar Council concerned in a uniform manner. It is possible to visualise that if power to prescribe pre-enrolment training and examination is conferred only on the State Bar Councils, then it may happen that one State Bar Council may impose such pre-enrolment training while another Bar Council may not and then it would be easy for the prospective professional who has got requisite law degree to get enrolment as the advocate from the State Bar Council which has not imposed such pre-enrolment training and having got the enrolment he may start practice in any other Court in India being legally entitled to practise as per the Act. To avoid such an incongruous situation which may result in legal evasion of the laudable concept of pre-enrolment training, it is absolutely necessary to entrust the Bar Council of India with appropriate statutory power to enable it to prescribe and provide for all India basis pre-enrolment training of advocates as well as requisite apprenticeship to make them efficient and well informed officers of the Court so as to achieve better administration of justice. We, therefore, strongly recommend appropriate amendments to be made in the Act in this connection.

We may also mention that till the Parliament steps in to make suitable statutory amendments in the Act for providing pre- enrolment training to prospective advocates seeking enrolment under the Act, the Bar Council of India by way of an interim measure can also consider the feasibility of making suitable rules providing for in-practice training to be made available to enrolled advocates. Such an exercise may then not fall foul on the touchstone of Section 49(1)(ah). The impugned rules can be suitably re-enacted by deleting the condition of pre-enrolment training to advocates and instead of treating them to be a hybrid class of trainee advocates with limited right of audience in courts, may

provide in-practice training to already enrolled advocates at least for the first year of their practice as professionals. Such rules can also provide for appropriate stipend to be paid to them by their guides, if during that period such enrolled junior advocates are shown to have no independent source of income. Then in the light of Section 17(2) of the Act such newly enrolled advocates who are required to undergo in-practice training for first one year of their entry in the profession can legitimately fall in the category of other advocates apart from senior advocates as contemplated by that provision."[63]

To be read along with this are the observations of the Hon'ble Apex Court in *Bar Council of India* v. *Bonnie FOI Law College & others*[64], which is being currently shown by BCI as the tipping point from where the idea of Bar Examination has come up. The BCI had been taking a position in some media that they are conducting the Bar Examination pursuant to the direction of the Hon'ble Supreme Court of India in this regard. However, from the interim order dated October 6, 2010[65] it is clear that the case relates to affiliation and recognition of law colleges by BCI, rather than about introducing an All India Bar Examination. In so far as the matter in issue is not directly related to All India Bar Examination, the observations of the court would only remain an obiter and since, the final decision has not yet come, it is doubtful whether the said case can be taken as a touch stone to decide judicial view on the matter. In fact, it was the BCI that recommended for the All India Bar Examination rather than the Court when it was reminded of its rather more serious duty of ensuring quality education in the law colleges affiliated to it. In this context, it is pertinent to note that the three member expert committee appointed by the Court in this case[66] was asked to report only with regard to the shortcomings in the infrastructure and functioning of the College. Hence, in so far as the direction of the court in this case is concerned, it was regarding the maintenance of quality of law colleges, and the findings of the expert committee was in fact a direct indictment on the BCI's failure to check the quality of legal education in the country. It is strongly felt that the suggestion of BCI to introduce the All

65 See, <http://judis.nic.in/temp/2233720081610200 9p.txt> (Visited on 30-07-2010).

66 The Committee consisted of the Chairman and Vice Chairman of Bar Council of India, Director, National Judicial Academy and Prof. N.M. Mitra, Former Director of the National Law School, Bangalore.

67 *Supra* n. 24.

India Bar Examination is a halfhearted attempt to divert the attention of the Apex Court as well as the general public from its multitude of failures, errors and omissions in maintaining the quality of legal education as an overseeing body.

Conclusion

There is a general outcry that there exists a big divide between the doctrinal education acquired from law schools and practical knowledge required for undertaking legal practice. Another criticism about the legal education in India is about lack of uniform standards in the output from law schools, despite uniform standards in curriculum. As a first step to test the standards of legal education, and as a movement towards standardisation of legal profession, introduction of AIBE is a laudable step, and needs to be supported by every one. The results of the first AIBE also shows that much needs to be done to improve the quality of legal education and points towards the need of concerted steps from the BCI, government and legal educational institutions in such a direction, for which AIBE is the first right step. Still it is submitted that it would have been wiser if:

(i) the BCI had taken up with the government to modify the Advocates Act, 1961 suitably so as to give BCI the power to introduce Bar Examination as a compulsory requirement for enrolment, rather than as a half baked concept as it is in the present format. This is especially since while dealing with a similar matter in Sudeer v. Bar Council of India[67], the Court had observed that it was infact the Bar Council itself, which had pointed out to the High Power Committee constituted as an after math of Chief Justices Conference of 1993, that Section 28(2)(b) of the Advocate's Act, 1961 should be reintroduced to enable it to conduct pre enrolment training. Unless there is such a statutory provision, the BCI regulation would not have "a peg to hang on" as pointed out by the Hon'ble Supreme Court in *Sudeer's* case.

(ii) Test should have been conducted in all languages instead of a choice of a number of languages.

(ii) Instead of cumbersome requirement of certificate of practice, creating two distinct sets of lawyers, if the enrolment itself was made conditional to passing the Bar Examination, it would have made more sense.

(iii) It needs to be seen how passing an examination could test the competency of a lawyer to carry out his professional activities. It would have been better, if as part of its role in laying down standards of professional education, the BCI had come up with a syllabus where in internship with lawyers in made mandatory, and proper instructions are issued to State Bar Councils regarding the management of internees. This would have done away the need for further examinations, which, it is submitted, may not do much good to create good professionals.

(iv) It can be seen that in comparison to the Bar Examinations conducted by other jurisdictions, the AIBE is a simple multiple choice questionnaire, which does not test any practical or interpersonal skill of the new entrant to legal profession. Instead the test would merely serve as a re checking of the doctrinal knowledge, and would not do any service to reduce the existing gap between what is learnt in the law schools and what is stored for a new incumbent in the professional practice.

(v) It is also worth considering, that if permanent pre litigation lok adalats are established in connection with law colleges, law students can horn their clinical skill, and equip themselves for the profession, without requirement of a further examination, at the expense of their valuable professional time and energy. This would also save much cost to government, and additional revenue required to find space for housing the lok adalats, and would expose the law students to practical aspects of the profession and towards a culture of settlement in a much better way than any other programme. The law colleges, like medical colleges, should become one of the epicenters of justice dispensation machinery in the country, which would at the same time ease the pressure on professional judiciary and bring more accountability and exposure in the legal education scenario.

It is hoped that wise counsel will prevail over the Bar Council of India, and it would take up the matter immediately with the Law Ministry so that necessary legislative amendments are brought forth at the earliest so that the present legislative vacuum surrounding AIBE can be covered.

LEGAL REPRESENTATION IN QUASI-JUDICIAL PROCEEDINGS

Dr. Rajan Varghese*

Abstract

Representation of parties by lawyers or experts was an age old practice. In the modern days complexities of administrative and other transactions have necessitated the need for formalising the practice of legal representation not only in the traditional Courts but also in quasi judicial tribunals and other fora where individual's rights are tested and tried. The only formal legal norm in India regarding regulation of legal representation is the Advocates Act, 1961. By and large people prefer to have legal representation by trained professionals, though the law is not totally in consonance with the general preference. The application of the provisions of the Act to all situations of legal representation as a matter of right is not recognised by law. The article attempts to suggest solutions to overcome this difficulty in actual practice in India. Instances from the domestic tribunals and special tribunals illustrate how this problem is handled by various administrative and other special tribunals.

Introduction

It is believed that the proper forum for determination of disputes in a country are the law courts,[1] which are manned by legally trained and experienced adjudicators or judges and assisted by properly qualified legal professionals, called lawyers or advocates. A lawyer's role in representing the legal interest of a client may be traced back to ancient Athens, the general rule being that individuals were to plead their own cases[2]. However, occasionally, someone would help a friend or assist him in legal proceedings. Thus, the 'orators' of

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1 This is in conformity with Dicey's Rule of Law, which inter alia propounds the administration of the law of the land by the ordinary law courts. So also, as per the doctrine of Separation of Powers, the function of deciding disputes between contesting parties belongs to the ordinary courts of law.

2 See, Edward J. Devitt, "The Search for Improved Advocacy in the Federal Courts", Gonzaga Law Review, Vol. 13, 1978, p. 897.

Athens may be called the first lawyers. Broadly speaking, this could be termed as the beginning of the lawyer's profession. A lawyer, according to the Black's Law Dictionary, is "a person learned in the law; as an attorney, counsel or solicitor; a person licensed to practice law."[3] Hence, the duties of a lawyer include the practical application of abstract legal theories and knowledge to solve specific individual problems, or to advance the interests of those who retain them to provide legal services. Today, there are many laws and most of them are beyond the comprehension of the common man, which necessitates the service of a lawyer. The role of a lawyer varies significantly across legal jurisdictions. The evolution of the distinction between barristers[4] and solicitors[5] is a classic example in this regard. So also, the distinction between trial lawyers and appellate lawyers is popular in some legal systems. There are legal systems where a party may opt to represent their own case in person, while in some other systems[6] a party is not permitted to appear before a judge without a counsel.

The right to get represented by a lawyer is recognised in Article 22(1) of the Constitution of India, which stipulates that no person who is arrested shall be denied the right to consult and be defended by a legal practitioner of his choice. When a person's rights are denied or are attempted to be curtailed, disputes are bound to arise.

Traditionally, lawyers do not give any opinion as to the facts. The parties supply the facts and the lawyers act on those facts assuming them to be true.[7]

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3 Henry Campbell Black, *Black's Law Dictionary*, 5th Edn., St Paul West Publishing Co., 1979, p. 799.

4 Lawyers who practised in the Courts in England were known by the names Barristors and Solicitors. Those lawyers who were practising in the Courts, even in the Circuit Courts came to be called "barristers" because they were often called to the Bar. They were thus used to move from place to place. Initially, Barristers were the only 'lawyers' who were allowed to have audience in Courts. Practising at the Bar was considered to be a more socially prestigious profession than working as a solicitor.

5 Generally, Solicitors are supposed to be doing the drafting work and in certain cases all the real estate transactions are expected to be carried out by solicitors. These lawyers were originally more or less confined to certain localities.

6 Like Venezuela.

7 For instance, in *New Delhi Bar Association (Regd.) and others* v. *National Capital Territory of Delhi*, 2004 (2) RCR (Cri.) 40 (Delhi), it was held that an advocate has no responsibility for a false affidavit by a deponent regarding his age.

But, certain matters may involve a mixture of law and facts. In that event, lawyers will have to cull out the legal issues arising from the facts. Hence, legal representation may be defined as a deliberate process of speaking out on issues of concern on behalf of others. This process is also called advocacy.

The expression 'advocacy', is derived from a Latin term. The word '*Ad*' means 'in favour of' and '*Voca*' is to speak. Hence, the meaning of the word 'advocacy' is to speak in favour of someone. The advocates are also called lawyers, as they stand on behalf of and in favour of a side or a party. In other words, a lawyer is to speak for, or support someone. Advocacy can be called as the act of inducing and persuading the democratic agencies to resolve legal and social issues.

The lawyer's profession is considered to be one of the learned professions, all over the globe. The standard of professional conduct and etiquette and code of ethics of an advocate demands that:

> "A member shall, at all times, conduct himself in a manner befitting his status as a privileged member of his profession and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for a member."[8]

It is the duty of lawyers to guard the essential foundations of liberty, namely 'rule of law' which can be the most efficient instrument against tyrannical rule. It is here that the lawyer should emerge as a protector of rights of parties. In fact, a lawyer is under a triple obligation — an obligation to his or her clients to be faithful and responsible to them[9], an obligation to the profession not to besmirch its name, or injure its credit by any action or inaction and an obligation to the Court to be a dependable part of the justice administration machinery. In the administration of justice, the bar and the bench constitute two sides of the

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8 See the Preamble to 'Standards of Professional Conduct and Etiquette' made by the Bar Council of India under Section 49(1)(c) of the Advocates Act, 1961. See, Chapter II, Part VI of the Bar Council of India Rules, 1975.

9 Hence, non-appearance of a counsel in a case is professional misconduct. See, *G. Sridhar and another* v. *State of A.P.*, 2005 (2) RCR (Cri.) 116 (A.P.)

10 See the observation of the Supreme Court in *Common Cause, A Registered Society* v. *Union of India and Others*, (1989) Supp. 2 SCC 716.

same coin. In this background, an advocate is an officer of the Court[10] and the legal profession is not a trade or business. It is a noble profession and advocates have to strive to secure justice for their clients within the legally permissible limits.[11] With advocacy and knowledge of law at their disposal, lawyers play a fundamental role in assisting Courts in meeting the ends of justice. In the administration of justice, it is a lawyer who is called upon to translate complex legal provisions into a more comprehendible form. All these apparently refer to the role of a lawyer in a Court of law. The Advocates' Act, 1961, also lays down various provisions on the foundations of practice before the Courts.

However, in the modern age, with the growth of Administrative Law, which is necessitated by a variety of justified reasons, there is a proliferation of 'quasi-judicial tribunals', popularly known as tribunals, in almost every conceivable field of human activities. A plethora of legislative instruments of the Welfare State pushed up the tribunalised justice delivery system much above the justice delivery of ordinary courts. There had to be a radical change in the whole process of justice administration, as it became difficult, though not impossible for the ordinary courts to deal with and solve all the socio-economic problems of the people. Examples are that of solving the complex problems in the employer - employee relationship and in a number of scientific and technical matters. The complexity is not only in the bipartite relationship of employer and employee, but there is a third aspect, the public interest of the society as a whole, which necessitates the expeditious settlement of disputes between the two. It is not that the ordinary courts cannot decide such issues, but there are inherent limitations in the ordinary courts. Moreover, the Administrative Tribunals Act, 1985, enacted under Article 323-A of the Constitution of India opened a new chapter in the sphere of administering justice to aggrieved government servants.

Before proceeding any further, it is necessary to take a look at the expression 'tribunal'. Even though, several statutes create 'tribunals', a precise definition is not available. Under the Indian Constitution there are references to 'tribunals'. The Webster's New World Dictionary defines a 'tribunal' which apparently

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11 See the observation in *R.N. Sharma Advocate* v. *State of Haryana*, 2003 (3) RCR (Cri) 166 (P&H).

12 See, *Webster's New World Dictionary*, 1972, p. 1517.

includes an ordinary court of law as well. It is also understood as a court of justice, in a broader sense[12]. This broad definition of 'tribunal' will not suffice to comprehend its actual functioning. Tribunals have been defined as "Bodies outside the hierarchy of the courts with administrative or judicial functions."[13] In general terms, the authority for adjudicating disputes is the Court and if an outside agency or authority is empowered by the State to determine the rights of the contesting parties it may be referred to as a 'tribunal'. In fact, such an authority may not be exercising *stricto sensu* judicial functions, but may exercise certain powers akin to a judicial body. Such authorities may also be referred to as 'quasi-judicial authorities'.

The Supreme Court of India in *Bharat Bank* v. *Bharat Bank Employees*,[14] observed that though 'tribunals' are clad in many of the trappings of a Court and exercise quasi-judicial functions, they are not full-fledged Courts. Hence, a tribunal is an adjudicating body or a quasi-judicial authority, which decides controversies between the contesting parties and exercises judicial powers as distinguished from purely administrative functions.[15] In other words, a tribunal is an adjudicating authority other than a Court of law, vested with the judicial powers of the State. In *Durga Shankar Mehta* v. *Raghuraj Singh*,[16] the Supreme Court made an attempt to define a 'tribunal'. The Court observed:

> "... the expression 'Tribunal' as used in Article 136 does not mean the same thing as 'Court' but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State and are invested with judicial as distinguished from administrative or executive functions."[17]

In *Associated Cement Companies Ltd.* v *P. N. Sharma*,[18] the Supreme Court

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13 Curzon, *Dictionary of Law*, 1994, p. 387.

14 AIR 1950 SC 188.

15 This distinction should be understood only in a limited sense. In many respects, the distinction between the quasi-judicial and administrative functions ceases to exist in today's context. As per the decisions of the Courts, both are expected to observe certain procedural safeguards to ensure justice.

16 AIR 1954 SC 520.

17 This distinction between the quasi-judicial and administrative functions were held to be getting obliterated in India by the Supreme Court in *A. K. Kraipak* v. *Union of India*, AIR 1970 SC 150.

18 AIR 1965 SC 1595.

opined that in order to be a 'tribunal', it is essential that the power of adjudication must be derived from a law and not from an agreement between the parties.[19] A 'tribunal', according to an official web site, is a generic term for any body acting judicially, whether it is titled as a tribunal or not.[20]

Advantages of Tribunals over Traditional Courts

Even though the classical and orthodox views on separation of powers were against the establishment of Administrative Tribunals, it came into existence and continued to stay in almost all legal systems. The Franks Committee[21] opined that the advantages of tribunals were that they were less expensive, besides, accessibility, freedom from technicality, expedition and expert knowledge of a particular subject. The establishment of such 'tribunals' is justified for a number of reasons, which may be summarised as follows:

- Inadequacy of the traditional judicial system in solving problems of people effectively;
- The judiciary is always overburdened with cases and one cannot expect a speedy disposal, even in important matters. Therefore, the ordinary judicial system was found to be not very expeditious;[22]
- The court fee system and the expenses on lawyers and other matters relating to the conduct of cases in an ordinary court of law made it exorbitant;

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19 However, exceptions exist in the case of International Court of Justice, International Criminal Court and Arbitral Tribunals, where jurisdictions of the respective authorities start with an agreement of the parties concerned.

20 See, <http://indiancourts.nic.in/sitesmain.htm> (Visited on 5-6-2008).

21 *Report of the Committee on Administrative Tribunals and Enquiries*, 1957, (Cmnd, 218). The Frank's report led to the enactment of the Tribunals and Inquiries Act, 1958, which has now been replaced by the Tribunals and Inquiries Act, 1992, in England.

22 In this context the observation of Justice B.N. Aggarwal, Former Judge of the Supreme Court of India, is significant. According to the Hon'ble Judge, "Our Constitution provides for an independent and efficient justice delivery system. Delay in disposal of cases, not only creates disillusionment amongst the litigants, but also undermines the capability of the system to impart justice in an efficient and effective manner. On account of such deficiencies in the system, huge arrears of cases have piled up in courts at all levels, and ways and means are required to be found out urgently, to bring them to a manageable limit, so as to sustain the faith of common man." Available at <http://indialawyers.wordpress.com/2009/11/09/pendency-of-cases-speedy-justice/> (Visited on 2-3-2010).

- The Court proceedings are formal and complex. Decisions by these Courts are given only after hearing the parties, very often in detail and on the basis of the evidence adduced by them in strict compliance with the law of evidence.

- The Courts are bound by traditional rules of procedure, which are often tardy and hence, resulting in inordinate delay; and

- The ordinary courts are often manned by persons who are not specialists in the particular field to which the dispute relates; the judges are of course degree holders in law, but, may not have the expertise required in certain specific areas.

The Administrative Tribunals are designed to avoid technicalities and complexities of the traditional justice delivery system. The approach of tribunals is functional rather than legalistic. While the ordinary courts are orthodox, conservative and technical, the tribunals are non-orthodox, non-technical and flexible. Very often the issues which come before tribunals are technical, which the traditional judiciary may find difficulty in solving. The tribunals are manned by technical experts who will be in a better position to tackle the complexities of the problem at hand.

The advantages of the Administrative tribunals over the ordinary judicial system[23] as identified by the Law Commission of India are:

1. Inexpensive;

2. Expeditious;

3. Expert knowledge of the technical matter involved; and

4. Capacity to give effect to the policies of social improvement without undue restrictions from common law policies and the doctrine of precedent.

However, it is doubtful whether these purported advantages really exist in the present day context.

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23 See, Government of India, *Law Commission of India 162nd Report*, 1998, p.12.

In India, several tribunals are constituted under various laws, for instance, the Industrial Tribunals and Labour Courts created under the Industrial Disputes Act, 1947, the Income Tax Appellate Tribunals constituted under the Income Tax Act, 1961, District, State and National Consumer Fora created under the Consumer Protection Act, 1985, and the Authorities created under the Minimum Wages Act, 1948 and the Payment of Wages Act, 1936. In addition to these tribunals, there are other tribunals created under the authority of special enactments. For example, departmental enquiries and domestic enquiries are conducted by the employers under the statutory requirements of employment laws.

These agencies are also bound by the procedural and legal requirements which are to be followed by the Administrative Tribunals. It is important to note at this juncture that the tribunals are not strictly bound by any of the procedural law requirements enumerated in the Civil or Criminal Procedural Codes and the law of evidence in our country. These tribunals are given the freedom by the statutes creating them to choose an appropriate procedure as they deem fit. It may, however, be noted that this freedom is not to be misused by the tribunals to choose any arbitrary procedure. Moreover, the tribunals are clothed with some trappings of courts, even though not all. It is significant to note that virtually all tribunal proceedings involve some complexities, so as to warrant legal representation to a great extent.

It is well accepted that the tribunals are expected to follow the principles of natural justice while solving disputes of parties.[24] The Franks Committee in England had observed that the tribunals will have to observe openness, fairness and impartiality in its approach. Unlike Courts, they can obtain all information material for the points under enquiry from all sources and through all channels, without being fettered by rules of procedure, which govern proceedings in a Court of law. In doing so, the tribunals must act openly, fairly and impartially,

24 See the Law Commission of India, *Fourteenth Report on Reform of Judicial Administration*, 1958, Vol. II, pp. 671 695. See also the observation of the Supreme Court in *State of Mysore v. Shivabasappa*, AIR 1963 SC 375, "...tribunals exercising quasi-judicial functions are not courts and that therefore they are not bound to follow the procedure prescribed for trial of actions in Courts nor are they bound to by strict rules of evidence. They can, unlike Courts, obtain all information material for the points under enquiry from all sources, and through all channels, without being fettered by rules and procedure which govern proceedings in Court."

which implies that the tribunals must afford a reasonable and fair opportunity to the parties to present their case before the tribunal. What amounts to reasonable and fair opportunity depends on the facts and circumstances of each case. For instance, the observation of the Supreme Court in *State of Mysore* v. *Shivabasappa*[25] is noteworthy. According to the Court, "The only obligation which the law casts on them is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it. What is a fair opportunity must depend on the facts and circumstances of each case ..."[26]

Standards of Fair Hearing

It is universally accepted that the rules of natural justice are the minimum standards of a fair decision making process.[27] One of the principles of natural justice is that of fair hearing. During a fair hearing, an authority is exercised according to the principle of 'due process of law'. Fair hearing, therefore, means that an individual will have an opportunity to present his or her case and to discover what evidence exists against him or her. Fair hearing may be defined as "a court or administrative hearing conducted so as to accord each party the due process rights required by applicable law".[28] The right to fair hearing requires that an individual shall not be penalised by a decision affecting that individual's rights or legitimate expectations, including, notice, opportunity to answer the notice and an opportunity to present one's case. An important question that may arise at this juncture is, whether the right to representation or hearing includes the right to get legal representation or not. Strictly speaking, the right to get legal representation is not considered as part of natural justice. The Supreme Court has held in a number of cases[29] that no one can claim the right to get legally represented as a matter of right. However, if such a right is conferred by a statute, then it may be claimed as a right.[30] In *Pett* v. *Greyhound*

25 AIR 1963 SC 375, p. 377.

26 See also *Jacob Mathew* v. *Professor of Medicine, Medical College and another*, (1966) II LLJ 638 Ker.

27 De Smith and R. Brazier, *Constitutional and Administrative Law*, 7th Edn., 1994, p. 602.

28 *Webster's New World Law Dictionary*, Wiley Publishing Inc., Hoboken, New Jersey, 2006.

29 See for instance, *Kalindi* v. *Tata Locomotives*, AIR 1960 SC 914; *Mohinder Singh Gill* v. *Election Commissioner*, AIR 1978 SC 851.

30 *H. C. Sarin* v. *Union of India*, AIR 1976 SC 1686.

Racing Association,[31] Justice Lyell expressed the same view. According to him it was difficult to claim legal representation before a tribunal as a basic feature of dispensation of fair justice. Adopting this attitude in a rigid manner may lead to injustice, especially in cases where the representation to be made may be in self defence, where self defence may not be effective. Take for instance the case of a person who is unable to express himself. It is ideal that legal representation is permitted in such situations where injustice would result if a proper representation is not made. It is significant to note the observation of Lord Denning in the *Greyhound Racing Association case*[32] wherein he said:

> "... when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor..."

So also, is the view of Professor de Smith who said that, in general, legal representation of the right quality before statutory tribunals is desirable and that a person threatened with social or financial ruin by disciplinary proceedings in a purely domestic forum may be gravely prejudiced if he is denied legal representation.[33] However, several issues arise for discussion on the question whether a party to a proceeding before an administrative tribunal is entitled to be legally represented or not.

The first issue which arises is that of claiming the right to legal representation as a fundamental right very closely linked with the principles of natural justice. The second is the case of legal representation where it is permitted by Statutes. The third is the situation where it is left with the quasi-judicial authority to permit legal representation. The fourth is the situation of an authority conducting some sort of enquiry, where a disciplinary authority is conducting a domestic enquiry. Before delving into the various issues in this regard, it is pertinent to look at the relevant provisions of the Advocates Act, 1961, which permits legal representation to parties by advocates.

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31 (1969) 2 All ER 221.

32 *Ibid.*

33 De Smith, *Judicial Review of Administrative Action*, 4th Edn., Stevens and Sons Ltd., 1980, p. 214.

The Advocates Act, 1961

The Advocates Act, 1961, Chapter-IV prescribes provisions for right to practise. Sections 29, 30, 32 and 33 in this Chapter are as follows:

> "29. Advocates to be the only recognised class of persons entitled to practise law:- Subject to the provisions of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates.
>
> 30. Right of advocates to practice: - Subject to the provisions of this Act, every Advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends,-
>
> (i) in all Courts including the Supreme Court;
>
> (ii) before any tribunal or person legally authorised to take evidence; and
>
> (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.
>
> 32. Power of court to permit appearances in particular cases: - Notwithstanding anything contained in this Chapter, any court, authority, or person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case.
>
> 33. Advocates alone entitled to practice:- Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act."

An advocate can represent a client in all the Courts in the country. In addition, an advocate may represent the interest of his client before a tribunal legally authorised to take evidence and before any other authority before whom an advocate is entitled to practice under any law in force. It may be noted that an advocate may represent the interest of the client as a matter of right before the Courts of law and before a tribunal which is authorised to take evidence. In any other case, the right to legal representation is conditional. The basic idea behind this appears to be that adducing evidence is a technical matter as

it involves examination and cross examination of witnesses and production of documentary evidence. Legal technicalities can best be handled by a professionally qualified lawyer. In this context, it may be noted that the right to legal representation is not available to anyone as a matter of right.[34] It has to be permitted by the law of the land. There are several laws in India which permit as well as restrict legal representation by lawyers before quasi-judicial authorities.

Statutory Restrictions

There are statutes which impose restraints on legal representation; while some permit legal representation and others permit it under certain conditions. For instance, restraint on lawyers from appearing before labour tribunals may be found in Section 36 of the Industrial Disputes Act, 1947. It refers to persons who can represent the management and workmen in a proceeding under the Act. Section 36(1) deals with workmen's representatives and allows only office bearers of the unions and their federation. Under 36(2), employers could be represented not only by the office bearers of their associations and federations but also by the paid officers of such associations and federations. Section 36(4) of the Act provides that in any proceeding before a Labour Court, Tribunal or National Tribunal a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be. Similarly, Section 13 of the Family Courts Act, 1984, provides that no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner.[35] The proviso to the said section provides

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34 However, there are contrary views on this aspect. Some authors hold the view that in the context of criminal cases,'right to legal representation is universally acknowledged as a fundamental right'. See, Samuel P.K. Vandi, "Examining the Right to Legal Representation: a reflection on the case of *The Inspector General v. Steven Harvey Perez and the Othe* ", (known as *the cocaine case*) Centre for Accountability and Rule of Law, available at <http://www.carl-sl.org/home/index.php?option=com_content&view=article&id=181:examining-the-right-to-legal-representation-a-reflection-on-the-case-of-the-inspector-general-v-steven-harvey-perez-and-the-others-&catid=4:articles&Itemid=23> (Visited on 10-10-2008).

35 The Family Courts Act, 1984, s. 13 reads: "Right to legal representation - Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right to be represented by a legal practitioner.

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as *amicus curiae* "

that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as *amicus curiae*.[36] One of the reasons for not permitting lawyers before tribunals or courts was that the appearance of a lawyer may prejudicially affect the interest of the other party.

In certain jurisdictions, advocates cannot appear before land tribunals constituted under some enactments.[37] However, in India, the legal position appears to be different. In *H.S. Srinivasa Raghavachar* v. *State of Karnataka*,[38] section 48(8) of the Karnataka Land Reforms Act, 1961, as amended by the Karnataka Land Reforms (Amendment) Act I of 1974, which excluded legal practitioners from appearing before the Tribunals was contended to be in conflict with section 30 of the Advocates' Act and section 14 of the Indian Bar Councils Act, 1926. It was argued that the State legislature was not competent to make a law repugnant to laws made by Parliament pursuant to Entries 77 and 78 of List I of the Seventh Schedule of the Constitution. The Court held that the submission of the learned counsel was fully supported by the judgment of a Full Bench of the High Court of Punjab and Haryana in *Jaswant Kaur* v. *State of Haryana*[39]. The Court adopted the reasoning of the High Court and directed that section 48(8) shall not be enforced so as to prevent advocates from appearing before the Tribunals functioning under the Act.[40]

However, considering the restriction on the appearance of lawyers before an Industrial Tribunal in *Paradip Port Trust* v. *Workmen*,[41] the Supreme Court expressed the opinion that a lawyer, simpliciter, cannot appear before an Industrial Tribunal without the consent of the opposite party and leave of the tribunal[42] merely by virtue of a power of attorney executed by a party. However, a lawyer can appear before the tribunal in the capacity of an office-bearer of

36 The phrase *amicus curiae* is a Latin word which literally means 'friend of the Court'.

37 For example in Australia, a person with legal qualifications, experience or training is not allowed to represent any party or witness before a customary land tribunal. Customary land tribunals determine the rights of the parties to the dispute in accordance with custom. However, they may appear as a party or a witness.

38 (1987) 2 SCC 692.

39 AIR 1977 P&H 221.

40 The Karnataka Land Reforms Act, 1961, s. 48(8) was thereby omitted by the Amending Act 1 of 1991 w.e.f. 5-2-1991.

41 (1977) 2 SCC 339.

42 See, the Industrial Disputes Act, 1947, s. 36(4).

a registered trade union or an officer of an association of employers and no consent of the other side and leave of the tribunal will then be necessary.

Another enactment which imposes restriction on the appearance of pleaders is the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974. Section 9-A of the Act provides:

> "9-A. Notwithstanding anything contained in this Act or any law for the time being in force, no pleader shall be entitled to appear on behalf of any party in any proceedings under this Act before the Collector, the Commissioner or the Maharashtra Revenue Tribunal:
>
> Provided that, where a party is a minor or lunatic, his guardian may appear, and in the case of any other person under disability, his authorised agent may appear, in such proceedings."

In *Lingappa Pochanna Appelwar* v. *State of Maharashtra*,[43] the Supreme Court examined the validity of the above provision. It was contended that an advocate enrolled under the Advocates Act, 1961, has an absolute right to practise before all Courts and tribunals. Such a right is no doubt conferred by Section 30 of the Advocates Act. But the Court opined that,

> "... unfortunately for the legal profession, Section 30 has not been brought into force so far, though the Act has been on the Statute Book for the last 22 years. There is very little that we can do in the matter and it is for the Bar to take it up elsewhere. A person enrolled as an advocate under the Advocates Act is not ipso facto entitled to a right of audience in all Courts unless Section 30 of that Act is first brought into force. That is a matter which is still regulated by different statutes and the extent of the right to practise must depend on the terms of those statutes."[44]

An attempt to get a mandamus issued against the Central Government to bring section 30 of the Advocates Act, 1961, into force was made in *Aeltemesh Rein* v. *Union of India*.[45] The Supreme Court clarified its position and held

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43 (1985) 1 SCC 479.

44 In fact the issue was considered by the Supreme Court in *Aeltemesh Rein* v. *Union of India*, (1988) 4 SCC 54 and directed the Government of India to consider whether Section 30 of the Act should be brought into force or not.

45 (1988) 4 SCC 54.

that it was not open to the Court to issue a writ to the Central Government to bring a statute or a statutory provision into force[46] when according to the statute concerned the date on which it should be brought into force is left to the discretion of the Central Government. However, the Court issued a writ in the nature of mandamus to the Central Government to consider whether the time for bringing section 30 of the Advocates Act, 1961, into force has arrived or not.

In fact, the right of an advocate on the rolls to practise is just what is conferred on him by Section 14(1)(*a*), (*b*) and (*c*) of the Bar Councils Act, 1926. The relevant provision reads:

> "14. (1) An advocate shall be entitled as of right to practise:
>
> (*a*) subject to the provisions of sub-section (4) of Section 9, in the High Court of which he is an advocate, and
>
> (*b*) save as otherwise, provided by sub-section (2) or by or under any other law for the time being in force in any other court and before any other tribunal or person legally authorized to take evidence, and
>
> (*c*) before any other authority or person before whom such advocate is by or under the law for the time being in force entitled to practise."

A very important rule of interpretation is the Golden Rule of Interpretation, which is that the legislative intent reflected in a Statute must be given effect to by the Courts while interpreting a Statute. Hence, if a statute prohibits representation of a party by a lawyer, then it must be given the normal meaning of the expressions given in the Statute and thereby prohibiting the representation by lawyers. On the contrary, if a statute permits legal representation, it is the duty of the authority to permit representation by lawyers. The Supreme Court of India in *Harish Uppal (Ex-Capt.)* v. *Union of India*[47] held that:

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46 See also, *A.K. Roy* v. *Union of India and another*, [1982] 2 SCR 272.

47 (2003) 2 SCC 45. The Court held that that lawyers had no right to go on strike or give a call for boycott, not even to go on a token strike.

"...the right of appearance in Courts is still within the control and jurisdiction of Courts. Section 30 of the Advocates Act has not been brought into force and rightly so. Control of conduct in Court can only be within the domain of Courts."

The Right to Legal Representation and the Principles of Natural Justice

The legal position on the question of representation by lawyers in proceedings before administrative tribunals is similar to that of ordinary Courts. There is no blanket permission to legal representation as procedural fairness[48] does not require legal representation.[49] The question as to the validity of the proceedings before a tribunal without giving an opportunity to be represented by a lawyer was answered in the Australian case, *Li Shi Ping and another* v. *Minister for Immigration, Local Government and Ethnic Affairs*,[50] Justice Drummond of the High Court of Australia explained that, in the absence of a statutory indication to the contrary, administrative bodies and lay tribunals are in general free to exclude lawyers. However, the circumstances of a particular case may place a case in the category which violates the principles of natural justice if no legal representation is permitted. In Australia, it is generally understood that the need for legal representation must depend on the background of the party concerned, the nature of the proceedings, the nature of the tribunal and the nature of the claim.[51]

Thus, there can be circumstances in which the rules of natural justice would not be satisfied if an opportunity to represent a party by a lawyer is not given. Where the rules are silent, the matter is to be decided by the Courts according

48 The Australian Securities and Investments Commission (ASIC) has set out seven rules of procedural fairness as including an opportunity to be heard (Principle 1), entitlement to notice (Principle 2), a right to an impartial decision maker (Principle 3) and finding of facts to be made on a sound basis (Principle 4). ASIC, Hearings Practice Manual, Para 2, pp. 6-7, available at <www.asic.gov.au> (Visited on 25-1-2009).

49 See, Paul Latimer *et. al.*, "Legal Representation in Australia before Tribunals, Committees and other Bodies", Murdoch University E Law Journal, Vol. 14, No. 2 (2007), p. 122.

50 (1994) 35 ALD 225, as cited in "*O*" v. *Minister for Immigration & Multicultural Affairs*, [2000] FCA 265, available at <http://www.unhcr.org/refworld/country,,AUSFC,,IRN,,3ae6b6a428,0.html> (Visited on 25-1-2008).

51 See for instance, *Orellana-Fuentes* v. *Standard Knitting Mills Pty Ltd and Another*, (2003) 57 NSWLR 282; *Carey* v. *Blasdom Pty. Ltd. T/As Ascot Freightlines and Another* [2003] NSWCA 146 at para. 97.

to the nature of the proceedings.[52] *McNab* v. *Auburn Soccer Sports Club Ltd.*[53] is an instance. In this case, there was a situation where there was no rule or practice to exclude lawyers, but counsels were excluded. The appellant was charged with conduct unbecoming of a member of a club. He was expelled from the Soccer club. In the enquiry, the tribunal opined that he was not entitled as a right to get legal representation. According to the Court, in appeal, "Natural Justice applies less rigorously to clubs than it does to Courts and Tribunals". However, the Court also pointed out that the rules vary in detail in different circumstances. It observed, "...it's possible to think of a case where legal representation would be essential and if the tribunal refused to allow it, in such a case, the decision would be void. If it was essential, and if the tribunal refused to allow it, the decision would be void."[54]

One of the most important aspects in adhering to the principles of natural justice is to ensure fairness. A fair hearing does not necessarily involve the right to legal representation.[55] So also, Courts are of the view that oral hearing is not a part of natural justice.[56] The Frank's Committee, 1957, in England proclaimed three basic and fundamental objectives in the working of administrative tribunals, which are equally applicable universally to any tribunal, whether quasi judicial or departmental. They are openness, fairness and impartiality. The judicial attitude in England, prior to 1963, regarding the applicability of the principles of natural justice appears to be narrow.[57] However, gradually,

52 Deborah Healey, *Sport and the Law*, 4th Edn., University of New South Wales Press Ltd., Sydney, 2009, p. 117, available at <http://books.google.co.in/books?id=UE3I7YVHHK8C&dq=McNab+v.+Auburn+Soccer+Sports+Club+Ltd.&source=gbs_navlinks_s> (Visited on 29-1-2009).

53 [1975] 1 NSWLR 54. Other cases in this category are *Freedman* v. *Petty and others*, (1981) VR 1001; *Sweeney* v. *Committee of South East Racing Association*, (1985) FLR 191 and *Gamilaroj Boomerangs Sports Aboriginal Corporation* v. *Member of New England Group 19 Rugby League General Committee*, [1999] NSWSC 293. Deborah Healey, *op.cit.*, p. 263.

54 [1975] 1 NSWLR 54, p. 61, see UQLS and Allen Allen and Hemsley Notepool, LA313 – Administrative Law – Week Six 21.03.00, available at <http://uqls.com/notepool/download.pbp?file_id=520> (Visited on 25-1-2009).

55 David Scott and Alexandra Felix, *Principles of Administrative Law*, Cavendish Publishing Ltd., London/Sydney, 1997, p. 136.

56 *Union of India* v. *J.P. Mitter*, (1971) 1 SCC 396.

57 For instance, *R.* v *Metropolitan Police Commissioner*, (1953) WLR 1150. It was a case of denial of natural justice to a driver while revoking his driving licence where the judiciary refused to intervene.

this attitude gave way to a more practical approach where of recognising the applicability of the principles of natural justice in quasi judicial functions. The House of Lords clearly indicated this change in attitude by observing that:

> "The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case."[58]

The next change in the judicial approach was in disregarding the divide between 'quasi judicial' and 'administrative' functions. The view was that in either case the administrator was to act with fairness as laid down in England by the House of Lords in *Ridge* v. *Baldwin*[59] and by the Court of Appeal in *Infant K (H)*.[60]

In this regard, in India almost similar principles exist. The Supreme Court of India in *Union of India* v. *T. R. Verma*,[61] observed that the tribunals should observe the principles of natural justice in conducting the enquiry. These principles may be stated in simple terms as:

a) a party should have the opportunity of adducing all relevant evidence on which the party relies;

b) the evidence of an opposite party should be taken in the presence of the other party;

c) a party must be given an opportunity to cross examine the witness produced and examined by the opposite party; and

d) no material should be relied on against a party without being given an opportunity to that party to examine and explain the same.

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58 In *Ridge* v. *Baldwin*, (1964) A C 40 at p. 80. In fact, it was a case where the watch committee dismissed a chief constable without observing the principles of natural justice. A plethora of authorities hold the view that failure to give a hearing will make a decision void and hence a nullity. Wade, *Administrative Law*, 5th Edn., Oxford University Press, Oxford, 1982, p. 315; de Smith, *Principles of Administrative Law*, 1973, p. 241; *Malloch* v. *Aberdeen Corporation*, (1971) All ER 1279; *Anisminic Ltd.* v. *Foreign Compensation Commission*, (1967) 3 WLR 382; *Devendra Pratap* v. *State of U. P.*, AIR 1962 SC 1334, etc., are few examples in this regard.

59 1964 AC 40.

60 (1967) 1 All ER 226.

61 AIR 1957 SC 882.

All these are reflected in one of the principles of natural justice that no body shall be condemned unheard. This aspect highlights the requirement of 'fair hearing' by quasi judicial anthorities.

A natural consequence of these requirements highlights the usefulness of a lawyer representing and conducting a case in the interest of the party. The right to a fair hearing or fair trial is an essential right in all countries respecting the rule of law. It is explicitly proclaimed in Article 10 of the Universal Declaration of Human Rights,[62] the Sixth Amendment to the U S Constitution,[63] Article Six of the European Convention of Human Rights[64] and in Article 20 of the Indian Constitution,[65] as well as in numerous other Constitutions and Declarations throughout the world.[66] Further, if the matter before an authority

62 The Universal Declaration of Human Rights, Article 10 reads: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of bis rights and obligations and of any criminal charge against him."

63 The Sixth Amendment of the U S Constitution in fact sets forth rights related to criminal prosecutions in federal courts. The Supreme Court has ruled that the principal rights guaranteed by this amendment are so fundamental and important that they are also protected in state proceedings by the Fourteenth Amendment relating to the Due Process Clause. The text of the amendment reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to he confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to liave the Assistance of Counsel for his defence."

64 Article 6 of the European Convention of Human Rights provides a detailed right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time, the presumption of innocence, and other minimum rights for those charged in a criminal case (adequate time and facilities to prepare their defence, access to legal representation, right to examine witnesses against them or have them examined, right to the free assistance of an interpreter)

65 Constitution of India, Article 20 reads: "Protection in respect of conviction for offences

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence

(2) No person shall be prosecuted and punished for the same offence more than once

(3) No person accused of any offence shall be compelled to be a witness against himself".

66 In *Tomasevic* v. *Travaglini and another,* [2007] VSC 337 [139], Justice Bell considered fair hearing to he inherent in the rule of law and the judicial process. See Human Rights Law Resource Centre Ltd., *The Right to a Fair Hearing and Access to Justice: Australia's Obligations*, available at <http://www.hrlrc.org.au/files/hrlrc-submission-access-to-justice-inquiry.pdf > (Visited on 30-1-2008).

concerns complex questions of law and fact and the party concerned may find it complex to deal with it or is not in a position to handle the matter effectively, he may be permitted to be represented by a legal practitioner. Similarly, when a party is pitted against a legally trained opposition, it is necessary to allow representation by a legal practitioner.[67]

The right to representation by counsel before an administrative tribunal, even though considered to be part of the principles of natural justice, is not absolute. The existence of this right, as mentioned earlier, is dependent upon the nature of the dispute, the complexity of the case, the seriousness of the allegations contained in the pleadings and the consequences that could result from the tribunal's decision. The tribunals also have discretion to permit or refuse legal representation depending on factors, such as, judicial nature of the proceedings and the resultant delays and institutional constraints. In this context, it is interesting to note the observation of Justice Krishna Iyer in *Mohinder Singh Gill* v. *Chief Election Commissioner*,[68] where the learned Judge said:

> "...subject to certain necessary limitations natural justice is now a brooding omnipresence although varying in its play... Its essence is good conscience in a given situation; nothing more but nothing less."

An oral hearing cannot be regarded as an inseparable ingredient of natural justice in India.[69] Consequentially, the right to legal representation before an administrative tribunal cannot be claimed as a part of natural justice. This right must emanate from the constitutional or statutory provisions. Thus, if a Statute prohibits the appearance of lawyers before a tribunal, established under a Statute, it does not amount to denial of natural justice.[70] A Division Bench of the Bombay High Court consisting of Chagla C. J. and Gajendragadkar J., in *Mulchand Gulabchand* v. *Mukund Sivaram Bhide*,[71] observed:

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67 See for instance, *C. L. Subramaniam* v. *Collector of Customs*, AIR 1972 SC 2178.

68 (1978) 1 SCC 405.

69 See, *Union of India* v. *P. K. Roy*, AIR 1968 SC 853, p.859; *M. Seddalingleh* v. *State of Mysore*, AIR 1972 Mys. 9, p. 10. See also, H.M. Seervai, *Constitutional law of India*, Vol. II, N. M. Tripathi Pvt. Ltd., Bombay, 1976, pp. 930-31; Jain and Jain, *Principles of Administrative Law*, Wadhwa and Company, Nagpur, 1973, p. 192.

70 See, the Industrial Disputes Act, 1947, s. 36(4).

71 AIR 1952 Bom. 296.

> "According to the Bar Councils Act and also the Bombay Pleaders Act, the right of a lawyer to practise before a tribunal is not an absolute right. It is a right subject to the provisions of any law for the time being in force. Therefore, the only right of a lawyer that has been safeguarded under the Constitution is the right to practise his profession. Now, that right not being an absolute right, no absolute right is conferred upon the lawyer by the provisions of the Constitution. The Constitution guarantees to the lawyer such right as he has under his charter. If any such right is affected or contravened, then undoubtedly he can rely upon the provisions of Article 19(f). But if the right given to him is a limited right and that right is not in any way affected, he cannot claim a wider right or a larger right under the Constitution."

Reference may also be made to a passage in *Basil's Commentary on the Constitution of India*,[72] under the heading "Right of a lawyer to practice", where it is observed:

> "The right of a lawyer to practice is not a natural or absolute right but is subject to the terms and conditions laid down in the statute which enables him to practice, e.g., the Bar Councils Act. What Article 19(1)(g) guarantees is that limited right to practice, subject to the terms imposed by the statute which gives him the statutory right to be enrolled, and to practice. Hence, when that statutory right is expressly subject to 'any other law for the time being in force', and a law prescribes that a lawyer shall have no authority to appear before a particular tribunal or authority, no fundamental right is infringed."[73]

We have already noticed that in certain situations refusal of legal representation may tantamount to denial of justice. For example, in cases where the subject matter of inquiry is technical or complicated or evidence is voluminous or the case involves a question of law, disallowing legal representation might result in the denial of natural justice.[74] Thus, it depends upon the facts and circumstances of a particular

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72 *Basil's Commentary on the Constitution of India*, 5th Edn., Vol. I, p. 752, as cited in *Kulwant Singh* v. *Income-Tax Officer* and others, *infra*.

73 See, *Kulwant Singh v. Income-Tax Officer*, and others, available at <http://www.indiankanoon.org/doc/1397109/> para 21 (Visited on 10-4-2008).

74 Jain and Jain, *Principles of Administrative Law*, 1973, pp. 202 -3.

case whether the refusal to permit the appearance of a lawyer amounts to denial of natural justice or not.[75] If a statutory provision either specifically or by inevitable implication excludes the application of the rules of natural justice, then the Court cannot ignore the mandate of the legislature. Whether or not the application of the principles of natural justice in a given case has been excluded, wholly or in part, in the exercise of statutory power, depends upon the language and basic scheme of the provision conferring the power, the nature of the power, the purpose for which it is conferred and the effect of the exercise of that power. [76]

Legislative Policy

a) Denial of Legal Representation by Statutes

The right to be represented through a lawyer has not been insisted upon as a necessary ingredient of the principles of natural justice unless the circumstances are such that its denial results in manifest injustice.[77] The legislative policy in this regard in India appears to be non-uniform. Some Statutes place restrictions on the legal practitioners from appearing before the authorities established under the statutes. The view against legal representation is that it complicates and delays matters and gives an edge to the rich over the poor. In this context it is significant to note Section 6(*a*) of the Administrative Procedure Act, 1946, in England which provides for legal representation and paragraph 87 of the Franks Committee Report which lays down that the right to legal representation should be curtailed in most 'exceptional circumstances'. Therefore, it may be ideal to curtail legal representation only when it is clear that the interests of the parties would be better served by such restriction and even in such cases legal aid must be provided by the administrative agency itself.

b) Unconditional Legal Representation Permitted by Statutes

There are other Statutes which permit legal practitioners to appear before various authorities. Tribunals under the tax laws would mould their own rules of procedure and dispose off appeals and reference applications with the assistance of 'authorised representatives' of the parties. Section 288 of

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75 *Ram Naresh* v. *State of UP*, AIR 1967 All 384.

76 See, *Union of India* v. *Col. J. N. Sinha*, 1970 (2) SCC 458.

77 *N Kalindi* v. *Tata Locomotive & Engineering Co* , AIR 1960 SC 914.

the Income Tax Act, 1961, permits an assessee to be represented before the Tribunal by (a) a relative of the assessee, (b) a person regularly employed by the assessee, (c) a lawyer, (d) an accountant or (e) an income tax practitioner. This last category gives continued recognition to persons who had been attending before income tax authorities. It also gave recognition to persons who have passed a recognized accountancy examination or has acquired certain prescribed educational qualifications. The income tax authority, which is a party before a tax authority can be represented by a representative.[78]

c) Legal Representation Authorised by Statutes, subject to the Permission of the Authority

Another important aspect of statutorily permitted legal representation is the one with the permission of the authority concerned before such representation takes place. The most common example may be found in the Indnstrial Disputes Act, 1947.[79] The Act generally does not permit representation by a legal

78 Usually an Income-tax officer and in recent years, an Additional / Deputy Commissioner assisted by an Income-tax Officer duly appointed for the purpose by the Central Government by a Gazette notification or any other person acting on his behalf could represent the Department.

79 Section 36 of the Act reads: "Representation of parties.

(1) A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by

(a) any member of the executive or office bearer of a registered trade union of which he is a member;

(b) any member of the executive or other office bearer of a federation of trade unions to which the trade union referred to in clause (a) is affiliated;

(c) where the worker is not a member of any trade union, by any member of the executive or other office bearer of any trade union connected with, or by any other workman employed in, the industry in which the worker is employed and authorized in such manner as may be prescribed.

(2) An employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by –

(a) an officer of an association of employers of which he is a member.

(b) an officer of a federation of association of employers to which the association referred to in clause (a) is affiliated;

(c) where the employer is not a member of any association of employers, by an officer of any association of employers connected with, or by any other employer engaged in, the industry in which the employer is engaged and authorized in such manner as may be prescribed.

(3) No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceedings under this Act or in any proceedings before a Court.

(4) In any proceeding before a Labour Court, Tribunal or National Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be.

practitioner in certain proceedings. However, under the provisions of the Act, a party to an industrial dispute before a tribunal or court may be represented by a lawyer when the opposite party consents for such representation and on the permission of the presiding officer. The general trend among the presiding officers of labour courts, industrial tribunals and national tribunals is to allow legal representation in every matter. Another instance of statutory permission to engage legal practitioners may be seen under Section 20(2) of the Minimum Wages Act, 1948.[80] One could find several other legal provisions in this regard. However, whether the Presiding Officers of these tribunals insist on the requirement of the leave of such authorities is a matter of further examination.[81]

Another tribunal before which the appearance of lawyers is not appreciated is the Consumer Court. Section 12 of the Consumer Protection Act, 1986, deals with the question as to who can file complaints before the appropriate consumer fora.[82] In this context, it is interesting to note the orders of the National Consumer Disputes Redressal Commission in a Revision Petition[83] from the order of the State Consumer Commission of Tamil Nadu in a matter concerning authorised representation by an agent of the parties. During the course of discussion, the State Commission referred to the provisions of the Constitution of India, the Advocates' Act 1961, the Consumer Protection Act, 1986 and the rules framed thereunder by the Central Government and the

80 Subsection (2) of Section 20 provides:

"Where an employee has any claim of the nature referred to in sub-section (1) the employee himself or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf or any Inspector or any person acting with the permission of the authority appointed under sub-section (1) may apply to such authority for a direction..."

81 An interaction by the author with some of the Presiding Officers of Industrial Tribunals and Labour Courts in India revealed that, for various reasons, they prefer having lawyers representing cases before them.

82 According to the Act, any person who can be termed as a consumer under the Act can make a complaint. Further, the following are also recognized as persons who can file a complaint under the Act:

- a consumer; or
- any voluntary consumer association registered under the Companies Act, 1956 or under any other law for the time being in force, or
- the Central Government or any State Government,
- one or more consumers, where there are numerous consumers having the same interest.

83 1017 of 2002.

Tamil Nadu State Government, the Civil Procedure Code and the Civil Rules of Practice of Madras High Court, the Criminal Procedure Code and various Judgments of the High Courts and the Supreme Court. Thereafter, the State Commission observed:

> "Thus it is crystal clear that the provisions adumbrated under the Act, 1986 enables a voluntary consumer organization registered under the Companies Act, 1956 or under any other law for the time being in force to present a complaint for and on behalf of the aggrieved complainant / consumer in the absence of himself virtually figuring and filing a complaint as a complainant. An authorised agent appears for and on behalf of the complainant or the opposite party in their absence before the Forum on the hearing dates. The authorised agent either for the complainant or for the opposite party is not at all empowered to make a representation for and on behalf of the party he is appearing for. His appearance before the hearing date is actually to dispense with the presence of the complainant or the opposite party on the date of hearing and nothing further. As such, the statutory provisions adumbrated under the Act, 1986 does not give the right of audience either to the voluntary organisations registered under the provisions of the Companies Act, 1956 or any other law for the time being in force or in favour of the authorised agents either for the complainant or for the opposite party. It appears that the salient provisions in the Act, 1986 had been adumbrated in rather a bid to avoid an order being passed, dismissing the complaint for the default of the complainant or an order being passed ex parte on merits or for the avoidance of the technical objection of locus standi that may emerge for the complaint to be filed by such associations instead of by the aggrieved party / complainant / consumer and nothing further."[84]

It was contended that if the various pronouncements of the Supreme Court and of the High Courts on Order – III of the Code of Civil Procedure, 1908,[85] are

84 In *Voluntary Organisation in Interest of Consumer Education (VOICE)* v. *The Registrar Tamil Nadu State Consumer Disputes Redressal Commission*, in Revision Petition No. 107/2002, available at <http://ncdrc.nic.in/RP10172002.html> (Visited on 10-4-2008).

85 Order III provides for the various rules relating to 'Recognized Agents and Pleaders'.

considered, it could be seen that under the general prevailing law no authorised agent could claim to possess a right of audience in the Court of law, unless specific permission of the Court was obtained and that, the word 'appear' in Order III does not include right of audience before a Court. However, the objectives of the Act and various pronouncements of the Supreme Court show that authorised representatives can certainly have a right of audience and this right is not merely confined to appearance before a Consumer Forum. A Division Bench judgment of the Bombay High Court in *Sanjay R. Kothari and another* v. *The South Mumbai Consumer Disputes Redressal Forum*[86] was also referred to the National Commission. The High Court in this case observed:

> "We, thus conclude that a party to the proceeding before the District Forum/State Commission has right to authorise a person of his choice to represent him and appearance of such agent authorised by the party on the date of hearing before the District Forum/State Commission is not restricted to physical appearance but includes in terms of Rule 4(7) 4(8) or 9(6) of Rules of 2000 to examine and cross examine the witness, address the court and take part in the proceedings as the case may be. Any other view may defeat the very objectives for which Act of 1986 was enacted..."

Some of the observations from the above judgment were relied on by the National Commission in examining the scope of the expression 'appear' and right of audience.

> "The right to appear, therefore includes right of addressing the Court, examining, cross-examining witnesses, oral submissions, etc. If we accept the submission...that 'to appear' means only physical presence before the Consumer Forum for the purposes of filing a complaint, appeal, or reply on behalf of the party, it would create a very strange situation before the Consumer Forum/State Commission. If an authorised agent alone appears on the date/dates of hearing, neither the hearing will proceed further, nor the consumer forum will be able to either dismiss the complaint for default or decide it on merit or decide it ex parte. Consider a situation like this: Section 12 of the Act

86 AIR 2003 Bom. 15.

of 1986 permits the aggrieved consumer to file a complaint through a recognised consumer association. In the complaint, the consumer association appears through its office bearers as its recognised agent. Does the law i.e., Act of 1986 and Rules of 2000 compel such complainant-association who is espousing the cause of a consumer, engagement of a legal practitioner to address the Consumer Forum? Answer is a simple no. Once the complaint is filed by an aggrieved consumer through a recognised consumer association, the authorised agent appearing for such recognised consumer association is expected to take the complaint to a logical conclusion by full participation in the complaint proceedings which may include addressing the Forum, examining and cross-examining the witnesses, etc. Observation of principles of natural justice alone is sufficient in rendering justice to consumers...In view of this, we have no hesitation in giving a wider and comprehensive meaning to the expression 'to appear' appearing in Rule 4(7) and 8(7) of the Rules of 2000 to include addressing the Court, examining and cross-examining witnesses, etc. We are of the considered view in the light of statutory provisions like section 2(1) (b) (ii) and section 12 of he Act of 1986 and Rule 4(7) and 8(7) of Rules of 2000 that the right of audience inheres in favour of authorised agents of the parties to the proceedings before District Consumer Forum and State Commission and such right is not inconsistent or in conflict with the provisions of the Advocates Act...It is now a well settled position of law that the right conferred on advocates under the provisions of the Advocates Act is a statutory right and not a fundamental right guaranteed under the Constitution. A person who is not an advocate cannot practise law. Any person other than a party to the proceedings or an advocate cannot claim a right of audience before the Court, tribunal or authority until it is provided by law or such person is specifically permitted by such court, tribunal or authority. This in sum and substance is the scheme of Sections 29, 32 and 33 of the Advocates Act, 1961, and Section 14 of the Bar Councils Act, 1926 which is still operating as Chapter IV of Advocates Act, 1961 has not fully come in operation and Section 14 of Bar Council's Act, 1986 cannot be said to have been repealed."

The National Forum was of the opinion that the 'agent' as defined in the Central Consumer Protection Rules, 1987, means 'a person duly authorised by a party to present any complaint, appeal or reply on its behalf before the National Commission'.

Another issue in this case was whether a person who is neither a part of a consumer organisation nor related to the consumer in any manner nor a practicing lawyer can appear on a regular basis before a Consumer Forum as an authorised person or not. It was contended that there was considerable merit in the submission that such a practice might be detrimental to the working of the Consumer Forum as such person, not having any linkage with a consumer organisation, may become a parallel body which might in fact exploit a consumer rather than subserve his interests, as there was no accountability attributable to such persons. In this context reference was made to the decision of the Supreme Court in *Harishankar Rastogi* v. *Girdhari Sharma*[87] where the Supreme Court observed:

> "Judges may suffer if quarrelsome, ill-informed or blackguardly or blockheadly private representatives filing arguments at the court. Likewise, the party himself may suffer if his private representative deceives him or destroys his case by mendacious or meaningless submissions and with no responsibility or respect of the court. Other situations, settings and disqualifications may be conceived of where grant of permission for a private person to represent another may be obstructive, even destructive of justice. Indeed, the Bar is an extension of the system of justice; and advocate is an officer of court..."

It was also contended that the rights of advocates under the Advocates Act vis-à-vis rights of consumer organisations has to be rejected. The argument was that Section 30 of the Advocates Act had not been notified, and that apart, the Supreme Court has upheld the legislation depriving the right of lawyers from appearing in Courts.[88] In such circumstances, when lawyers can themselves appear before the Consumer Forum, it cannot be said that there is any deprivation of their rights. It is a settled principle of law that when there

87 (1978) 2 SCC 165.

88 For instance, the Labour Courts and Industrial Tribunals.

are two special enactments, the latter enactment would prevail and in this case, the latter enactment is the Consumer Protection Act, 1986.

It is important to note another significant factor in this regard. A Consumer Forum will permit an authorised agent to appear before it, but an authorised agent will not be one, who has used this as a profession to earn his livelihood. A Consumer Forum has to guard itself against unscrupulous authorised agents who may exploit the consumer for their own benefit and are strangers to the consumer movement. A Consumer Forum can certainly examine the qualification, relationship and antecedent of an authorised agent when he represents a consumer. It can certainly forbid an unscrupulous authorised agent from appearing before it in any particular complaint, appeal or revision. While the Bar Council of a State or Bar Council of India exercises control over the conduct of a lawyer there is no such control over a 'professional' authorised agent. Even in the case of voluntary consumer organisations no Code of Conduct has been formulated by the Government of India.[89]

It is interesting to note the concluding argument of Mr. Gopal Subramanium,[90] which was accepted by the Commission in this case. Approving the contention, the National Commission held:

> "Keeping in mind that the composition of consumer courts is such that it includes not only judicial members but also non-judicial members from the field of administration and social work this envisages a new approach, which is to be shorn of the shackles of procedural law so that access to justice is easy and simple. In this context, to say, that a consumer association cannot plead the case of the consumer or an association cannot appear before a consumer court will be to defeat the purposes of the Act itself. Therefore recognised Consumer associations should have the right of audience before the fora under the Act".

89 Only requirement is that such organizations shall be "recognized consumer association" to mean voluntary consumer association registered under the Companies Act, 1956 or any other law for the time being in force. See Explanation to the Consumer Protection Act, 1986, Section 12.

90 Senior Advocate, who was an *amicus curiae* in this case.

Legal Representation in Domestic Enquiries

In the matter of domestic enquiries, law in general, does not allow legal representation as a matter of right to the parties. It may be permitted in exceptional circumstances. In *Fraser* v. *Mudge*[91] the Court of Appeal held that there was no right to legal representation in a disciplinary proceeding before a Board of Visitors, although the Board could allow representation. However, in *R* v. *Secretary of States for the Home Department ex parte Tarrant*,[92] the Divisional Court held that in certain circumstances the Board must allow representation.[93]

The law in India also follows the same track. It does not concede an absolute right of representation to an employee or a person in domestic enquiries as part of the right to be heard. So also, there is no right to representation by somebody else unless the rules or regulations or standing orders regulating the conduct of disciplinary proceedings specifically recognize such a right and provide for such representation. In *N. Kalindi* v. *Tata Locomotive & Engineering Co. Ltd.*,[94] the Supreme Court observed:

> "Accustomed as we are to the practice in the courts of law to skillful handling of witnesses by lawyers specially trained in the art of examination and cross examination of witnesses, our first inclination is to think that a fair enquiry demands that the person accused of an act

91 [1975] 3 All ER 78.

92 [1985] QB 251. In this case, following a riot and rooftop demonstration by some prisoners at Albany prison and a later violent confrontation, a number of prisoners faced serious charges at adjudication. The prisoners asked for and were denied either legal representation or the assistance of a friend at the hearings. They sought leave to apply for judicial review on this basis. The Divisional Court held that it was bound by the earlier decision in *Fraser* v. *Mudge* (*supra*) that there is no right to legal representation at an adjudication. However, the Court also held that adjudicators were masters of their own procedure and the decision did not affect their discretion to allow such representation in certain situations.

93 Webster, J., identified the following circumstances for permitting legal representation: The seriousness of the charge and the potential penalty; Whether any points of law are likely to arise; The capacity of the person (prisoner) to represent his case; Procedural difficulties such as the difficulty some prisoners might have in cross-examining a witness, particularly one giving expert evidence, without previously having seen that witness' evidence.

94 AIR 1960 SC 914. See also, *The Management of National Seeds Corporation Ltd.* v. *K. V. Rama Reddy*, 2007 (1) SCC (L&S) 512.

should have the assistance of some person, who even if not a lawyer may be expected to examine and cross-examine witnesses with a fair amount of skill. We have to remember however in the first place that these are not enquiries in a court of law. It is also necessary to remember that in these enquiries, fairly simple questions of fact as to whether certain acts of misconduct were committed by a workman or not only fall to be considered and straightforward questioning which a person of fair intelligence and knowledge of conditions prevailing in the industry will be able to do will ordinarily help to elicit the truth. It may often happen that the accused workman will be best suited, and fully able to cross examine the witnesses who have spoken against him and to examine witnesses in his favour.

It is helpful to consider in this connection the fact that ordinarily in enquiries before domestic tribunals the person accused of any misconduct conducts his own case. Rules have been framed by the Government as regards the procedure to be followed in enquiries against their own employees. No provision is made in these rules that the person against whom an enquiry is held may be represented by anybody else. When the general practice adopted by domestic tribunals is that the person accused conducts his own case, we are unable to accept an argument that natural justice demands that in the case of enquiries into a charge-sheet of misconduct against a workman, he should be represented by a member of his Union. Besides it is necessary to remember that if any enquiry is not otherwise fair, the workman concerned can challenge its validity in an industrial dispute.

Our conclusion therefore is that a workman against whom an enquiry is being held by the management has no right to be represented at such enquiry by a representative of his Union; though of course an employer in his discretion can and may allow his employee to avail himself of such assistance."

In a subsequent case, namely, *Dunlop Rubber Co. (India) Ltd. v. Workmen*,[95]

95 AIR 1965 SC 1392.

the Supreme Court laid down that there was no right to representation by another person in disciplinary proceedings unless the Service Rules specifically provide for the same.

The matter was again considered by the Supreme Court in *Crescent Dyes's case*.[96] In the context of Section 22(ii) of the Maharashtra Recognition of Trade Unions and the Unfair Labour Practices Act, 1971, as also, in the context of domestic enquiry, the Court[97] upheld the statutory restrictions imposed on a delinquent's choice of representation through an agent.

Subsequently in *Brooke Bond India (P) Ltd.* v. *Subba Raman and another*,[98] it was held that the law in this country does not concede an absolute right of representation to an employee as part of his right to be heard. It was further specified that there was no right to representation as such unless the Company, by its Standing Orders, recognises such a right. In this case, it was also laid down that a delinquent employee has no right to be represented in the departmental proceedings by a lawyer unless the facts involved in the disciplinary proceedings were of a complex nature in which case the assistance of a lawyer could be permitted. This position was reiterated by the Supreme Court in *Bharat Petroleum Corporation Ltd.* v. *Maharashtra General Kamgar Union & Ors.*[99]

Another case where the question of legality or otherwise of legal representation in domestic enquiries came up before the Supreme Court was in *The Management of National Seeds Corporation Ltd.* v. *K.V. Rama Reddy*.[100] In this case, the appellant called in question the legality of the judgment of the Karnataka High Court directing the National Seeds Corporation to consider afresh the respondent's prayer for being represented by a legal practitioner.

In this case, the respondent was an Assistant Grade II. The respondent and another person, a Seed officer, were responsible for a huge loss of above Rupees 63 lakhs which was misappropriated by them. Accordingly, a complaint was

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96 *Crescent Dyes and Chemicals Ltd.* v. *Ram Naresh Tripathi*, 1993 (2) SCC 115.

97 *Per* Justice A. M. Ahmadi.

98 1961 (2) LLJ 417. In this case the Court followed the earlier decisions in *Kalindi's case* (*supra*) and the *Dunlop Rubber Company's case* (*supra*).

99 JT 1998 (8) SC 487.

100 2007 (1) SCC (L&S) 512.

lodged with the Police and simultaneously departmental proceedings were also initiated against them. At the enquiry, the respondent sought permission of the disciplinary anthority to take the assistance of a retired Assistant Manager of the Corporation. The prayer to take his assistance was rejeeted by the Corporation, in view of Rule 31(7) of National Seeds Corporation (Conduct, Discipline and Appeal) Rules, 1992[10]. The respondent challenged the order by filing a Writ Petition before the Karnataka High Court. The challenge was on the legality of Rule 31(7) of the Rules on the ground that the provision denied opportunity to a delinquent employee to avail services of the person of his choice. The High Court did not accept the contention and dismissed the writ petition. After the dismissal of the writ petition, the respondent made a representation for permission to take the assistance of a legal practitioner. The said request was turned down by the management. Against this order the respondent filed another Writ Petition, again challenging that part of the rule which permitted engagement of a legal practitioner only when the presenting officer appointed by the disciplinary authority is a legal practitioner or the disciplinary authority having regard to the circumstances of the case, so permitted. A counter-affidavit was filed by the Corporation taking the stand that the same issnes were earlier raised in the previous writ petition which was dismissed. The High Court allowed the writ petition by observing that even though presenting officer was not a legal practitioner, yet the disciplinary authority could permit engagement of a legal practitioner having regard to the circumstances of the case. The Supreme Court dismissed the plea and allowed the appellant's contention. The Court observed:

> "The reasons indicated by the appeltant for the purpose are (a) that the amount alleged to have been misappropriated is Rs.63.67 lakhs (b) number of documents and number of witnesses are relied on by the respondent, and (c) the prayer for availing services of the retired employee has been rejeeted and the respondent is unable to get any assistance to get any other able co-worker. None of these factors are

10(Rule 3J(7) reads: "The employee may take the assistance of any other employee working in the particular unit where the employee is working/was working at the time of happenings of alleged changes to which the inquiry relates or where the inquiry is being conducted to present the case on his behalf but may not engage a legal practitioner for the purpose unless the presenting officer appointed by the disciplinary authority is a legal practitioner or the disciplinary authority having regard to the circumstances of the case, so permits."

really relevant for the purpose of deciding as to whether he should be granted permission to engage the legal practitioner. As noted earlier, he had to explain the factual position with reference to the documents sought to be utilised against him. A legal practitioner would not be in a position to assist the respondent in this regard. It has not been shown as to how a legal practitioner would be in a better position to assist the respondent so far as the documents in question are concerned. As a matter of fact, he would be in a better position to explain and throw light on the question of acceptability or otherwise and the relevance of the documents in question. The High Court has not considered these aspects and has been swayed by the fact that the respondent was a physically handicapped person and the amount involved is very huge. As option to be assisted by another employee is given to the respondent, he was in no way prejudiced by the refusal to permit engagement of a legal practitioner. The High Court's order is, therefore, unsustainable and is set aside."[102]

Conclusion

It is time that the law makers reconsider the law on this subject. The right to be represented through a lawyer has not been insisted upon as a necessary ingredient of the principles of natural justice unless the circumstances are such that its denial results in manifest injustice.[103] In the light of the above discussion, it may be seen that certain statutes, like, the Industrial Disputes Act, 1947, bar legal representation while statutes like, the Income Tax Act, 1961, allow legal representation. The common argument against allowing legal representation is that it complicates and delays matters and as mentioned above, gives an edge to the rich over the poor. Whatever may be the truth, it certainly reminds one of the words of the well-known jurist, C. K. Allen that it is a "mistaken kindness to the poor".[104] In England, Section 6(*a*) of the Administrative Procedure Act, 1946, provides for legal representation and para 87 of the Frank Committee Report lays down that the right to legal representation should be curtailed

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102 2007 (1) SCC (L&S) 512, p. 517.

103 *Kalindi* v. *Tata Locomotive & Engg. Co.*, AIR 1960 SC 914, (1960) 3 SCR 407.

104 I.P. Massey, "Compulsions and Constraints of Administrative Justice Against the Backdrop of the Swaran Singh Committee Report", (1976) 3 SCC (Jour) 9.

in most 'exceptional circumstances'.[105] Judicial opiniou in general favours permitting legal representation only in certain circumstances. The old notions on this legal issue must give way to modern thoughts based on ideas of justice with a humanitarian approach. Hence, it is suggested that the right to legal representation be considered as a general rule and the same may be curtailed only in instanees where the interests of the parties would be better served by sueh restriction. In such circumstances legal aid to the un-represented party must be provided by the authority concerned.

105 J. A. G. Griffith, "Committee on Administrative Tribunals and Enquiries", The Modern Law Review, Vol. 2J, No. 1, 1958, p. 73.

INFORMED CONSENT WITHIN PATIENT AUTONOMY AS A NON-DEROGABLE HUMAN RIGHT

Dr. Anil R. Nair*

Abstract

The paper analyses the ethical and legal dimensions of the doctor – patient relationship and seeks to establish the patient's right to choose what happens to his body as a fundamental and non-derogable human right. It reviews instances when the availability of the right of informed consent as contemplated in the context of patient autonomy is available as a fundamental and non-derogable human right. The paper suggests that the patient's enjoyment of the right to choose within the human right of patient autonomy is directly dependent on its acceptance as a fundamental and non-derogable human right. The paper argues that recognising the right to choose as non-derogable would help the medical professional and the patient to modulate their conduct in situations where the patient is incapacitated to enjoy it with full autonomy.

Introduction

Consequent to the efforts of the international community after the Alma Ata Declarations of 1978 to achieve 'health for all', the approach to modern healthcare has become holistic and preventive moving away from its curative

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1 Declaration of Alma-Ata made at the International Conference on Primary Health Care, Alma-Ata, USSR, between 6-12 September, 1978. Article 1 reads: "The Conference strongly reaffirms that health, which is a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity, is a fundamental human right and that the attainment of the highest possible level of health is a most important world-wide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector."

2 The Declaration states: "In September 2000, 189 heads of state adopted the UN Millennium Declaration and endorsed a framework for development. The plan was for countries and development partners to work together to reduce poverty and hunger, tackle ill-health, gender inequality, lack of education, lack of access to clean water and environmental degradation. They established eight Millennium Development Goals, with targets set for 2015, and identified a number of indicators to monitor progress, several of which relate directly to health. All the goals and their targets are measured in terms of progress since 1990." See <http://www.who.int/mediacentre/factsheets/fs290/en/index.html> (Visited on 30-7-2010).

roots.[1] Though the aim to achieve 'health for all' by the year 2000 A.D. has not been met as underscored by the setting of the Millennium Development Goals with a significant relationship to health,[2] and considerable progress has been made in this regard across the world.[3]

In India, the legal system has recognised the need for State intervention to ensure adequate healthcare facilities to the citizens. Article 39(e) of the Constitution of India enjoins the State to formulate its policies in such a manner that it prevents the abuse of the health and strength of its citizens and protect its children from avocations unsuited for their age or strength.[4] Article 47 conveys that it is the duty of the State to raise the level of nutrition and the standard of living and to improve public health.[5] The Supreme Court of India contributed significantly to the creation of an enforceable right to health and medical care by recognising it as a facet of right to life envisaged in Article 21 of the Constitution of India thus raising it to the level of a fundamental right.[6] In its decisions recognising the right to health as an aspect of the right to life, the Supreme Court has drawn strength from the Constitution of India as well as from international documents.[7] In fact, the Court recognizes that the principles enshrined in the Universal Declaration of Human Rights, the

3 Kate Kelland, "WHO sees Good Progress on UN Health Goals for Poor", available at <http://uk.reuters.com/article/id UKLDE6470FA, CH .2420> (Visited on 30-7-2010). "With five years remaining to the MDG deadline in 2015 there are some striking improvements", the author quotes from *The World Health Report 2010 - Health Systems Financing: The Path to Universal Coverage.*

4 Article 39 lays down certain principles of policy to be followed by the State. The clause reads thus: "The State shall, in particular, direct its policy towards securing – that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength."

5 Article 47 reads: "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."

6 *State of Punjab* v. *Mohinder Singh Chawla*, AIR 1997 SC 1225, (1997) 2 SCC 83.

7 The Universal Declaration of Human Rights, 1948, article 25 reads: "(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

International Covenauts aud the Constitution of India eannot be achieved in a civilised society without recognizing a right to live that ineludes a right to medical care.[8]

Thus, the legal system in India is, iu theory, tuned towards providing adequate healthcare to all. Though various decisions of the Supreme Court recognises the signifieant gap between the theoretical legality and the practical reality,[9] the legal system agrees that every person has the right to healthcare and it is the duty of the State to provide the same.[10]

In this clamour for having a rights based approach to healthcare, driven as it is by eoncerns of inadequate infrastructure, high costs of health care and lack of universal access to medical services, the significant question of patient autonomy understandably gets relegated to the background. Studies have shown that the trend to respect patient autonomy was greatest in the U.S. and was least evident iu China and India.[11]

What is Patient Autonomy?

Patient autonomy generally means recognition of the right of the patient to take decision about their medical care uninfluenced by the health care provider. Though patient antonomy allows for health care providers to educate the patient, it does uot allow the health care provider to make the decision for the patient.[12] It is the principle that health care professionals have a duty to treat the patient within the bounds of accepted treatment in aecordance with the

8 *Chameli Singh* v. *State of Uttar Pradesh*, (1995) 6 SCR 827, paras 8 and 10. The Court held: "Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care, and shelter. These are basic human rights...All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights and Conventions under the Constitution of India cannot be exercised without these basic rights."

9 *Parmanand Katara* v. *Union of India*, AIR 1989 SC 2039; *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*, AIR 1996 SC 2426.

10 *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*, AIR 1996 SC 2426, para. 9, the Court held: "The Government hospitals run by the State and the Medical Officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in a violation of his right to life under Article 21."

11 See, Wertz D. C. *et. al.*, "In Focus - Has Patient Autonomy Gone Too Far? Geneticists' Views in 36 Nations", American Journal of Bioethics, 2002, Fall 2(4):W21.

12 See, <http://www.medterms.com/script/main/art.asp?articlekey=13551> (Visited on 27-3-2010).

patient's desires protecting the patient's confidentiality.[13]

In 1914, in the much quoted case of *Schloendorff* v. *Society of New York Hospital*[14], Cardozo, J., reiterated the concept of patient autonomy in the following words: "Every person being of adult years and sound mind has a right to determine what shall be done with his own body."[15]

Patient autonomy received greater attention after the enunciation of the Nuremburg Code in 1947 to deal with the consequences of forced human experimentation during the rule of the Nazi regime. The ten standards laid down in the judgment by the war crimes tribunal at Nuremberg was formulated to ensure that certain basic principles are observed in order to satisfy moral, ethical and legal concepts.[16] The Code gives utmost importance to the voluntary consent of the human subject which it deems to be absolutely essential thus establishing a non-derogable moral, ethical and legal standard for the medical profession in its conduct towards its users.[17]

Greater interest in bio-medical research prompted the World Medical Association to formulate the Helsinki Declaration in 1964 as a guide to every physician in biomedical research involving human subjects.[18] The concept of a freely obtained informed consent is a dominant feature of the Declaration

13 See, <http://www.ada.org/prof/prac/law/code/principles_01.asp> (Visited on 27-3-2010).

14 211 NY 125 (1914). The case related to the consent given for a diagnostic examination by the patient which was held to be wrongly utilised by the doctor for a therapeutic surgery of her fibroid tumour by a hysterectomy while she was unconscious. Post surgical complications resulted in gangrene on her arm which necessitated the removal of some of her fingers. She lost the case which was filed against the hospital and not against the doctors who operated on her, since the Judge held that a hospital could not be held liable for acts of its employed physicians. This 'Schloendorff rule' was overruled later in 1957 in the case of *Bing* v. *Thunig*, 143 NE 2d 3, 9 (1957). See for a critical appraisal of the case, Paul A Lombardo, "Phantom Tumors and Hysterical Women: Revising our View of the Schloendorff Case", The Journal of Law, Medicine & Ethics, available at <http://www.allbusiness.com/legal/3587338-1.html> (Visited on 1-8-2010).

15 211 NY 125, 129-130 (1914).

16 Available at <http://www.bmj.com/cgi/content/full/313/7070/1448> (Visited on 1-8-2010).

17 For example, the relevant portion of the first standard lays down that "the voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision ..."

finding mention in its parts on basic principles, clinical research and non-clinical bio-medical research.[19]

Though the concept is simple, consent in patient autonomy throws up a lot of ethical and legal challenges. For example, how is a doctor supposed to help the patient arrive at an appropriate decision with respect to the treatment that he wants? Should the doctor be matter of fact and objective, giving the patient the raw facts devoid of his personal opinions and experiences or should the doctor be subjective in his advice to the patient thereby throwing himself open to the accusation that he has influenced the patient in his decision making process thus undermining patient autonomy? This is an ethical question for the doctor, which may perhaps end up as a legal problem for him if the patient suffers a setback due to the treatment or the lack of it.

The 'doctor-centered' approach leaves the quantum of voluntary information to be given to each patient for helping the patient arrive at a decision, to be decided by his doctor based on his professional expertise and experience. The 'prudent doctor test' is currently adopted by the English Courts following the decision of the majority of the House of Lords in *Sidaway* v. *Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*.[20] This test essentially means that a doctor need not volunteer information unless specifically sought for by the patient.

In the words of Lord Diplock, J.,

> "But when it comes to warning about risks, the kind of training and experience that a judge will have undergone at the Bar makes it natural for him to say (correctly), it is my right to decide whether any particular thing is done to my body, and I want to be fully informed of any risks that may be involved of which I am not already aware from

18 WMA Declaration of Helsinki - Ethical Principles for Medical Research Involving Human Subjects, available at < http://www.wma.net/en/30publications/10policies/b3/index.html > (Visited on 1-8-2010). Subject to constant review and revision the current update of the Helsinki Declaration was adopted in October 2008 at the 59th WMA General Assembly held in Seoul.

19 For example, the Principle 22 as adopted in October, 2008, reads: "Participation by competent individuals as subjects in medical research must be voluntary. Although it may be appropriate to consult family members or community leaders, no competent individual may be enrolled in a research study unless he or she freely agrees."

20 [1985] 1 AC 871 (HL).

my general knowledge as a highly educated man of experience, so that I may form my own judgement as to whether to refuse the advised treatment or not.

No doubt if the patient in fact manifested this attitude by means of questioning, the doctor would tell him whatever it was the patient wanted to know; but we are concerned here with volunteering unsought information about risks of the proposed treatment failing to achieve the result sought or making the patient's physical or mental condition worse rather than better. The only effect that mention of risks can have on the patient's mind, if it has any at all, can be in the direction of deterring the patient from undergoing the treatment which in the expert opinion of the doctor it is in the patient's interest to undergo. To decide what risks the existence of which a patient should be voluntarily warned and the terms in which such warning, if any, should be given, having regard to the effect that the warning may have, is as much an exercise of professional skill and judgement as any other part of the doctor's comprehensive duty of care to the individual patient, and expert medical evidence on this matter should be treated in just the same way."[21]

The 'paternalistic' or the 'doctor-centered'[22] and the 'patient-centered' approaches have their own supporters and opponents each group gaining strength from individual instances that support their stance. But it is a fact that the 'patient-centered' approach to treatment giving primacy to patient autonomy is the most favoured in the current times.

The Doctor's Dilemma

A doctor who adopts a patient centered approach must see to it that he generates a sufficiently reasonable evidentiary record of the patient's consent or the lack of it before he proceeds with the treatment, if any. A lack of such records could place the doctor in legal difficulties.

21 For a critical appraisal of this view, see, Marc Stauch *et. al.*, *Sourcebook on Medical Law*, 2nd Edn., Routledge, London, 2002, p. 153.

22 [1985] 1 AC 871 (HL).

In the case of *Dr. T. T. Thomas* v. *Smt. Elisa and Ors.*[23], a peculiar situation arose. The doctor was accused of not performing an emergency surgery as per the prevalent medical standards in a case where he diagnosed the patient with having a 'perforated appendix with peritonitis'. The doctor's defence was that the patient did not give consent for the surgery initially and by the time he gave consent his condition had deteriorated making it impossible to perform the surgery. The court held it to be a case of negligence since the doctor could not prove that the patient had refused consent for the surgery in the first instance.

The court took the view that consent from the patient for treatment was not for the safety of the patient but for the protection of the medical personnel. It reasoned that every surgery was fraught with risk and the law protected the health care professional only if it is proved that such risk was taken with the express or implied consent of the patient since that is the defence available to the doctor as envisaged under Section 88 of the Indian Penal Code.

The court acknowledged the importance of consent in cases of selective surgery which are not of an imminent nature. It went on to observe that even in emergencies where the surgeon would not be justified to await the consent of the patient, when the patient can give a voluntary answer, the surgeon is duty bound to inform of the dangers ahead or the risks involved by going without an imminent treatment.[24]

It went on to place the burden of proving a lack of consent on the doctor who refuses to perform an emergency life saving surgery as per the prevalent medical standards. The court observes thus:

> "Consent is implicit in the case of a patient who submits to the doctor and the absence of consent must be made out by the person alleging it...A surgeon who failed to perform an emergency operation must prove with satisfactory evidence that the patient refused to undergo the operation, not only at the initial stage, but even after the patient was informed about the dangerous consequences of not undergoing

23 AIR 1987 Ker. 52.

24 AIR 1987 Ker. 52, para 11.

the operation."[25]

The law favours the doctor who provides life saving treatment as per the prevailing medical standard to their patients in cases of medical emergency. This protection of the law is seen in India under the Indiau Penal Code, 1860. Section 92 of the Code protects acts done in good faith for the benefit of a person even if it is done without consent in circumstances where such consent cannot be obtained due to the impossibility or incapacity of such person to signify consent and the lack of time for obtaining lawful consent for the person to be benefited by the act contemplated.[26]

The concept of consent is also dealt with under Section 90 of the Indian Penal Code, 1860.[27] It provides that the Code does not conceive of a consent that is obtained due to the misconception of any person.

Evidently, the law places a great premium on the consent of the patient.[28] But the recording of the patient's consent is fraught with practical difficulties. Of great concern to doctors and patients is the nature of the consent. The law demauds it to be a free consent.

25 *Id.*, para. 13.

26 Indian Penal Code, 1860, s. 92, reads: "Act done in good faith for benefit of a person without consent - Nothing is an offence by reason of any harm which it may causes to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit: Provided - First - That this exception shall not extend to the intentional causing of death or the attempting to cause death; Secondly - That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity; Thirdly - That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt; Fourthly – That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend."

27 Indian Penal Code, 1860, s. 90, reads: "Consent known to be given under fear or misconception - A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person - if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child - unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

28 For a more detailed analysis on consent in medical treatment in India, see, Omprakash V.

Patient autonomy is dependent on the ability of the patient to take informed decisions. Hence, the right to information is of utmost concern to patients.

During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated that 'Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the UN is consecrated.'[29] Though this is generally spoken of in the context of the freedom of the press, it is equally applicable in the case of every individual's right to know.

This right to information in the context of free consent is also recognised in the law relating to contracts. The Indian Contract Act, 1872 provides under Section 14[30] that free consent is that consent[31], which is not caused by coercion[32], undue influence[33], fraud[34], misrepresentation[35], or mistake. Obviously, free consent in contract traverses only that path where the right to information is assured. Moreover, the 'prudent doctor test' is unlikely to pass muster here if the doctor has willfully concealed certain information from the patient for the purpose of obtaining his consent for a desired form of treatment citing the fact that the patient did not demand such information. The doctor-patient relationship is understood to be of a fiduciary nature.

Nadimath, "Consent and Medical Treatment: The Legal Paradigm in India", Indian Journal of Urology, available at <http://www.indianjurol.com/article.asp?issn=0970-1591;year=2009;volume=25;issue=3;spage=343;epage=347;aulast=Nandimath> (Visited on 1-8-2010).

29 14th December, 1946.

30 The section reads: "Consent is said to be free when it is not caused by - (1) coercion, as defined in section 15, or (2) undue influence, as defined in section 16, or (3) fraud, as defined in section 17, or (4) misrepresentation, as defined in section 18, or (5) mistake, subject to the provisions of section 20, 21, and 22. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake."

31 The Indian Contract Act, 1872, s. 13 defines it as "Two or more person are said to consent when they agree upon the same thing in the same sense."

32 The Indian Contract Act, 1872, s. 15, defines it as "Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. Explanation - It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed."

33 The Indian Contract Act, 1872, s. 16, defines it thus: "(1) A contract is said to be induced

This fiduciary nature of the doctor-patient relationship is recognised even under the Right to Information Act, 2005, which prevents the dissemination of information processed during such a relationship unless a competent authority is satisfied that the larger public interest warrants the disclosure of such information. The Act is also helpful to patients since it can be used to guarantee a patient or research subject the right to see his or her own medical or research record.

While the patient has a right to information the doctors are to be guided by their experience and special knowledge of the situation on the aspect of withholding information from patients. Understanding patient autonomy to be a non-derogable right would help the doctors to take an appropriate decision in such situations. The opinion of the Council on Ethical and Judicial Affairs of the American Medical Association is that:

> "The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an informed choice. The patient should make his or her own determination about

by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another - (a) where he hold a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other. Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872"

34 The Indian Contract Act, 1872, s. 17, defines it as "Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents, with intent to deceive another party thereto his agent, or to induce him to enter into the contract; (1) the suggestion as a fact, of that which is not true, by one who does not believe it to be true; (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it; (4) any other act fitted to deceive; (5) any such act or omission as the law specially declares to be fraudulent."

35 The Indian Contract Act, 1872, s. 18, defines it as "Misrepresentation means and includes - (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him; (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is subject of the agreement."

36 Opinion E-8.122, "Withholding Information from Patients", available at <http://www.

treatment. The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for the patient's care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice. Infotmed consent is a basic policy in both ethics and law that physicians must honour, unless the patient is unconscious or otherwise incapable of consenting and harm from failure to treat is imminent. In special circumstances, it may be appropriate to postpone disclosure of informatiun."[36]

It further states that:

> "Physicians should sensitively and respectfully disctose all relevant medical information to patients. The quantity and specificity of this information should be tailored to meet the preferences and needs of individual patients. Physicians need not communicate all information at one time, but should assess the amount of information that patieuts are capable of receiving at a giveu time and present the remainder when appropriate."[37]

Even if the doctor is armed with this kind of expert ethicat and legal guidance of what kind of information is to be revealed to which kind of patients, the doctor may still have to face patients who are unwilling to receive certain information. Such patients are those that do not want to take a decision abont the kind of treatment that they should receive. In dealing with such patients the doctors are foreed to take decisions ou behalf of patients who do not want to give an informed consent.

Factors Reducing Patient Autonomy

Though a generally welcomed practise, patient autonomy suffers serious sethacks in its application in India. One of the most significant reasons for this is the inability of the State to ensure adequately trained medical personnel

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texmed.org/Template.aspx?id= 6049> (Visited on 1-8-2010).

37 Based on the report, "Withholding Information from Patients (Therapeutic Privilege)", available at <http://www. texmed.org/Template.aspx?id =6049> (Visited on 1-8-2010).

working with infrastructure that supports their full potential.[38] Training is a major aspect since the ability to recognise the patient as a human being and not as an object for applying one's expertise is to be cultivated through professional training in every doctor who is licensed to practice by the State. This recognition of the patient as a human being is independent of the environment or the infrastructure in which the doctor meets the patient.

Another significant factor affecting patient autonomy as an individual right is the socio-cultural difference between India and similar countries where individual rights consciousness have not gained prominence as compared to the Western world where individual rights reign supreme. A doctor and a patient do not generally stand on an equal footing in India where medical facilities are not easily available. This is in itself a factor that adversely affects patient autonomy since the patient does not have an option to approach another doctor or get a second opinion in such circumstances. Being in an unhealthy state physically, the patients would be unlikely to question the nature of treatment or the behaviour of the doctor towards them. The incapacity of such patients to appreciate the nuances of patient autonomy should not come in the way of the doctor practising patient autonomy.

Considering the social and cultural background of patients, in situations where the doctor finds a patient to be either unwilling or incapable of receiving the necessary information to take informed decisions, it may not be proper to shift the burden of decision making to the doctor.[39] In such situations an emphasis on choice within patient autonomy as a non-derogable human right can help a doctor to be in compliance with ethical, moral and legal considerations. This would be possible if this factum of choice within patient autonomy is conceptualised as a non-derogable human right to be exercised by the patient

38 *Devendra Kumar Sharma* v. *PGI Chandigarh*, 2002 (1) Consumer Protection Judgements 211 (Chd. UTCDRC). The case involved the abandoning of a surgical procedure for clipping of aneurysm in a vessel in brain due to non-availability of a functional drill.

39 Richard T. Hull, "Informed Consent: Patient's Right or Patient's Duty?", The Journal of Medicine and Philosophy, 10 (1985) 183, p. 196. available at <http://www.richard-t-hull.com/publications/1985_informed_consent_right_duty.pdf> (Visited on 1-8-2010). The author while discussing the health care professional's responsibility says "Asking another to assume the task of restoring one's health, repairing one's broken body, trying to save one's life, is asking a lot. We have in our society elected to emphasize too exclusively the health care professional's responsibility for the choice of therapy and its results, to the exclusion of any sense of responsibility in the patient."

himself or by his guardians depending upon his capacity to appreciate the consequences of such autonomy.

Patient Autonomy and Non-derogability

Derogable rights are those that can be limited by the State for sufficient reasons.[40] Derogation is provided for in exigent circumstances under Article 4 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) on the stipulation that such measures should not be inconsistent with the other obligations of the State under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. In particular, Article 4 of ICCPR makes non-derogable the Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18.

At a time when capital punishment is taken to be an uncivilised form of punishment[41] retained in the statute books of only a handful of countries, the right to life as envisaged and promised in the international documents favours right to choose in patient autonomy being recognised as a non-derogable fundamental human right.

In the United Kingdom, in the case of *Re a Ward of Court (withholding medical*

40 Curtis Francis Doebbler, *International Human Rights Law: Cases and Materials*, CD Publishing, Washington DC, 2004, p. 287. "States may derogate from international human rights for certain reasons that broadly can be described as being in the interest of preserving the authority of the state. Derogation means avoiding an obligation by claiming that the specific obligation to respect human rights should not apply because of a specific situation requiring the state to exercise special powers to maintain order. In contrast to a restrictive interpretation of a human right, a derogation will usually apply to more than one human right. Derogations must be in accordance with certain conditions that are specified in the convention articles allowing derogation. These conditions generally include the following: (1) proof of an emergency situation, (2) that the derogation be limited by the necessity of the situation, (3) that the treaty depository and other states have been informed, and (4) that the derogation is limited in time to the duration of the emergency. In addition, some human rights such s the prohibition of torture, the right to life, the freedom of conscience, thought and religion, are non-derogable."

41 Abolished by the Second Protocol to the International Covenant on Civil and Political Rights, 1989.

42 [1996] 2 IR 79.

43 *Id*, p. 129.

44 Article 12 reads: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

treatment) (No.2),[42] O'Flaherty, J., had this to say on patient autonomy with respect to the right of refusal to medical treatment:

"The next matter that is not in dispute is that consent to medical treatment is required in the case of a competent person ... and, as a corollary, there is an absolute right in a competent person to refuse medical treatment even if it leads to death..."[43]

Taken from the perspective of a right to privacy, patient autonomy is guaranteed as per Article 12[44] of the Universal Declaration of Human Rights; the international social and legal system must ensure it as per Article 28[45] of the same Declaration and as per Article 30[46] none of the rights stated therein can be interpreted to destroy the rights given in it.

Under the law of the United States, the patient's right of autonomy has been described as a right of self determination and the principle of informed consent is traced to the first[47], fourth[48], fifth[49], ninth[50] and fourteenth[51] amendments to its constitution.[52]

The central philosophical point of autonomy is respect for the patient as a person.[53] The ICCPR prevents the derogation of the right to life under its Articles 4(2),[54] 6(1)[55] and 7[56]. Article 8(1) and (2) which are also non-derogable relates to abolition of slavery.[57] Autonomy over one's own body being a right that should belong to every human being, its absence would indicate that the person is enslaved to those who exercise that power. Hence, the absence of choice within patient autonomy is equivalent to slavery since it negates autonomy over one's body. Therefore, choice within patient autonomy becomes a non-

45 Article 28 reads: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

46 Article 30 reads: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

47 Available at <http://caselaw.lp.findlaw.com/data/constitution/amendment01/> (Visited on 2-8-2010). "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

48 Available at <http://caselaw.lp.findlaw.com/data/constitution/amendment04/> (Visited on 2-8-2010). "The right of the people to be secure in their persons, houses, papers, and ef-

derogable human right.

The Supreme Court has recognized that the fundamental right to life enshrined under Article 21 of the Constitution of India includes the right to live with human dignity.[58] It recognizes that such right extends to include the faculties of thinking and feeling.[59] Reading Articles 14 and 21, the Supreme Court clarifies the issue further to recognize an immutable right to life with human dignity by holding that a law or procedure that authorizes an inhuman or degrading

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fects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

49 Available at <http://caselaw.lp.findlaw.com/data/constitution/amendment05/> (Visited on 2-8-2010). "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

50 Available at <http://caselaw.lp.findlaw.com/data/constitution/amendment09/> (Visited on 2-8-2010). 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

51 Available at < http://caselaw.lp.findlaw.com/data/constitution/amendment14/> (Visited on 2-8-2010). Section 1, which is the relevant portion in this context, reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

52 Available at <http://bioethicsdiscussion.blogspot.com/2010/02/patient-autonomy-where-should-it-begin.html > (Visited on 27-3-2010).

53 Cassell E. J., "The Nature of Suffering and the Goals of Medicine", New England Journal of Medicine, 1982, p. 306, pp. 639-45.

54 Article 4(2) reads: "No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision".

55 Article 6(1) reads: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

56 Article 7 reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

57 Article 8(1) reads: "No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. Article 8(2) reads: "No one shall be held in servitude".

58 *Francis Coralie Mullin* v. *The Administrator Union Territory of Delhi*, 1981 SCR (2) 516; *Consumer Education and Resource Centre* v. *Union of India*, AIR 1995 SC 636.

59 1981 SCR (2) 516, p 517-518. "The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a

treatment to be unconstitutional and void.[60]

Choice within patient autonomy consists of many facets in its practical implementation so far as the patient and the doctor are concerned. On the one hand is the doctors' duty to save the life of the patient mandated both by his profession and by the State and on the other is the patient's right to a dignified life as a human being. Though only a fully informed, conscious, legally and mentally capable person would be in a position to give a free consent under the laws, it does not automatically prevent the extension of the same opportunity to those who are endowed with a lesser capacity on any of these grounds.

Availability of choice within patient autonomy is significantly reduced during emergencies, or in the cases of the young and the very old, the mentally unstable and those in the custody of the State. In all these instances the guiding factor that drives the doctor and the legal personnel who takes decisions for others must be what is reasonable in accordance with the standards of that society. In this context, patient autonomy must be treated as a non-derogable fundamental right so that no patient suffers on account of negligence, lack

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fortiorari, this would include the faculties of thinking and feeling... Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. Therefore any act which damages or injures or interferes with the use of any limb or faculty of a person either permanently or even temporarily, would be within the inhibition of Article 21".

60 1981 SCR (2) 516, p 529. "The right to life includes the right to live with human dignity and all that goes along with it ... Every act which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Therefore, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruelty, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Article 14 and 21".

61 In *Gian Kaur* v. *State of Punjab*, AIR 1996 SC 946, the Supreme Court overruled *P. Rathinam* v. *Union of India*, 1994 (3) SCC 394, which had approved of a right to die and held that: "Right to life is a natural right embodied in Article 21 of the Constitution of India, but suicide is an unnatural termination or extinction of life and is incompatible and inconsistent with the concept of the right to life". The Court treats euthanasia akin to murder since there is the involvement of a third person. Being illegal, there is no decision of the Supreme Court which allows it. But the issue keeps cropping up testing the social and

of accountability or impunity on the part of the persons who took decisions for them. This implies that the autonomy of the patient is to be restored to its fullest potential the moment the emergent situation passes and the patient regains competence to take decisions thereby making choice within patient autonomy a non-derogable human right.

Decision making involving issues like refusing treatment as distinct from euthanasia[61], usage of the so called 'truth serum' on persons in the custody of the State, religious beliefs decrying usage of modern medical practices[62], force feeding protestors undergoing hunger strikes[63], concealed medication given in the treatment of persons with mental disorders[64], etc., are some instances where treating the right of consent in patient autonomy as a non-derogable fundamental human right would ensure better protection to a person's right to life. In this, the medical personnel is to be guided by the ethical code of his profession and his actions should be justifiable on any of the standards of conduct acceptable in the profession.

Essentially, this would mean that competence of the patient is a determinative factor in his ability to exercise choice within the ambit of autonomy. Non-derogability of the right of choice within the sphere of autonomy of the patient is to be understood largely from the perspective of competence of the person. A legally or mentally incompetent person cannot be thrust with full choice within autonomy since choice in that context would not have any rational meaning.

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judicial acceptability of the concept. See, <http://news.bbc.co.uk/2/hi/south_asia/8417549.stm> (Visited on 31-7-2010).

62 An example is the case of Jehovah's Witnesses who refuse blood transfusion on religious grounds. See, Joelyn Knopf Levy, "Jehovah's Witnesses, Pregnancy, and Blood Transfusions: A Paradigm for the Autonomy Rights of All Pregnant Women", Journal of Law, Medicine & Ethics, June 22, 1999, available at <http://www.accessmylibrary.com/article-1G1-55669763/jehovah-witnesses-pregnancy-and.html> (Visited on 31-7-2010).

63 For instance, the case of Irom Sharmila who is on a hunger strike since 5th November, 2000, for the repeal of the Armed Forces (Special Powers) Act, 1958. See <http://www.outlook-india.com/article.aspx?220857> (Visited on 31-7-2010).

64 See, K. S. Latha, "The Noncompliant Patient in Psychiatry: The Case For and Against Covert/Surreptitious Medication", available at <http://www.msmonographs.org/article.asp?issn=0973-1229;year=2010;volume=8;issue=1;spage=96;epage=121;aulast=Latha> (Visited on 1-8-2010). The author mentions "Autonomous patients are presumed to be able to make decisions. Although autonomy is a fundamental principle underlying health care, it must be balanced by the need for public safety and ideals of beneficence and duty to provide care".

Conclusion

In the context of the patient-doctor relationship, merely because a patient is brought before a medical personnel or a patient chose to come before a medical personnel, such medical personnel cannot gain a blanket control over the patient's body. Any treatment done or diagnostic procedure to which the patient is subjected to must be performed with the informed consent of the patient. If the patient is a minor, or somebody incapacitated from giving such an informed consent, then the person who provides the treatment or performs the diagnostic procedure must be held accountable under the strictest possible standards relating to the non-derogability of choice within patient autonomy as a fundamental human right. In order to avoid legal hassles to the genuine practitioners of medicine and law as well as to other ancillary medical support services providers, this concept of choice within patient autonomy needs to be statutorily and judicially defined. This would help in the formulation of best possible assumptions by such personnel in their dealings with patients.

THOUSAND YEARS' WAR - ANTI-INDIANISM IN WORLD POLITICS

Dr. Sanmyajit Ray*

Abstract

Every nation goes through highs and lows in conducting its relations with foreign powers. The experience of India has not been different. The image that India has earned over the years is not blotless. Anti-Indianism is pervasive not only among its neighbours, but in the United States and Britain as well. This article goes into some incidents and developments that gave rise to such anti-Indianism and the reasons behind it. Not that India was at fault every time, but, there were moments in history when India could have done better to avoid being branded as interventionist and expansionist. Politicians like Zulfiqar Ali Bhutto of Pakistan, Ziaur Rahman of Bangladesh, and Ranasinghe Premadasa of Sri Lanka had made careers out of opposing, baiting, and bad-mouthing India. US Senator Dan Burton (R-IN) is known for, among other things, his rabid anti-Indianism. This article explores the consequences of international opposition to Indian foreign policy and the ways to deal with it, if at all.

Introduction

Not since Zulfiqar Ali Bhutto has anyone talked about a 'thousand years' war' with India. That was 1967, the year he formed the Pakistan People's Party (PPP). But the demagogic Pakistani Prime Minister had to bite dust in 1971; Pakistan was partitioned, with active Indian military support to the rebellious East Wing. Bhutto also had the 1972 Simla Agreement thrust on him; not only did it require India and Pakistan to respect each other's national unity, territorial integrity, political independence, and sovereign equality, but also, bound the two estranged nations to settle their differences by peaceful means through bilateral negotiations.

The Pakistani Army had no love lost for Bhutto, and the ever-suspicious hard-line Muslim clerics trained their guns on him. Though, Bhutto was rabidly

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anti-Indian, he and not the inept and bungling General Agha Muhammad Yahya Khan, Pakistan's war-time President, was blamed for the 1971 defeat in the war with India. The rabble-rousing Sindhi leader, who had promised to turn Pakistan into a democracy based on 'Islamic socialism', was seen as someone who had failed to preserve Pakistan's Islam-inspired unity in the face of language-motivated Bengali nationalism. On July 5, 1977, Pakistan's Army Chief, the devout Muhammad Zia-ul-Haq, overthrew Bhutto in a bloodless coup. On April 4, 1979, Bhutto, found guilty in the murder of a PPP dissident, was hanged. Amongst the world leaders who appealed to General Zia to let Bhutto go was the late Indian Prime Minister Mrs. Indira Gandhi.

An Aggressor

Incidentally, Mrs. Gandhi was hailed in India, even by political rivals, for carrying out the dismemberment of Pakistan and had used the war victory for maximum electoral benefits in 1972. India was accused of meddling in Pakistan's internal affairs, of extending political, financial, and military support to Bengali secessionists (led by Sheikh Mujibur Rahman's Awami League and its armed wing, the *Mukti Bahini*), and of ultimately waging a war against Islamabad that led to the first-ever partition of the country.[1] A secular Hindu-majority India was accused of being responsible for the creation of a secular Muslim-majority Bangladesh.

Many in India, like many others the world over, thought that India would annex East Pakistan, not that annexation was anything new to India. It had annexed Goa in 1961 and Sikkim in 1975. But, India midwifed the birth of Bangladesh with the limited objective of repudiating the 'Two-Nation Theory'. Annexing East Pakistan would have made New Delhi look like an aggressor, as both the United States and China, known sympathizers of Pakistan, had told the world it was.

India's active involvement in the 'liberation' of Bangladesh was not without a price; the demography of bordering Indian states, especially, Assam and West Bengal, changed forever. The two Indian states were facing the third wave[2]

1 "Nixon's dislike of 'witch' Indira", BBC News, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/4633263.stm> (Visited on 30-6-2005).

2 The first two were in 1947 and 1965.

of Hindu refugees from erstwhile East Bengal that adversely affected their politics, economy and society. West Bengal's homegrown Maoist insurgency, better known as Naxalism, was yet to be quelled, and in less than a decade, a violent anti-refugee movement, led by students belonging to the All Assam Students' Union (AASU) broke out in Assam. Worse, both these Indian states had to bear the brunt of unabated illegal immigration of Bangladeshi Muslims into their territories. Having made an international statement in carving Bangladesh out of Pakistan, the Government of India left West Bengal and Assam to fend for themselves.

A Soviet Stooge

As the only South Asian country that styled itself on Western-type liberal democracies, with free elections, a free press, an independent judiciary, and freedom of worship for its citizens, India was once viewed by President John F. Kennedy as a model for Third World states to follow, as opposed to the Chinese communism. But, then India, charting an 'independent' foreign policy, strongly criticized US intervention in Vietnam. Ho chi minh was a Soviet protégé, and openly siding with this North Vietnamese communist 'aggressor' was, in American eyes, putting oneself on the wrong side of history.

When Prime Minister Indira Gandhi imposed national emergency between 1975 and 1977, many regarded it as the end of the road for Indian democracy. Sections in the US press described her as an 'imperious' dictator who had imposed the emergency to ensure her own political survival.[3] But, Mrs. Gandhi was not a usurper; the sweeping powers that she assumed and the fundamental rights that were curtailed were requirements of Article 352 of the Indian Constitution. Her measures may have been unpopular, but not unconstitutional. Though, she lost power in 1977 (only to regain it in 1980), she did not subvert the Constitution.

Ironic though it may sound, Mrs. Gandhi had done her bit to strengthen Indian democracy. It was during her time that 'secularism' got constitutional status, vide the Constitution (42nd Amendment) Act, 1976, and it was the same amendment that made the advice of the Union Council of Ministers binding on the President of India, preventing the President from becoming an alternative

3 "Indira Gandhi's Dictatorship Digs In", *Time*, July 14, 1975.

center of power to the Prime Minister. To measure Mrs. Gandhi with the same yardstick as other Third World despots was the biggest mistake the US could make.

The US had always looked at democratic India's so-called 'independence' in foreign policy as a façade for pro-sovietism, and cited the 1971 Indo-Soviet Treaty of Peace, Friendship, and Cooperation and Moscow's support to the Emergency, both happened during the Prime Ministership of Mrs. Gandhi, as examples of the diplomatic and political closeness between the two countries. In the American eye, China was still a counter to India, but not as a model of economic development, only as a military adversary. Kennedy was long gone, and Richard M. Nixon had normalized relations with Beijing, cashing in on the Sino-Soviet split. Nixon's infamous tilt toward Pakistan, coupled with America's new-found friendship with China, was meant to contain the emergence of India as a major center of Soviet political and military influence.

Not that India had not played any part in ruffling American feathers, it never criticized the Soviet invasion of Afghanistan, let alone opposing it. Worse, it cultivated close diplomatic ties with successive puppet communist governments in Kabul, especially the government of the ravenous Dr. Mohammad Najibullah. New Delhi even went to the extent of sheltering the fallen dictator's family from 1992.[4] Needless to say, the American leadership had not taken kindly India's overt enthusiasm to promote the Soviet-backed communist regime in Afghanistan. In fact, in the American view, India's support to the communist People's Democratic Party of Afghanistan and its despotic leaders firmly put New Delhi in the Soviet bloc.

All that ended in 1991, the year the socialist giant collapsed and disintegrated, and Prime Minister P.V. Narasimha Rao sent India trudging the free market road. India was also free to pursue a really independent foreign policy. Even at the risk of incurring the wrath of its sizable Muslim minority, New Delhi established diplomatic ties with Israel, Washington's major ally in the Middle East. For India, which had repeatedly hosted the Palestine Liberation Organization (PLO) leader Yasser Arafat, both at home and at international

4 Najibullah is also reported to have attempted to flee to India after being forced to relinquish power in April that year.

forums, and took the brave and revolutionary step for Palestinian liberation at the United Nations more than once. And reason enough to endear itself to the United States.

A Friend of Iran

India refused to shed other historical baggages it was carrying. New Delhi remained largely reluctant to curtail Iran's nuclear program, a matter of concern for the then Bush Administration.[5] India's vote at the International Atomic Energy Agency (IAEA) in September, 2005, to refer Iran's atomic program to the UN Security Council, thus, can well be regarded an aberration. Iran was surprised at India's objection, but, relations were not strained beyond a point. However, by voting against Iran, India fulfilled a requirement of the Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act, 2006, to "fully and actively participate in United States and international efforts to dissuade, isolate, and, if necessary, sanction and contain Iran for its efforts to acquire weapons of mass destruction, including a nuclear weapons capability…".[6] By the time the legislation was passed by the US House of Representatives, India had already qualified.

When Mahmoud Ahmedinejad made a brief stopover at New Delhi in April, 2008, India scoffed at American suggestions that it should impress upon the hard-line Iranian President the need to meet the requirements of the UN Security Council regarding Tehran's nuclear program[7], and refused to be guided by the United States in conducting bilateral ties with Iran.[8] During his visit to Tehran, in February 2007, and then again in November, 2008, India's Foreign Minister Pranab Mukherjee reiterated that Iran had every right to develop nuclear energy for peaceful purposes but in a manner that was consistent with its international commitments and obligations.[9] India's close ties with

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5 Rama Lakshmi, "India's Long-Established Ties With Iran Straining Alliance With US", *The Washington Post*, September 20, 2007, p. A15.

6 Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act (2006), HR 5682, 109th Congress, 2nd Session, US Government Printing Office, Washington DC, 2006.

7 Iran is a signatory to the Nuclear Non proliferation Treaty, whereas, India is not.

8 Madhur Singh, "India and Iran: Getting Friendly?", *Time*, April 24, 2008.

9 "Pranab's Iran visit to focus on energy cooperation", *The Financial Express*, February 7, 2007; see also, "Iran has every right to develop nuclear energy: India", *Tehran Times*, November 2, 2008.

Islamic Iran have remained a major irritant in US-India relations. In fact, New Delhi was never friendly to the erstwhile Iranian monarchy[10], and it was after the Islamic revolution of February, 1979, that India started cultivating close relations with Iran. American policy makers have not missed the point that whereas India was cold to the pro-US Reza Shah Pahlavi, Iran's last monarch overthrown by Ayatollah Khomeini's revolution, it is overtly friendly towards the anti-US Islamic Republic that the revolution created.

Incidentally, both India and Iran are opposed to the Taliban[11] and had instead chosen to support the US-backed Afghan government of President Hamid Karzai. This happened despite Iran and Pakistan's common opposition to Soviet intervention in and subsequent occupation of Afghanistan. Interestingly, negotiations on the $7 billion Iran-India gas pipeline through Pakistan are yet to be finalized, but New Delhi's relations with the influential Shiite Islamic Republic continue to thrive.

Iran had been a traditional backer of India in international forums and had repeatedly foiled Pakistani attempts to introduce anti-India resolutions at the Organization of the Islamic Conference (OIC), though it was the first country to extend recognition to Pakistan when it emerged as an independent state in August 1947. That Pakistan was a friend and ally of the US and Iran was an adversary, and that Iran was close to India are factors that have indeed adversely affected relations between the two Islamic republics.[12] Worse, Iran had never supported Pakistan's position on Kashmir, insisting that the Kashmir issue was better resolved through dialogue between India, Pakistan, and representatives of the Kashmiri people.[13] This may be regarded as a real diplomatic achievement for India in its relations with Iran. In fact, India's close ties with Iran may be construed as a reason, apart from sectarian differences, behind Tehran's lack of sympathy for Pakistani causes.

10 Shah Reza Pahlavi had even provided free refuelling facilities to Pakistani airplanes during the 1965 Indo-Pak war.

11 They never recognized the Taliban government in Afghanistan.

12 Shah Alam, "Iran-Pakistan Relations: Political and Strategic Dimensions", Strategic Analysis, Vol. 28, No. 4, Oct.-Dec. 2004, p. 528.

13 R. Muralidhar Reddy, "Iran favours dialogue on Kashmir", *The Hindu*, April 27, 2001; Syed Amin Jafri, "Iran clarifies stand on Kashmir", available at <http://www.rediff.com/news/2003/jan/28iran.htm> (Visited on 30-1-2003).

A Violator of Human Rights

Since 1947, the Pakistani political leadership, media, and public opinion had disputed Kashmir's accession to India, insisting that the Muslim majority state should have been part of Pakistan instead. The Kashmir insurgency, with slogans of *azadi* (political independence) and *Kashmir banega Pakistan* (Kashmir will become Pakistan), ranting in the background, traditionally had the full backing of the Pakistani establishment, which had aided the insurgents with men, money, arms, and combat training for long. But, for India, secessionist movements were not a new phenomenon. There were people who had taken to arms to secede from the Indian Union, most notably in the North-East and Punjab. Though the movements were ultimately crushed, Western powers, especially, the US and Britain branded India as a violator of human rights.

In March 1966, Aizawl achieved the dubious distinction of being the first (and till date the only) Indian state capital, though Mizoram was not a state then, to be bombed by the Indian Air Force (IAF). The Government of India was trying to quell a violent secessionist uprising led by the Mizo National Front (MNF). The Mizo insurgency ended with the signing of the Mizo Accord between the MNF and the Indian government in June 1986, and Mizoram ultimately achieved statehood in February 1987, nearly 21 years after the IAF bombings.

The Punjab Accord of July 1985 failed to curb terrorism in the trouble-torn state. The Shiromani Akali Dal led by Sant Harcharan Singh Longowal withdrew its *dharamyudh* (holy war) agitation as the Indian government agreed to accept all the major demands of the Akalis. But, less than a month later, Longowal himself fell to militants' bullets while addressing a gathering of supporters outside a *gurudwara*.[14] Sikh militancy, inspired by the separatist ideology of the London-based Jagjit Singh Chauhan and the late Sant Jarnail Singh Bhindranwale, both of whom openly advocated Khalistan, a sovereign nation-state for Sikhs, petered out after 1992 during the Chief Ministership of the strong-willed Beant Singh. Incidentally, Mr. Singh himself was killed in a car-bomb explosion in August 1995; by that time, he had already rid his beleaguered state of the terrorist menace.

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14 The Sikh place of worship, meaning 'gate of the Lord'.

Sikh militant organizations, like, the Dal Khalsa, the All India Sikh Students' Federation (AISSF), the Khalistan Liberation Force (KLF), the Khalistan Commando Force (KCF), the Bhindranwale Tiger Force (BTF), and the dreaded Babbar Khalsa International (BKI) terrorized north India for more than a decade. But, for the first time after Independence, a new phenomenon arose in foreign policy discourse — cross-border terrorism. Dumping a long history of Muslim-Sikh animosity[15], the Islamic Republic of Pakistan, led by a deeply devout Army Chief, who doubled as President, started camps for training Sikh terrorists who had taken up arms against the Indian State for the ostensible purpose of creating a Sikh homeland.

As late as May 2004, the then Chairman of the Subcommittee on Wellness and Human Rights of the US House Committee on Government Reform, Rep. Dan Burton (R-IN), was holding congressional hearings on human rights violations in India and recording the testimony of Dr. Gurmit Singh Aulakh, President of the Washington DC based Council of Khalistan.[16] Representative Edolphus Towns (D-NY), Chairman of the House Committee on Oversight and Government Reform in the 111th Congress, and ultra-conservative US Senator Jesse A. Helms, Jr. (R-N.C.), late Chairman of the US Senate Committee on Foreign Relations (between 1995 and 2001), have also been championing the Khalistani cause. This bipartisan sympathy displayed by influential US Representatives and Senators toward Sikh separatists has not only gone a long way to encourage such elements to preach their violent separatist ideology brazenly, but also, can be held responsible for the feeble US response to the problem of terrorism that India had faced for long. Proponents of Khalistan in the US and Canada, countries with sizable immigrant and native-born Sikh populations, have always found sympathetic ears within the political system. Recently, though, the Canadian government has sought to assure its Indian counterpart that Sikh militants 'promoting terrorist ideology' would not be allowed to operate within its borders.[17]

15 That started from the reign of Zahiruddin Mohammad Babur, the first Mughal emperor, to the days of the Partition of India in 1947.

16 "Dr. Aulakh, Others Expose Indian Human Rights Violations at Congressional Hearing", Council of Khalistan Press Release, available at <http://www.khalistan.com/PressReleases/PR051204_DrAulakhTestifies.htm> (Visited on 13-5-2004).

17 "Canada assures India it will not tolerate Khalistanis", *Hindustan Times*, March 12, 2008.

Interestingly, Conservatives in Britain have held terrorists, guerilla organizations, and religious extremists responsible for human rights violations.[18] However, Baroness Sayeeda Warsi, born of Pakistani immigrant parents and currently, Chairman of the British Conservative Party, had famously stated that British anti-terror laws should not prevent Britons from supporting the 'freedom fighters' in Kashmir.[19] Former British Foreign Secretary David Miliband even said on Indian soil that resolution of the Kashmir dispute was necessary to prevent future Mumbai-type terror attacks. In the face of such bipartisan support to secessionist causes, it is futile for India to expect cooperation from countries waging a war against global terrorism for its lonely war against its homegrown terrorist menace.

Any attempt to provide moral support to separatists in India, all of whom had taken to terrorist violence to realize their aims, undermines India's efforts to deal with the twin problems of terrorism and secessionist ideologies. Both the demands for Khalistan and *azadi* (freedom) for Kashmir from Indian occupation repudiate the idea of India. Powerful voices in avowedly multicultural nations, like, the US, Britain, and Canada have been more than willing to listen to and even accommodate such demands within their political agenda. Calling the Indian state a human rights violator, with reference to actions by Indian security forces against terrorists, and then, expecting New Delhi to join the global war on terror under the aegis of those very nations, is asking for a bigger share of the diplomatic pie than is due.

A Belligerent Neighbour

India's neighbours have not always been comfortable with its military might and political influence, despite, New Delhi's repeated affirmations of commitment to non-interference in their internal affairs, peaceful coexistence, and global and regional peace. Countries, like, Pakistan, Bangladesh, Sri Lanka and Nepal, have had issues with India at various times and for various reasons,

18 "Conservative Party Human Rights' Commission's 2007 Annual Report", Conservative Human Rights Group, available at <http://www.conservativehumanrights.com/events/annualreport2007_hs.html?Cameron=true> (Visited on 11-12-2007).

19 Nile Gardiner and Sally McNamara, "Wrong Way Warsi", NRO Weekend, July 5, 2007, <http://article.nationalreview.com/?q=MmVjMDY1NjA0NmQ3ZDc5MTAzNmViODkyNDRkY2QzZDA=> (Visited on 6-7-2007).

with deep-rooted suspicions regarding New Delhi's intentions. India has not been particularly successful in winning the confidence of such neighbours, and anti-Indianism is rampant in all of them. In fact, in these countries political parties have emerged with rabid anti-India platforms and virulently anti-Indian political leaders have risen to prominence to the extent that they have been able to influence the foreign policies of the big powers to the detriment of India from time to time.

Nepal

Though India had tried to cultivate good-neighbourly relations with the erstwhile Hindu Kingdom of Nepal, not all Nepalese monarchs were favourably disposed toward Hindu-majority, yet secular, India. The late King Tribhuvan Bir Bikram Shah had taken refuge in India between November 1950 and February 1951, having fled Rana[20] despotism in Nepal, and when the Ranas installed the three-year old Gyanendra (Tribhuvan's grandson) as King, India strongly opposed the Rana move and reiterated its support for Tribhuvan.[21] Indian Prime Minister Jawaharlal Nehru even said that New Delhi would not tolerate outside interference (read Western powers) in the internal affairs of Nepal. Interestingly, the Nepali Congress (NC), formed in Calcutta in 1947, built up an armed revolution against the Rana oligarchy and supported Tribhuvan's return to Kathmandu and the inauguration of a titular monarchy under him. However, Tribhuvan never liked the idea that he was dependant on the goodwill of India. After his return to Nepal, he reneged on his promise to hold elections to a new Nepalese Constituent Assembly, a promise which had Indian backing, and assumed dictatorial powers fearing that a popularly elected Constituent Assembly would reduce him to being a figurehead. But, Tribhuvan continued to be on the good books of India, as he was the first modern Nepalese monarch to include the NC in his ministry and begin the process of democratization in the Himalayan kingdom.

The first democratic elections were held in Nepal in 1959, and the NC won a landslide. Trouble started when King Mahendra – Tribhuvan's eldest son and successor – sacked the BP Koirala-led NC ministry and assumed authoritarian

20 The hereditary *kshatriya* clan that supplied the nation's Prime Ministers.

21 Ramjee P. Parajulee, *The Democratic Transition in Nepal*, Rowman & Littlefield Publishers Inc., Lanham M.D., 2000, p. 39.

powers in 1960. The King dismissed the government and dissolved parliament, claiming that the NC' dispensation had worked against the national interest and democracy itself. In early 1961, he banned all political parties.[22] The new monarch also abolished parliamentary democracy and introduced a new political order, better known as the *panchayat* system, that increased the King's hold on both the executive government and the partyless *panchayat* (National Council). Pandit Jawaharlal Nehru dubbed the King's action 'a matter of regret', arguing that democracy had suffered a setback in Nepal.[23] Political rivals in Nepal charged Koirala for colluding with India on many fronts to which Mahendra also agreed.

Mahendra knew that India's sympathies lay with the NC', and he looked to China for support for his actions, even though China chose to remain silent on the issue. The Sino-Indian war was yet to take place, but relations between the two countries had deteriorated after Nehru gave shelter to Tibet's highest spiritual and temporal leader, the 14th Dalai Lama, after he fled to India in 1959. Mahendra successfully played on the differences between India and China to ensure his own political survival.[24] Indeed, China was Nepal's biggest contributor of foreign aid[25], even more than the US and the Soviet Union. Despite that, Mahendra refused to be guided by China in foreign affairs, let alone be subservient to it, and turned down Chinese Premier Chou Enlai's offer of a nonaggression pact.[26] Embracing non-alignment, a foreign policy doctrine enunciated by Nehru (among others), the Nepalese King told the world, and Beijing, of course, that he could not be expected to be pro-Chinese. By dismissing the Indian-backed NC' government, he told New Delhi that he could not be expected to be pro-Indian.

Mahendra knew that India had its own compulsions. Reverses suffered by India during its war with China forced New Delhi to revise its policy toward Nepal. Initially, the Indian leadership backed the violent resistance movement

22 *Id*, p. 48.

23 *Id*, p. 49.

24 Prakash Saran Mahat, "PM Dahal following King Mahendra's foot steps", available at <http://www.telegraphnepal.com/news_det.php?news_id=4648> (Visited on 8-1-2009).

25 It had given its tiny southern neighbour $4,500,000 and had promised an additional $29 million.

26 "The Student King", *Time*, May 9, 1960.

put up by the NC to restore parliamentary democracy in Nepal. In the face of heavy territorial losses, India, in search of strong allies in the region, found it prudent to dump the NC and get closer to Mahendra's government. The shrewd Nepalese monarch had the last laugh; he extended the state of emergency indefinitely and tightened his grip on his country. Interestingly, when Koirala was released in 1968, he fled to India.

There are authors who see in India an expansionist neighbour out to annex Nepal, just as it had annexed Sikkim. India is even charged with conspiracies to destroy the Nepalese monarchy, and to have used both the Koirala family and the Maoists to first weaken and then do away with the nearly 250 year old monarchy altogether.[27] This may seem too far-fetched, but, there is substance to the argument that when India closed its borders with Nepal in 1989, following a breakdown in trade negotiations, it adversely affected Nepal's foreign trade and brought acute hardship to its people. Peasants and professional classes united in their opposition to the government of King Birendra Bir Bikram Shah Dev, eldest son of and successor to Mahendra, and in 1990 the NC and other parties came together to launch the Movement for the Restoration of Democracy.[28] In November that year, Birendra bowed to public pressure, abolished the corrupt, inept, and hated *panchayat* system, and restored multi-party democracy under a new Constitution for his beleaguered nation.

Birendra's brother, Gyanendra Bir Bikram Shah, who became King under tragic circumstances in June 2001, also had to bow to public pressure in 2006, when the restored Parliament (which he had dissolved in 2002) stripped him of all executive powers and vested them in the Prime Minister. Among the countries that had condemned Gyanendra's so-called high-handedness in dealing with the pro-democracy movement was India. New Delhi asked Gyanendra to transfer executive powers to the Seven Party Alliance (SPA) that had led the pro-democracy movement without trying to install a handpicked Prime Minister.[29] Gyanendra realised that the Indian demand was a gross interference

27 Ashutosh Shrivastav, "Nepal Royal Massacre and The Mystery Unfolding", *News Blaze*, June 19, 2008.

28 "King Birendra of Nepal", available at <http://www.telegraph.co.uk/news/obituaries/1309622/King-Birendra-of-Nepal.html> (Visited on 24-8-2001).

29 Indrani Bagchi & Bhaskar Roy, "Nepal at war, but King Gyanendra refuses to blink", *The Times of India*, Delhi, April 20, 2006.

in the internal affairs of Nepal, and he remained non-committal. The Indian backing of the SPA's movement for restoration of democracy and the total reversal of its earlier support to 'constitutional monarchy' in the embattled Himalayan kingdom went a long way to first turn Gyanendra into a figurehead without real executive powers and ultimately bring about his downfall. In fact, experts had identified the monarchy as part of the problem afflicting Nepal since the time Gyanendra imposed direct rule, and had wanted India to break from its traditional stance of supporting the monarchy as the symbol of order and stability in Nepal.[30]

The Indian government, dependent for its own survival on support from the Left Front, did just that; it encouraged dialogue and rapprochement between the mainstream parties and the Maoists and, in the process, silently and conveniently changed its stand on 'constitutional monarchy'.[31] This made the Bharatiya Janata Party's (BJP) support to 'constitutional monarchy' look like a parochial Hindu demand, meant to preserve and protect the world's last Hindu monarchy. In sacrificing Gyanendra, and the Nepalese monarchy, the Indian government was driven solely by domestic political compulsions. To install a government in Nepal, dominated and controlled by Maoists and led by a man (Maoist Prime Minister Pushpa Kamal Dahal "Prachanda"), who was bent on portraying India as an expansionist neighbour, was an open invitation for increased Chinese political influence in the tiny landlocked state, and the Indian action can be termed as nothing but shortsighted. India had to pay a heavy price for getting the democratic parties to seek a negotiated political solution to the Maoist insurgency in Nepal.

Sri Lanka

If the Nepalese monarchs abhorred Indian interference in their country's internal affairs, former Prime Minister and President of Sri Lanka, Ranasinghe Premadasa, was no different. As Prime Minister, he did not like the peace accord which was meant to put an end to years of ethnic conflict between the Tamils and Sinhalas and bring peace to the country's northern and eastern

30 S.D. Muni, "A Himalayan Shift", available at <http://www.outlookindia.com/full.asp?fod name· 20040914&fname=nepal&sid=1&pn=1> (Visited on 15-9-2004).

31 Pranab Dhal Samanta, "King strikes BJP chord, Jaswant leaves April 24", *Indian Express*, Delhi, April 20, 2006.

provinces, signed between Srilankan President, JR Jayawardene, and Indian Prime Minister Rajiv Gandhi in 1987. But, the accord also brought to Sri Lanka the indian Peace-Keeping Force (IPKF), an Indian military contingent sent to oversee the disarming of the Tamil milltants (especially the LTTE). Though the IPKF was locked in a violent struggle with the LTTE, as the latter refused to disarm, Premadasa (then President) did everything in his capacity to ensure that the IPKF left the island nation. He is supposed to have even armed the LTTE with sophisticated weapons to fight and undermine the IPKF.[32] On May 1, 1993, three years after the IPKF had left Lankan shores, President Premadasa was assassinated by a LTTE suicide bomber. Whatever be the case, Premadasa did not allow himself to be pressurized by India; in a way his predecessor Junius R Jayewardene was. Prime Minister Indira Gandhi had once threatened Jayewardene that the Indian government could make an armed intervention in support of the Tamil liberation movement (read LTTE) if diplomatic efforts failed to resolve the protracted ethnic conflict.[33] Again, it was the same Jayawardene, faced with the prospect of active Indian intervention, who bowed to Indian pressure and signed the accord with Rajiv Gandhi that apart from making him agree to devolution of powers in the northern and eastern provinces brought the IPKF to Sri Lanka. Earlier, when Indian fishing boats carrying food and medicine for the embattled Tamil population were stopped by the Sri Lankan Navy, the Government of India, in defiance of its Sri Lankan counterpart, sent transport planes and jet fighters into the island's northern Jaffna peninsula to airdrop 'humanitarian assistance' for them.[34] Not only did the Indian action embolden the LTTE and create fears in the minds of Lankan officials that it was a prelude to 'liberating' Tamil Eelam on the lines of Bangladesh, it was the first time since 1971 that New Delhi had intervened so directly in the internal affairs of a neighboring country. But, the 1987 Indian intervention in Sri Lanka remains an unmitigated disaster, not only did that intervention not have any clear long-term goals, India ended up with no friends in the island nation, alienating both the majority Sinhalas and the minority

32 Nirupama Subramanian, "Premadasa armed LTTE: Panel", *Indian Express*, Bombay, April 18, 1998.

33 D.T. Hagerty, "India's Regional Security Doctrine", Asian Survey, Vol. 31, No. 4, April 1991, pp. 351-63.

34 Steven R. Weisman, "India Airlifts Aid to Tamil Rebels", *The New York Times*, June 5, 1987.

Tamils.[35]

The Indian government, after the assassination of Rajiv Gandhi, banned the LTTE. Regional parties in Tamil Nadu have time and again taken up the cause of 'liberation' of Tamil Eelam and openly supported the LTTE. But, successive Indian governments have made the preservation of Sri Lankan sovereignty and territorial integrity the mainstay of New Delhi's policy toward Colombo, despite the fact that India's central government has been dependent on the support of these parties more often than not. In 2000, India had turned down requests by the then Lankan President, Chandrika Kumaratunga, for military assistance to her beleaguered Army, refusing to send troops and supply arms. Last year, the Indian government again refused to intervene in Sri Lanka; it was clear that New Delhi did not intend to ask Sri Lanka to stop its military campaign against the LTTE. New Delhi had held the LTTE responsible instead for civilian deaths in the Northern Province as a result of that campaign, and had even offered to work with Colombo to evacuate civilians caught in the crossfire.[36] Certainly, India has come a long way in its approach towards the ethnic conflict in Sri Lanka. Most importantly, it had happened under duress — first, the IPKF debacle (nearly 1400 Indian soldiers lost their lives), and then the assassination of Rajiv Gandhi. The LTTE's so-called 'liberation-struggle' had given New Delhi a handle to meddle in the internal affairs of Sri Lanka; again it was the LTTE which became the reason behind India's inglorious exit from the politics of that country.

Bangladesh

Ironically, the only neighbouring country where India did not get a foothold was Bangladesh, even though it was largely instrumental in its creation. Ironically again, Maj Ziaur-Rahman[37], the first to declare the independence of Bangladesh, resented the pro-India stance of the nation's founder-leader Sheikh Mujibur Rehman and tried to steer the fledgling republic away from Indian influence when he himself became president in 1976. The government

35 Brahma Chellaney, "India has no stake in Sri Lanka's war", *The Japan Times Online*, <http://search.japan times.co.jp/cgi-bin/co20000603a2.html> (Visited on 4-6-2000).

36 Aloke Tikku, "India blames Tigers for civilian deaths in Sri Lanka", *Hindustan Times*, February 19, 2009.

37 Rahman, like many other Bengali officers, had defected from the Pakistani Army to the side of the liberation fighters.

of Khondkar Mushtaque Ahmed, who took power immediately after Mujib's assassination, had inaugurated an anti-Indian, but pro-Islamic and pro-Western foreign policy.[38] Zia, when he succeeded to the presidency, continued with the same policy. His attempts at Islamisation of the political system, his emphasis on the role of Islam in Bangladeshi national life, his idea of Islam-inspired 'Bangladeshi nationalism' (as opposed to Mujib's secular Bengali nationalism), his constitutional amendment to make Bangladesh 'endeavor to consolidate, preserve, and strengthen fraternal relations among Muslim countries based on Islamic solidarity', his rehabilitation of pro-Pakistani Islamic parties and even those responsible for Mujib's assassination, and his policy of moving away from the Indo-Soviet axis and getting close to the Western powers and the People's Republic of China were all meant to spite India. In the eyes of a Pakistani commentator, both Pakistan and Bangladesh have emerged as strong Islamic states, 'posing a threat to India' from both sides. He adds that anti-Indian sentiments have been inflamed in both the Muslim countries over time and they have drawn closer to each other due to a common enmity with India.[39] If that is the case, then Ziaur Rahman of Bangladesh is solely responsible for stoking the fire of anti-Indianism in his country; he had never been comfortable with Bangladesh's status of a client state of India and did everything in his capacity to undermine the patron-client relationship that New Delhi had started with Dhaka (then Dacca) and which Mujib subscribed to. Zia's Bangladesh Nationalist Party (BNP) is in alliance with the Jamaat-e-Islami for a long time, and had inspired the emergence of Islamist groups in his country. Organizations like the Harkat-ul-Jihad-e-Islami, allegedly involved in terrorist violence in India, are a present-day reminder of Zia's fundamentalist and anti-Indian legacy.

Pakistan

The principal objective of Indian foreign policy, wrote Zulfiqar Ali Bhutto, has been to isolate Pakistan.[40] Pakistan's search for parity with India has sometimes

38 Mahfuzul H. Chowdhury, *Democratization in South Asia: Lessons form American Institutions*, Ashgate Publishing Ltd, Burlington, 2003, p. 35.

39 Brig. (Retd.) Asif Haroon Raja, "US reliance on India counter-productive", *Pakistan Observer*, February 25, 2009.

40 Zulfiqar Ali Bhutto, *The Myth of Independence*, Oxford University Press, Karachi & Lahore, 1969, p. 134.

been cited as an important reason behind troubled relations between the two countries. Born on 14th August, 1947, as a homeland for Indian Muslims, Pakistan is till date the only modern state established in the name of Islam. Though, India adopted a secular Constitution, despite the sub-continent's partition on communal lines, Pakistan reaffirmed its Islamic identity time and again. The Objectives' Resolution of 1948, moved by then Prime Minister Liaquat Ali Khan, proclaimed that the Constitution of Pakistan would not follow any European model, but, be based on the 'ideology and democratic faith of Islam'. So did the Constitution of 1956 that declared Pakistan an 'Islamic Republic' for the first time. There is no doubt, then, that Pakistan seldom cultivated any democratic ethos and never emerged as a Western-type liberal democracy. The Muslim League, Pakistan's party of independence, was soon discredited and fell apart. The various later incarnations that went by the generic name of Muslim League had neither any link to the original party nor any nationwide following. Bhutto's PPP, though with an all-Pakistan presence, had always been a one-family affair. The influence of ethnic parties, like, the Mohajir Qaumi Mahaz (MQM) and the Awami National Party (ANP), had largely remained local. Interestingly, out of the five military rulers it ever had, only General Muhammad Zia-ul-Haq had tried to reinvent Pakistan's Islamic identity by strictly enforcing the *Shariat*.[41] Again, among the democratic rulers, only Mian Mohammed Nawaz Sharif, during his first term as Prime Minister, took steps to make the Islamic Shariah the supreme law of the land through the enforcement of the Shariah Act in 1991. During his second term, Sharif proposed to create an Islamic society in Pakistan and establish a legal system based on the Holy Quran and the Sunnat, through his much-publicized Shariat Bill.[42] The Bill fell through, as the PML did not have the requisite majority in the Pakistani Senate. But, Sharif's 1991 measure remains the first attempt by a democratically elected Prime Minister in Pakistan to give constitutional and legal status to the Shariah. Taken together, the Islamizing initiatives of Zia-ul-Haq and Nawaz Sharif had given unprecedented salience to the position of Islam in public life and the national discourse in Pakistan.[43]

41 He passed the controversial *Hudood* Ordinance in 1979 for the purpose.

42 "Pakistan Premier Proposes an Islamic Society based on Koran", *The New York Times*, August 29, 1998. See also, "Pakistan parliament approves Islamic law", BBC News, available at <http://news.bbc.co.uk/2/hi/south_asia/189735.stm> (Visited on 10-10-1998).

43 Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change*, Princeton University Press, Princeton, 2002, p. 91.

As far as Bhutto was concerned, though his 1973 Constitution recognized Islam as the national religion, no one took his Islamic pretensions seriously. Sharif's Pakistan Muslim League-Nawaz (PML-N) and other Islamic parties had repeatedly campaigned, with varying degrees of success, against Bhutto and his daughter's alleged lack of Islamic commitment. In fact, Bhutto has even admitted to having tried to impress upon Gen Zia that the 'Muslim country of Pakistan' should not be forced to undergo a big change such as the introduction of 'Islamic' law.[44] No doubt, Bhutto's commitment to Islam was seriously doubted by Zia and his political protégés, Nawaz Sharif being the most important of them.

Nawaz Sharif is also known for authorizing the nuclear tests of May 1998, in retaliation to India's own nuclear tests. Sharif justified the tests on the grounds of national security, and said they were conducted as a 'defensive step' against a nuclear-armed and 'expansionist' India and accused India of unleashing a 'thoughtless' nuclear arms race in South Asia.[45] Reaffirming that Pakistan was not a 'submissive' nation, the Prime Minister said that no enemy could attack it with nuclear arms. With these nuclear tests, Pakistan became the first Islamic state to acquire nuclear capability and the seventh nation in the world to do so, 'fully settling' the nuclear account with India.

But Nawaz Sharif was not the first civilian ruler to talk about a nuclear programme for Pakistan. In fact, it was Bhutto who set Pakistan on the road to acquiring a nuclear capability. He started the militarization of Pakistan's nuclear programme, under General Tikka Khan, in early 1972, days after the humiliating defeat against India. Two years later, Bhutto wanted to meet 'the grave and serious threat' posed by the testing of India's first nuclear device by making Pakistan's own nuclear weapons. Bhutto reiterated that Pakistan would never surrender to nuclear blackmail by India and his countrymen would do anything, 'even eat grass', to achieve nuclear parity with the neighboring country.

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44 Zulfiqar Ali Bhutto, *Notes from Death Cell*, Radha Krishna Prakashan, New Delhi, 1979, p. 4.

45 "World: Monitoring Nawaz Sharif's speech", BBC News, available at <http://news.bbc.co.uk/2/hi/world/monitoring/102445.stm> (Visited on 29-5-1998).

In fact, Bhutto had made a career out of opposing, baiting, and bad-mouthing India. The demagogic Sindhi leader first rose to political prominence[46], when he resigned as Gen. Ayub Khan's Foreign Minister in 1966 over differences with the President on the agreement that the latter had reached with Indian Prime Minister Lal Bahadur Shastri at Tashkent. At the UN General Assembly in 1965, Bhutto had passionately argued that not only was Jammu & Kashmir not an integral part of India, it had never been an integral part of India. In fact, he said, Jammu & Kashmir was more a part of Pakistan than of India and that the people of Jammu & Kashmir were part of the people of Pakistan.[47] He had even called Muslim-majority Kashmir 'the handsome head of the body of Pakistan' and accused India of holding it 'against all norms of morality'.[48] Campaigning across the length and breadth of his country, Bhutto vowed to fight a 'thousand years' war' with India for upholding and securing the 'democratic rights' of the Kashmiri people. Not only was he proud to have kept the Kashmir issue alive throughout his political career, but also he had claimed that Kashmir's accession to India was not final, even shortly before his death.[49] Bhutto's strong anti-India position on Kashmir was reiterated time and again by his party, especially, by his daughter Benazir, and the present PPP-led dispensation in Pakistan is expected to do just that.[50] The executed Pakistan Prime Minister's rabid anti-Indianism made him more famous, at home and abroad, than his so-called commitment to democracy and socialist reforms did. He had worked under two military rulers, Ayub and Yahya, and both lost in wars with India. Incidentally, Bhutto blamed both India and the Pakistani Army for the dismemberment of Pakistan in 1971, whereas, the *ulema* blamed him. In the view of Pakistan's hard-line clerics, the creation of Bangladesh was as much a political failure of Bhutto as it was a religious failure on the part of East Pakistanis.[51] Forever at loggerheads with the army-

46 He even assumed the title *Quaid-e-Awam* (Leader of the Nation) in the process.

47 Zulfiqar Ali Bhutto, "Speech at the United Nations General Assembly", Youtube.com, <http://www.youtube.com/watch?v=E5eYP_V8tkg&feature=related > (Visited on 10-12-2007).

48 Bhutto (1969), op. cit., pp. 179-80.

49 Bhutto (1979), op. cit., p. 22.

50 "Government to pursue ZAB's Kashmir Policy, says Qaim", *The Nation*, February 5, 2009.

51 Stephen Philip Cohen, *The Idea of Pakistan*, Oxford University Press, New Delhi, 2005, p. 169.

controlled and Punjabi-dominated Pakistani establishment, Bhutto's stringent anti-Indianism was meant to convince his countrymen that it was a civilian leader (that too a non-Punjabi) and not the Pakistani army who was better placed to meet any Indian threat, even going to the extent of giving Pakistan a nuclear capability for the purpose. Nawaz Sharif's retaliatory nuclear tests were only the culmination of a process set in motion by Bhutto.

Conclusion

India's attempt to follow an 'independent' foreign policy has not been without its incumbent risks. It had failed to keep clear of the politics of the cold war and found itself aligned with the Soviet bloc. Despite its claim to be the world's largest democracy, domestic compulsions and the ideology of the ruling elite in New Delhi forced it to make friends with countries that were far from democratic. It had backed liberation struggles that the West had branded as terrorist movements. In return, it found elements in the West sympathising with secessionist movements within its borders. It was compelled to intervene in the internal affairs of neighbours, giving rise to a wave of anti-Indian sentiments in those countries. Its own nuclear programme fuelled ambitions for an Islamic bomb in Pakistan, effectively giving rise to a nuclear arms race in South Asia.

The US used the Sino-Soviet split to its advantage and India fell a victim to it. An anti-Soviet Chinese leadership cultivated close diplomatic relations with Pakistan, throwing the Nehru-era Indo-Chinese bonhomie to the winds. The alliance between Communist China and Islamic Pakistan was an ideological coup of sorts, and New Delhi can only pat its own back for pulling it off. The consequence has been sad for India, despite the presence of Muslim extremists in China's northwest Xinjiang region, Beijing is yet to unequivocally condemn *jehadi* activities in Kashmir. The Chinese government has identified separatism, religious fundamentalism, and terrorism as the 'three evil forces'[52] - the Kashmir insurgency is a combination of all of them. In the face of this, if the Peoples' Republic has not come out in open opposition to the Kashmir insurgency, it is because the movement has Pakistan's backing. India has

52 "Muslim 'extremists' attempt uprising in western China: Government", *Sino Daily*, Beijing, April 2, 2008.

only itself to blame in this case. India acquiesced to the Soviet invasion in Afghanistan because of political exigency, caught as it was in Moscow's grip, and the subsequent wrath of the Taliban was a result of that. After the Soviets withdrew from the war-ravaged country, India had no option but to cultivate ties with the *mujahideen* government. If it did not, then it would have been left with little influence in post-Soviet Afghanistan. The search for a role for itself in post-Taliban Afghanistan again made New Delhi to throw its lot behind the US backed Hamid Karzai dispensation. Though Washington welcomed India's support and cooperation, Pakistan was, and still is, unwilling to concede any Indian role in Afghanistan. According to Islamabad's foreign policy makers, India's search for a foothold in Afghanistan was part of a design to weaken Pakistan, just as India's steadfast support to the Soviet occupation was meant to undercut Pakistan's influence on its western neighbor. Consequently, the killing of Indian workers and diplomatic personnel in and around Kabul was met with little or no sympathy from Pakistan.

India's support to the secular communist puppet regimes in Afghanistan scantly served its national interest, though it was a *quid pro quo* for Moscow's support to the Indian position on Kashmir. Interestingly, though India has always associated with secular governments (whether that of Najibullah or of Saddam Hussein) and secular liberation struggles (whether in Palestine, East Pakistan, or Sri Lanka), religion had always been used against it as a diplomatic tool. Despite helping to create a secular Bangladesh, President Ziaur Rahman's Islamization was meant to free his country from the perceived Indian stranglehold it was under. Sri Lanka's Ranasinghe Premadasa had the full backing of his nation's powerful Buddhist clergy in first seeking and then securing the IPKF's expulsion from the island. Pakistan had refused to accept the accession of Jammu & Kashmir to India on the ground that it had an overwhelming Muslim majority and hence, under the terms of the India Independence Act of 1947, should rightfully have been part of Pakistan just as Hindu-majority Junagadh and Hyderabad (despite being ruled by Muslim kings) were ceded to India. Concomitantly, Pakistan has, in the name of Islam, extended moral, material, and political support to Kashmiri insurgents in their struggle for *azadi* (independence) from what it, and of course, the insurgents, see as Indian occupation.

Interestingly, though India had no clear stand on the Islamic revolution in Iran,

it was prudent to seize the opportunity and cultivate close ties with the Shiite Islamic Republic that the revolution established. The *ayatollahs* in Tehran showed a surprising willingness to accept New Delhi's offer of friendship and turn down a similar offer by Pakistan, keeping in mind that India was never supportive of the erstwhile Shah of Iran whereas Pakistan was. India so earnestly and painstakingly built its relation with Islamic Iran that it did not sour even during the latter's protracted war with Saddam's Iraq which India was also overtly friendly to. That was a diplomatic coup indeed.

The present government in Iraq is Shia dominated and perceived to be close to Tehran. That doesn't mean that Iraq would automatically warm up to New Delhi. After President Barack Obama ultimately pulls his troops out of Iraq, New Delhi has to walk the extra mile to establish ties with Baghdad. It is unrealistic to expect that any Iraqi Prime Minister would forget India's closeness to Saddam so easily. India may have to use its good offices with Iran to build ties with Saddam's erstwhile opponents who presently hold the reigns of power in Baghdad.

Not that India has never been accused of harbouring religious bias. Pakistan has consistently held that despite its secular pretensions, India was a Hindu nation at heart and persecuted its minorities (especially, Muslims). Several US lawmakers, who had traditionally received liberal campaign donations from immigrant Sikh groups settled in that country, had time and again accused India of religious discrimination against Sikhs and taken up the cause of a sovereign Khalistan. Both the Clinton and Bush administrations had complained about the persecution of Christian denominations in India during the rule of the 'Hindu nationalist' BJP. Buddhist politicians in Sri Lanka belonging to both major parties had publicly voiced their suspicion about 'Hindu' India's covert support to the largely Hindu LTTE. Interestingly, both the Indian National Congress and the BJP, while emphasizing the 'need' to uphold the Nepalese monarchy (when it existed), had generally avoided to stress the 'need' to preserve Nepal as a Hindu state. Even though for the Congress it was not a 'need', the BJP played evasive out of fear of being accused of upholding a Hindu theocracy (which, in any case, Nepal was not).

It makes little sense to discuss 'emerging' India without a reference to its past. Its biggest foreign policy success in the last two decades has been its

willingness and ability to liberate itself from Soviet ideological and political bondage. Bold foreign policy steps, like, the establishment of diplomatic ties with Israel, accompanied by matching domestic policy initiatives, like, the economic reforms, had endeared it to the West. Both Democrat Bill Clinton and Republican George W Bush firmly gripped the extended Indian hand. Rewards like the US-India nuclear deal was then a matter of time, despite domestic apprehensions in both the US and India.

But that's an old story, recounted time and again to help understand India's current status in the international environment. What is more important is the future. The US now has a president who, though he doesn't deem New Delhi to be a top foreign policy priority of Washington[53], would like India to believe that the US is its best friend. He is less concerned with Iraq (which India should also be less concerned with) than with Afghanistan (which India should also be more concerned with). India should seize this opportunity, instead of wasting time pleading with the American president not to take BPO jobs away from India. Obama has proposed to increase US aid to Pakistan, but his partymen in Congress has tied it to Islamabad's success in combating terrorism. India should realize that President Ronald Reagan extended huge military and economic aid to Pakistan to counter a pro-Soviet India; Obama has no such hidden intentions.

India has already refused to be guided by US dictates in conducting relations with Iran, and New Delhi's relations with Tehran should be independent of its relations with Washington, just as India had been friendly to Saddam Hussein without ever offending the ruling *ayatollahs* in Tehran. More importantly, President Obama wants to reach out to Iran, and his administration does not consider the Shiite Islamic Republic a 'rogue state'. Iran has no proven links to the al Qaeda, and is stringently opposed to the Taliban. India can seize this opportunity too, and play the role of facilitator in the re-establishment of US-Iran ties. As long as India is not found guilty of transferring nuclear technology to Tehran, Washington under Obama cannot (and possibly, will not) dictate terms to India. Even if the Shiite *mullahs* develop a nuclear capability at a future date, India cannot be held responsible for it. Realistically speaking, Iran is a powerful and influential Muslim state, and now that Saddam Hussein is

53 India should not regret this, as only global trouble-spots become foreign policy priorities for the US.

gone, India would need Iranian help at every step to counter Pakistani influence among Muslim nations.

To say that India is again at the crossroads would be a cliché. Agreed that there would be no 'thousand years' war' with India, but that does not mean that the impossibility of it would restrain someone to talk about it in the future.[54] Bhutto's powerful personality had polarised Pakistani politics forever into those for the PPP and those against; there is no third alternative. Like her father, the late Benazir had no love lost for India. Remember, the PPP was born to oppose India, more specifically, the Indian 'occupation' of Kashmir. No other party in Pakistan claims such a distinction. Not that the anti-PPP parties would concede Indian claims on Kashmir, but any Kashmir-specific deal with a PPP government would not be long lasting. The Pakistani Army has zero tolerance as far as the PPP is concerned. The Kashmiri militants on both sides of the LOC have no faith on the PPP either. Whatever India may say and believe, Pakistan sponsored terrorism in India is invariably linked to the Kashmir question. India should know who to reach out in Pakistan in its search for a lasting solution to the Kashmir tangle. Even if the PPP opposes any pact that India signs with Pakistan in this regard, it does not have the means at its disposal to rouse the entire Pakistani nation against it. If India misses the bus yet again, the bus service between New Delhi and Lahore would finally have to be wound up.

54 President Asif Ali Zardari, Zulfikar Ali Bhutto's son-in-law, has of late spoken about a 'thousand years' ideological war' with India on Kashmir.

CASE COMMENT

A Comment on *Smt. Selvi and Others* v. *State of Karnataka*

Technological developments have transformed the way crimes are committed. Traditionally, detection of a crime and further investigation depended on the skill of the investigating officer alone. However, today, technical expertise is indispensable if investigation is to proceed in a proper manner. Many a times, sophisticated technologies assist the offenders in committing the offence, as well as in destroying the evidence, bringing the investigation to a standstill. New scientific techniques of investigation, like, narco analysis, lie detector test, brain mapping, etc., come to the rescue in these circumstances. These scientific techniques gained momentum in India in 2002 through the Godhra carnage case. Subsequently, in Best Bakery case, Parliament attack case, Mumbai terrorist attacks, Telgi scam case, EPF scam case, Malegaon blast case, Nidhari case, Arushi murder case, Sister Abhaya case, etc., these techniques were adopted. In many of these cases scientific techniques proved to be successful in gathering evidence.

In *Smt. Selvi and others* v. *State of Karnataka*[1], the Supreme Court decided a batch of criminal appeals filed against the judgments of various High Courts. The appeals were related to the use of involuntary administration of certain scientific techniques, namely, narcoanalysis, polygraph examination and the brain electrical activation profile (BEAP) test, for the purpose of improving investigation in criminal cases. A Bench consisting of K. G. Balakrishnan (CJI), R. V. Raveendran and J. M. Panchal, JJ., held that the involuntary administration of scientific techniques, viz., narcoanalysis, polygraph examination and the brain electrical activation profile (BEAP) test, is violative of Articles 20(3) and 21 of the Constitution of India.

The issues before the Court were whether the involuntary administration of the impugned techniques violates the right against self-incrimination under Article 20(3) of the Constitution and whether it can be treated as a reasonable

1 (2010) 7 SCC 263.

restriction on personal liberty under Article 21 of the Constitution.

The Bench reasoned thus:

> "262. In our considered opinion, the compulsory administration of the impugned techniques violates the 'right against self-incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. *Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible 'conveyance of personal knowledge that is relevant to the facts in issue'. The results obtained from each of the impugned tests bear a 'testimonial' character and they cannot be categorized as material evidence*[2] " (emphasis supplied).

Article 20(3) will attract only when the statement is proved to be incriminating against the person making it. The question of incrimination will arise only when the subject makes some incriminating statements during the test. There is a duty cast on the state to protect the larger interests of the public and it outweighs the fundamental rights of the individuals. Further, the fundamental rights envisaged under our Constitution can always be subjected to reasonable restrictions in larger public interest. It is the sole prerogative of the state to prevent crimes and various statutory provisions are aimed at achieving this prime objective[3]. The finding of the court that the results obtained from each of the impugned tests bear a testimonial character is totally wrong. This is

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2 *Supra* n. 1, p. 382.

3 For instance, the Evidence Act, 1872, ss. 27, 73, the Identification of the Prisoners Act, 1920, ss. 5, 6, the Code of Criminal Procedure, 1973, 39, 53, 156, 161, 162, etc., are prima facie self incriminating. However, these statutory provisions are not held unconstitutional and are incorporated to serve the larger public interest.

without appreciating the purpose of these tests in the present scenario. The disclosures made during the tests may not be limited to incriminating answers, but several other information about the offence may be obtained which can help the investigators to proceed further. The admissibility of the revelations made during these tests is not at issue; the accused is already having various statutory and constitutional protections against incriminating statements. The statements made during the tests are akin to the statements made by an accused while in the custody of police. There was no need to observe that the statement having testimonial character is not treated as material evidence. Law is crystal clear in this respect.

The Court observed that:

> "260. One of the main functions of constitutionally prescribed rights is to safeguard the interests of citizens in their interactions with the government. As the guardians of these rights, we will be failing in our duty if we permit any citizen to be forcibly subjected to the tests in question. One could argue that some of the parties who will benefit from this decision are hardened criminals who have no regard for societal values. However, *it must be borne in mind that in constitutional adjudication our concerns are not confined to the facts at hand but extend to the implications of our decision for the whole population as well as the future generations*[4]." (emphasis supplied).

If the Court really meant what it said it should have held that the impugned tests are legal in the larger public interest as well as in the interest of the future generations. The purpose of the scientific tests are not only the extraction of incriminating statements, as observed by the court, but also to get a proper link regarding the commission of the offence, involvement of other persons, the target of operation, etc. It cannot be looked into only in an individual perspective. As far as the protection of individual is concerned amble safeguards are already envisaged under the statutes and the Constitution. In this context, the Court went wrong in applying the ratio laid down in its decisions, such as, *Kathi Kalu*[5], *Nandini Satpathy*[6], etc. The decisions dealt with the

4 *Supra* n. 1, p. 382.

5 *State of Bombay* v. *Kathi Kalu*, AIR 1961 SC 1808.

6 *Nandini Satpathy* v. *P. L. Dani*, AIR 1977 SC 1025.

protection against incrimination of accused even at the stage of investigation. The protection under Article 20(3) applies only to incriminating statements made by the accused against himself; any other statement made by the accused is not covered by Article 20(3). In Nandini Satpathy, the Court extended the protection against incrimination to the extent of remaining silent if the accused feels that the statement might be incriminatory. However, this decision does not put a ban on the process of interrogation as such.

In the instant case, the Court gave a blanket protection to all the statements made by the accused, whether incriminating or not. By using the rationale laid in Nandini, the Court has curtailed the investigation itself, which was neither envisaged in Nandini nor under the Constitution or any of the statutory provisions.

In the present scenario, with the growing number of organised crimes, terrorist attacks and blind crimes, in the absence of these scientific tests, the investigating agencies will be crippled and will be left with no other option other than filing a closure report due to the inability to obtain any evidence, which is not in the interest of the larger public.

The Court by prohibiting the administration of the test has given immunity to the accused from interrogation, but has thereby paralysed the investigative system. This is totally against public interest.

The Court also held that:

> "263. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of 'substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature govern the interpretation of statutes in relation to scientific advancements. *The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not*

feasible in light of the rule of ejusdem generis and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to cruel, inhuman or degrading treatment with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the 'right to fair trial'. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the 'right against self-incrimination'[7]" (emphasis supplied).

While making its recommendation to introduce section 53 in the Criminal Procedural Code, the Law Commission in its 37th report emphasised that the amendment is for effective investigation. Under section 53 the accused is subjected to medical examination without his consent and the evidence collected is admissible. As a modern scientific tool the Court should have included Narco and other tests in section 53 by giving a purposive interpretation to the section. These tests should be resorted to only as a last resort, in exceptional cases, with the permission of the Court.

Further, the Court was wrong in holding that reliance placed on the test results amounts to violation of right to fair trial. Nowhere, it was contended that reliance should be placed on the test results. The admissibility of the test results will be governed by the relevant statutory provisions, and statements, if any made, will be treated as confessions under sections 25, 26 and 27 of the Evidence Act. Further, if reliance placed on test results would amount to violation of fair trial, then how can the Court say that Narco with consent is permissible? Right to fair trial is a fundamental right under Article 21 and no person can waive his/her fundamental right. Thereby, the judgment itself is self contradictory.

In *Nandini Satpathy v. P. L. Dani*, the Court observed that law is a response to life and approach to criminal justice system varies from time to time. The Court should have given a purposive interpretation in the changing socio economic scenario and in view of rise of terrorism and other organised crimes.

7 *Supra* n. 1, p. 382.

Few decades before the focus was on the liberty of the person, but, now in the wake of organised crimes the focus has shifted to the security and safety of the nation. The apex court should have been mindful of this change and should have allowed these tests to advance the investigation rather than paralysing the system. Instead of curtailing the complete use of these techniques, the Court should have allowed them only for the purpose of investigation with adequate safeguards.

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BOOK REVIEW

Dr. J. N. Barowalia, *Commentary on the Right to Information Act*, 2nd Edn., Universal Law Publishing Co. Pvt. Ltd., New Delhi, pp. lv+1166, price Rs. 1295.

The Right to Information Act has become a powerful instrument of citizen's empowerment to demand transparency and accountability in administration. Its implementation has ushered in a new era — an era of transparency, resulting in a paradigm shift from the veil of secrecy to a system of openness and accountability. Earlier, because of the Official Secrets Act, 1923, non-disclosure of information was the norm and openness an exception. However, the judicial declaration of 'Citizen's Right to Know' as a fundamental right and the subsequent enactment of the RTI Act has completely thwarted the purported attempts of the government to hide behind the archaic and outdated Official Secrets Act to deny information. After the RTI Act came into force in 2005, its provisions are being invoked by citizens of all categories the rich, the poor and the people below poverty line — and is being successfully implemented, sometimes with the active support of social activists and NGOs.

However, the Act had to face many impediments and challenges to survive during the short span of its existence. There have been attempts to dilute the provisions of the Act and to exempt certain bodies from the purview of the Act the latest being the exemption granted to CBI. There have also been reports of attacks on the RTI activists. The greatest challenge, however, came from the apex court claiming exemption from the Act for the Office of the Supreme Court. Notwithstanding these challenges, the Act survived, not only survived but has transformed itself into a powerful weapon in the hands of the citizens to expose corruption, nepotism and maladministration in public life and to contain corruption to some extent. However, there is a need for creating further awareness about the provisions of the Act and the Rules made thereunder so that more and more citizens come forward to access information on the functioning of the government, thereby, making it transparent and accountable. The Act is a citizen–friendly legislation and requires the initiative and determination on

the part of the citizens for its enforcement and implementation.

The book under review, entitled *Commentary on the Right to Information Act* is an effort to provide complete insight into the subject so as to enable the stake holders to effectively implement the provisions of the Act. It is authored by Dr. J. N. Barowalia, who is the Former Principal Secretary (Law)-cum-Legal Remembrancer to the Government of Himachal Pradesh, an eminent jurist and an awardee of Himutkarsha's National Integration Award as 'Crusader against Social Evils'. The Forward to the book is written by Hon'hle Mr. Justice K. G. Balakrishnan, the former Chief Justice of India, who had vehemently opposed the inclusion of the Office of the Chief Justice within the ambit of the RTI Act. The learned judge observed: "Faith in the democratic form of Government, rests on the old dictum: Let the people have the truth and freedom to discuss it and all will go well", and he has also stated that the enactment of the RTI Act, 2005, is a step in the right direction.

Dr. Barowalia has done an excellent job in analysing and explaining each and every section of the Act with his comments and observations substantiated by convincing arguments supported by judicial decisions wherever applicable.

The book is a treatise in itself dealing systematically and comprehensively on Right to Information. Starting with the historical development of the concept of Right to Information, the author explains the salient features of the Act, section by section, along with the relevant rules of interpretation. There are detailed discussions on RTI vis-à-vis right to privacy, the Indian Evidence Act and the Official Secrets Act. He also discusses RTI in relation to the consumer, freedom of speech and expression, election, the press, arrested persons, corruption, environment, public interest htigation and e-governanee. But, surprisingly, there is no discussion on the controversy between the Supreme Court and the RTI.

Part · II of the book deals with the rules framed under the Act, viz., the RTI (Regulation of Fee and Cost) Rules, 2005, the Central hiformation Commission (Appeal Procedure) Rule, 2005 and the Central Information Commission (Management) Regulations, 2007. In addition to this, the rules framed by the various State Governments under the 2005 Act have also been incorporated under the section on *Other Related Laws*. These rules are absolutely essential

for a proper understanding of the Act and also as an aid to the implementation of the provisions of the Act.

Part - III of the book deals with other related laws which includes the Official Secrets Act, 1923, and the Freedom of Information Act, 2002, among others. The 2005 Act has not repealed the Official Secrets Act, but, has overriding effect on the provisions of the latter Act. It specifically provides that the provisions of the RTI Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923. While the Official Secrets Act may be relevant for a proper understanding of the background of Right to Information, the other Acts included in this Part have little relevance. One fails to understand the relevance of the Freedom of Information Act, 2002, which has been specifically repealed by the 2005 Act.

Part IV to XIV of the book contains a large number of Acts, Rules, Notifications and judicial decisions; some of them are relevant, some not so relevant and some quite irrelevant. More specifically, they deal with allied Acts and Rules, International Conventions and Declarations, reports and guidelines, decisions of the Supreme Court, High Courts and Central Information Commission, State Laws and Rules, fees structure of different States, Loksabha and Rajyasabha Rules, important Notifications and allied Information and specimen forms. As mentioned earlier, while the rules and regulations made by the State Government under 2005 Act, the Notifications and allied information, judicial decisions, the Reports and Guidelines, including the UK and USA Acts are quite relevant, there is no justification for incorporating texts of large number of State Acts which were enacted before the Central Act came into force in 2005 (except the J & K Right to Information Act, 2004 and the Rules made thereunder) not to speak of the Kerala and Madhya Pradesh Right to Information Bills of 2002 and 2003, respectively.

The book has a comprehensive table of cases consisting of important decisions of the Supreme Court, High Courts and the Central Information Commission on RTI. There is also a compilation of the relevant decisions of the Supreme Court, the High Courts and the Central Information Commission highlighting important aspects of the judgments. However, the book is bulky and voluminous having a total number of 1166 pages. The voluminousness and bulkiness of the

book is attributable to the inclusion of irrelevant and not so relevant Annexures, running to more than half of the total number of pages (690 pages). If these can be pruned and eliminated, the book would be more handy and affordable to the students as well as to the other stake holders.

However, despite these short comings — excessiveness one should say — the book is a valuable piece of work based on extensive research, covering all the important aspects of Right to Information in general and the Right to Information Act, 2005, in particular. As Justice C. K. Thakker in his Introduction to the book has rightly stated, the book will be found immensely useful to judges, advocates, and voluntary organizations and even to the common men in finding solutions for their questions in the field. Access to information is slowly coming to the door-step of the citizens of the country.

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